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CASES AND OTHER MATERIALS

ON

LEGISLATION

By

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and

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PREFACE

THIS work is designed as the basis for a law school course in the methods of the legislative process and in the judicial techniques of applying statutes in the solution of legal issues. It recognizes that they have been developed by treating statutes as a cognate group that must be dealt with as a whole. The objective of the course is not only to demonstrate pertinent methods, but also to reveal the concepts and attitudes that have influenced their historical development and prevail today.

Although "statute law is the basis of legal practice," and many law students are prospective legislators, until lately most lawyers have been commencing their professional careers with little knowledge of the handling, let alone the creation, of legislation. In 1934 the course in legislation was introduced at the University of Minnesota as an experimental attempt to cure that deficiency, and this book is the outgrowth of the mimeographed materials in use and experience gained there. In 1934 the New York Law Revision Commission was organized, and it set up headquarters at Cornell Law School. A few years later a problem course in legislation was offered at Cornell to a limited group of students, the method of instruction being part of a general program set up for third-year students. After revision of the cases and materials by the original editor in the light of each year's use, the selection and arrangement for this publication is new, and is the result of the combined teaching and practical experience of both editors.

This book presupposes at least an elementary knowledge of substantive law, and some understanding of the judicial techniques of applying and developing the "common law". It is meant to be correlated with a course in federal constitutional law. Desirable preparation also is at least one course in which statutory materials are interwoven with case law, and some training in legal research such as is acquired in a course in briefmaking. On the other hand, systematic training in legislative methods should not be postponed until after the students' techniques have become too rigidly set in the "common law" mold. Taking into account the foregoing factors and the problem nature of the course, this training is now given in the third year at both Minnesota and Cornell.

This book is patterned for a course of approximately sixty classroom hours, extending through the academic year. A greater amount of text material, mostly from legal periodicals, is included than in most casebooks. Some is expository and intended to save classroom time; much, however, presents conflicting and controversial ideas which require careful and critical comparative analysis and evaluation.

Cases are used mainly to enable study (a) of the methods by which certain devices are utilized, and (b) of the factors which influence the

PREFACE

choice of one of such devices rather than another. It has therefore not been possible by editing to shorten a number of the judicial opinions appreciably without depreciating their instructional value. The primary criteria for the selection of cases and materials have been (a) teaching value, and (b) reflection of present trends. The former has sometimes been more effectively met by developing a topic with cases and materials drawn from diverse sources; sometimes with those from a single representative jurisdiction. The latter has dictated inclusion of mostly recent cases and pronouncements on some phases of the subject.

The methods of legislation, like any other art, can be really understood only after some practice. The class-room discussion of theory should therefore be accompanied by as much collateral work in research and drafting as possible. In particular there is great teaching value in having the student participate in the preparation of actual bills and observe their fate in the legislature. While the object of the course is not to train expert draftsmen, and, indeed, little skill can be acquired in the available time, an appreciation of the difficulties involved in making laws cannot be as well learned in any other way. Furthermore, experience proves that no one can master the art of applying statutes without fully understanding how they are made. This book thus contains material on the mechanics of research and drafting. It is focused mainly on state legislation rather than on federal since (1) there is usually greater opportunity for students while in law school to participate in the preparation, and to make firsthand research studies, of the former; and (2) a knowledge of the field of private law revision is of great importance to a practitioner.

Considerations of space have precluded inclusion of specific drafting and research problems; but law teachers should not have difficulty in discovering challenging projects in their current environment, especially if they elicit the cooperation of governmental agencies and professional organizations. Also it will be obvious that many of the cases and statutes included provide exercises in correcting drafting faults and rectifying the results of inadequate research.

This book is meant to be a teaching tool useful in developing a course aimed at providing an understanding of the methods, nature, and function of legislation that are significant for a lawyer. The character and extent of treatment of each topic has been measured by the editors' view of its relative importance in such a course. The instructor must draw upon his resources of learning and experience to fill in details, point up the problems, and bring into comparison, when necessary, the peculiarities of any particular jurisdiction.

HORACE E. READ
JOHN W. MACDONALD

Jan. 15, 1948.

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CONTENTS

Analytical Table of Contents	Page XIII
Table of Cases	XXXVII
Table of Periodical and Text Materials	XLIH
Chapter	
1. Some Comparative Aspects of Growth of Law through the Judicial and Legislative Processes	1
2. Legislative Organization and Procedure	212
3. Types of Statutes	336
4. Various Means for Making Laws Effective	483
5. Form of Law-making: The Parts of a Statute	646
6. Legislative Language, Its Arrangement, and the Me- chanics of Drafting	785
7. The Methods of Interpretation and Construction	972
8. Fitting Legislation into a Unified Legal System	1207
Index	1339

ANALYTICAL TABLE OF CONTENTS

CHAPTER 1

SOME COMPARATIVE ASPECTS OF GROWTH OF LAW THROUGH THE JUDICIAL AND LEGISLATIVE PROCESSES

	Page
SECTION 1. TRANSITION OF THE GROWING POINT OF THE LAW	1
Pound, Sources and Forms of Law, 22 Notre Dame Lawyer 1-3, 5-8 (1946). (Historical development of legislation as a law making agency)	1
Jolliffe, The Constitutional History of Medieval England, 239- 240 (1937)	5
Von Mehren, The Judicial Conception of Legislation in Tudor England; Interpretations of Modern Legal Philosophies, 751, 755-757 (1947)	6
Brown, Lawyers, Law Schools and the Public Service. ("Leg- islation in the modern state.") (1948)	9
Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum.L.Rev. 527 (1947)	11
Salmond, Jurisprudence (8th ed. 1930)	12
O'Connor, Thoughts About the Law, 3 Camb.L.J. 161, 163-165 (1928)	14
Lewis, Adaptation of the Law to Changing Economic Condi- tions, 11 A.B.A.Jour. 11 (1925)	14
SECTION 2. THE NATURE AND LIMITATIONS OF JUDICIAL LAW- MAKING	17
A. Method and Effect of the Doctrine of Judicial Precedent in General	17
Sprecher, The Development of the Doctrine of Stare Decisis • and the Extent to Which It should be Applied, 31 A.B.A. Jour. 501-504 (1945)	17
Radin, The Trail of the Calf, 32 Cornell L.Q. 137, 143 (1946)	22
Llewellyn, Impressions of the Cincinnati Conference on Ju- dicial Precedent, 14 U. of Cinc.L.Rev. 343, 350-351 (1940)	23
Lincoln, The Relation of Judicial Decisions to the Law, 21 Harv.L.Rev. 120-121 (1907)	24
Holmes, The Common Law, 35-37 (1881)	25
Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L. Ed. 1086 (1917)	26
Pound, What of Stare Decisis? 10 Fordham L.Rev. 1, 12-13 (1941)	30
Aero Spark Plug Co. v. B. G. Corporation, 130 F.2d 290, 294-299 (1942)	31

ANALYTICAL TABLE OF CONTENTS

	Page
B. Lawmaking by Refusal to Follow Persuasive Precedent	37
Little v. Chicago, St. P., M. & O. Ry. Co., 65 Minn. 48, 67 N. W. 846 (1896)	37
C. Lawmaking in the United States by Over-Ruling Precedent	41
Eric Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188 (1938)	41
Hutcheson, Cincinnati Conference on the Status of the Rule of Judicial Precedent, 14 U. of Cinc.L.Rev. 203, 248-249 (1940)	53
Stone, The Waning Justification for Consideration as the Sole Test of Contractual Obligation (1933)	54
Rye v. Phillips, 203 Minn. 567, 282 N.W. 459 (1938)	55
Pattridge v. Palmer, 201 Minn. 387, 277 N.W. 18 (1937)	57
Epstein v. Gluckin, 233 N.Y. 490, 135 N.E. 861 (1922)	61
Baer and Washington, Lawyers, Taxes and the Supreme Court, 25 Cornell L.Q. 537-541, 546-547, 549-555 (1940)	62
Waring v. Colpoys, 74 App.D.C. 303, 122 F.2d 642 (1941)	71
Buradus v. General Cement Products Co., 159 Pa.Super. 501, 48 A.2d 883 (1946)	77
Freeman, The Protection Afforded Against the Retroactive Operation of an Overruling Decision, 18 Colum.L.Rev. 230, 250-251 (1918)	81
Van Vranken v. Helvering, 115 F.2d 709 (1940)	82
D. Some Cases of "Unprecedented" Law-Making	86
Oppenheim v. Kridel, 236 N.Y. 156, 140 N.E. 227 (1923)	86
Daily v. Parker, 152 F.2d 174 (1945)	91
SECTION 3. THREE EARLY LAW-REFORMING STATUTES	95
Statute of Westminster II, 13 Edw. I, ch. 24 (1285)	95
The Statute of Uses, 27 Hen. VIII, ch. 10 (1535)	96
Wimbish v. Tailbois, 1 Plowden 38, 75 E.R. 63 (1550)	97
Statute of Frauds (1677) 29 Car. II, c. 3 (§§ 4, 9, 17)	101
Ash v. Abdy, 3 Swans.App. 664, 36 E.R. 1014 (1678)	102
Browne, Statute of Frauds (5th ed., 1895) vii-viii	103
Riesenfeld and Mussman, Suretyship and the Statute of Frauds, 31 Minn.L.Rev. 1-3, 678-679 (1947)	104
SECTION 4. LEGISLATION IN AID OF THE COURTS	106
Crowley v. Lewis, 239 N.Y. 264, 146 N.E. 374 (1925)	106
Cochrane v. Taylor, 273 N.Y. 172, 7 N.E.2d 89 (1937)	108
Recommendation of the Law Revision Commission to the Legislature Relating to the Seal and to the Enforcement of Certain Written Contracts, N.Y.Leg.Doc. No. 65 (M), 13-20 (1941)	112

ANALYTICAL TABLE OF CONTENTS

	Page
The Uniform Written Obligations Act, sec I	119
Recommendation of the Law Revision Commission to the Legislature Relating to Discharge of Surety or Guarantor, N.Y.Leg.Doc. No. 65 (C) 5-6 (1938)	119
Becker v. Faber, 280 N.Y. 146, 19 N.E.2d 997 (1939)	121
SECTION 5. ORIGINS AND DEVELOPMENT OF LEGISLATIVE POLICY	125
A. Introductory	125
Moffat, The Legislative Process, 24 Cornell L.Q. 223, 228-233 (1939)	125
Freund, Standards of American Legislation, 215-218 (1917)....	128
B. Legislative Precedent	131
<i>(i) Illustration from Early American Law</i>	<i>131</i>
Riesenhfeld, The Development of American Poor Laws in Gen- eral, Sec. 5, B	131
<i>(ii) Illustration from 20th Century American Law</i>	<i>134</i>
Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927)	134
Culp, Process in Actions against Non-Residents Doing Busi- ness within a State, 32 Mich.L.Rev. 909-912 (1934)	136
Laws of Pennsylvania (1937) No. 558, 12 P.S. § 331	138
New York Vehicle Traffic Law 1931, § 52-a	138
Marano v. Finn, 155 Misc. 793, 281 N.Y.S. 440 (1935)	139
Minnesota Laws 1947, c. 46 (Providing for service of process on non-resident owner or operator of aircraft, or resident owner or operator who has remained without the state, in actions arising out of operation of the aircraft within the state)	140
C. Some Factors and Agencies That Influence Legislative Judg- ments	141
<i>(i) Sources of Bills and Some Consequences</i>	<i>141</i>
Sterling, Some Practical Aspects of Legislation, 38 Rep.Pa. Bar Ass'n 381, 399-401 (1932)	141
Alter, Legislation, Its Volume, Its Tendencies and the Causes and Processes Through Which It is Being Brought into Being, 31 Rep.Pa.Bar Ass'n 5, 11-13 (1925)	143
Keeton, Problem of Law Reform After the War, 58 L.Q.Rev. 246, 249, 251 (1942)	145
<i>(ii) Two "Case Studies" on Shaping and Presenting Issues.....</i>	<i>146</i>
Pirsig, Proposed Youth Correction Act, 28 Minn.L.Rev. 300 (1944)	146

ANALYTICAL TABLE OF CONTENTS

	Page
Questionnaire and Study of Prenatal History of Minnesota Non-Profit Medical Service Plan Corporations Act 1945, c. 255	165
(iii) <i>Pressure of Organized Interests and Public Opinion</i>	178
· Note—Improving the Legislative Process: Federal Regula- tion of Lobbying, 56 Yale L.J. 304 (1947)	178
Cantwell, Public Opinion and the Legislative Process, 40 Am. Pol.Sci.Rev. 924 (1946)	200

CHAPTER 2

LEGISLATIVE ORGANIZATION AND PROCEDURE

SECTION 1. OUTLINE OF LEGISLATIVE PROCEDURE: THE STAGES IN THE PROGRESS OF A BILL	212
New York Legislative Record and Index, 2 (1947)	212
Moffat, The Legislative Process, 24 Corn.L.Q. 223 (1939)	215
McKinney, Book I, Statutes, Division II, Formalities of En- actment and Approval, §§ 11, 14-16 (1942)	220
Final Report of the New York State Joint Legislative Com- mittee on Legislative Methods, Practices, Procedures and Expenditures, N.Y.Leg.Doc. (1946) No. 31, 28-38	225
SECTION 2. THE SPEAKER	235
“Mister Speaker”, 42 Time Magazine 19-20 (1943)	235
SECTION 3. THE COMMITTEE SYSTEM AND LEGISLATIVE FACT FIND- ING	237
A. Introductory Note	237
B. Committees of the Congress	238
Report of the Joint Committee on the Organization of the Congress of the United States, 79th Congress, 2nd Session, Senate Rep. No. 1011 (1946), 1-14, 34-35	238
Shull, The Legislative Reorganization Act of 1946, 20 Temp. L.Q. 375, 379-380 (1947)	254
Legislative Reorganization Act of 1946, Title I—Changes in Rules of Senate and House, §§ 101, 131-137, 141; Ch. 753, Pub. 601, Laws of 79th Cong., 2nd Session	256
Remodeled Congress at Work, 22 U.S.News 42-43 (1947)	259
Armstrong, Specific Steps for Improving Legislation: A Re- view of Kefauver and Levin, “A Twentieth Century Con- gress”, 33 A.B.A.Jour. 674, 675-676 (1947)	259

ANALYTICAL TABLE OF CONTENTS

	Page
C. Methods and Powers of Investigation	260
<i>Nebbia v. People of the State of New York</i> , 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1933)	260
Excerpt from Brief for Appellee in <i>Nebbia v. People of the State of New York</i>	265
<i>McGrain v. Daugherty</i> , 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1926)	267
<i>Doyle v. Hofstader</i> , 257 N.Y. 244, 177 N.E. 489 (1931)	273
Note—Legislation—Legislative Inquiries—Validity of Subpoena Issued by Senate Committee for all Telegraphic Correspondence Over Named Period, 36 Colum.L.Rev. 841 (1936)	278
D. The Conference Committee	281
<i>Norris</i> , One House Legislatures, 17 Philippine L.J. 356-358 (1938)	281
E. The Legislative Research Committee or Council	283
An Act Creating a Legislative Research Committee, Prescribing its Powers and Duties, and Appropriating Money Therefor, Minn.Laws 1947, ch. 306; M.S.A. §§ 3.31-3.38, 3.42	283
SECTION 4. CONSTITUTIONAL LIMITATIONS ON LEGISLATIVE PROCEDURE	286
<i>Board of Supervisors v. Heenan</i> , 2 Minn. 330, 2 Gil. 281 (1858)	286
<i>State ex rel. Kohlman v. Wagner</i> , 130 Minn. 424, 153 N.W. 749 (1915)	291
<i>Sterling</i> , Some Practical Aspects of Legislation, 38 Rep.Pa. B.A. 381, 414-417 (1932)	297
SECTION 5. THE LEGISLATURE AS AN ENTITY: CONTINUATION OF ITS POWERS AFTER ADJOURNMENT	299
<i>People v. Reardon</i> , 184 N.Y. 431, 77 N.E. 970 (1906)	299
<i>In re Hague</i> , 105 N.J.Eq. 134, 147 Atl. 220 (1929)	303
<i>Burns v. Sewell</i> , 48 Minn. 425, 51 N.W. 224 (1892)	305
SECTION 6. PROOF OF PROCEDURAL AND TEXTUAL IRREGULARITY: THE SO-CALLED ENROLLED BILL AND JOURNAL ENTRY RULES	307
<i>Woodward v. Pearson</i> , 165 Or. 40, 103 P.2d 737 (1940)	307
<i>Carlton v. Grimes</i> , 237 Iowa 912, 23 N.W.2d 883 (1946)	309
<i>Freeman v. Goff</i> , 206 Minn. 49, 287 N.W. 238 (1939)	313
<i>Harbage v. Tracy</i> , 64 Ohio App. 151, 28 N.E.2d 520 (1939)	317
<i>State v. Kiesewetter</i> , 45 Ohio St. 254, 12 N.E. 807 (1887)	320

ANALYTICAL TABLE OF CONTENTS

	Page
SECTION 7. PLACE OF THE EXECUTIVE IN THE LEGISLATIVE PROC- ESS	325
Lukes v. Nye, 156 Cal. 498, 105 P. 593 (1909)	325
State ex rel. Martin v. Zimmerman, 233 Wis. 442, 288 N.W. 454 (1939)	329
Armstrong, Unsolved Problems of Leadership and Powers, 33 A.B.A.Jour. 417, 418-419, 420 et seq. (1947)	331

CHAPTER 3

TYPES OF STATUTES

SECTION 1. DIRECT LEGISLATION	336
State v. Howell, 107 Wash. 167, 181 P. 920 (1919)	336
State v. Osborn, 16 Ariz. 247, 143 P. 117 (1914)	342
SECTION 2. DECLARATORY LEGISLATION	347
Pennsylvania Laws, 1833, No. 128, § 6	347
Pennsylvania Laws, 1848, No. 18, § 1	347
Greenough v. Greenough, 11 Pa. 489, 51 Am.Dec. 567 (1849)	348
Merchant Shipping Act, 1911, 1 & 2 Geo. V., c. 8	351
Harding v. Commissioner of Stamps for Queensland, [1898] A.C. 769	352
Excerpt From Study "Revision of Statutes in Matter of Form", N.Y.Doc. (1947) No. 65 (N), 44-45	356
State v. Cannon, 206 Wis. 374, 240 N.W. 441 (1932)	357
SECTION 3. CREATIVE LEGISLATION	362
Morrison v. Session's Estate, 70 Mich. 297, 38 N.W. 249 (1888)	362
Hardgrove, Futility of Resort to Roman Law for Interpreta- tion of Statutes on Adoption, 9 Marquette L.Rev. 239 (1925)	363
SECTION 4. AMENDMENTS, SUPPLEMENTS AND REPEALS	364
A. Amendments	364
State v. Johnson, 74 Minn. 381, 77 N.W. 293 (1898)	364
O'Pry v. United States, 249 U.S. 323, 39 S.Ct. 305, 63 L.Ed. 626 (1919)	367
Fletcher v. Prather, 102 Cal. 413, 36 P. 658 (1894)	371
Allison v. Corker, 67 N.J.L. 596, 52 A. 362 (1902)	376
B. Supplements	378
McCleary v. Babcock, 169 Ind. 228, 82 N.E. 453 (1907)	378

ANALYTICAL TABLE OF CONTENTS

	Page
C. Repeals	383
Tierney v. Dodge, 9 Minn. 166, Gil. 153 (1864)	383
State ex rel. Sum v. Archibald, 43 Minn. 328, 45 N.W. 606 (1890)	385
Spencer v. The State, 5 Ind. 41 (1853)	995
State v. Thornbury, 190 Wash. 549, 69 P.2d 815 (1937)	388
Bender v. United States, 93 F.2d 814 (1937)	389
Kennedy, Legislative Bill Drafting, 31 Minn.L.Rev. 103, 116 (1946)	394
SECTION 5. REVISIONS, CODIFICATIONS, CONSOLIDATIONS AND COM- PILATIONS	395
Smith v. Eau Claire, 78 Wis. 457, 47 N.W. 830 (1891)	395
Central of Georgia Ry. Co. v. State, 104 Ga. 831, 31 S.E. 531 (1898)	396
In re Hall, 50 Conn. 131, 47 Am.Rep. 425 (1882)	402
Mackey v. Miller, 126 F. 161 (1903)	406
State ex rel. Bergin v. Washburn, — Minn. —, 28 N.W.2d 652 (1947)	409
Murrell v. Western Union Tel. Co., 160 F.2d 787 (1947)	413
SECTION 6. SPECIAL LEGISLATION	415
Anderson, Special Legislation in Minnesota, 7 Minn.L.Rev. 133 (1922)	415
Constitution of the State of Minnesota, art. IV, § 33	419
Constitution of the State of New York, art. I, § 9; Art. III, §§ 15, 17, 19, 20; art. X, § 1; art. IX, §§ 11, 12	420
Constitution of the State of California, art. IV, § 25	424
Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933)	426
Young Men's Christian Association of Seattle v. Parish, 89 Wash. 495, 154 P. 785 (1916)	433
State ex rel. Attorney General v. Borough of Somers Point, 52 N.J.L. 32, 18 A. 694 (1889)	436
State ex rel. Board of Courthouse & City Hall Com'rs v. Cooley, 56 Minn. 540, 58 N.W. 150 (1893)	438
Leighton v. City of Minneapolis, 222 Minn. 523, 25 N.W.2d 267 (1946)	445
SECTION 7. UNIFORM LAWS	450
Report of the Minnesota Board of Commissioners on Uniform State Laws to the Minnesota State Legislature at its 1933 Session	450
Sutherland v. Mead, 80 App.Div. 103, 80 N.Y.S. 504 (1903)	459

ANALYTICAL TABLE OF CONTENTS

	Page
Union Trust Co. v. McGinty, 212 Mass. 205, 98 N.E. 679 (1912)	463
Hoar, Uniformity of Uniform Laws, 28 Marq.L.Rev. 32 (1944)	466
Whiteside, Jr., Effect of Adoption of the Uniform Sales Act Upon Arkansas Law, 1 Ark.L.Rev. 122-124, 128, 131-134, 137-140 (1947)	467
SECTION 8. INTERSTATE COMPACTS	469
Hartshorne, Inter-Governmental Cooperation—The Way Out, 2 U. of New Jersey L.Rev. 1 (1936)	469
The States Cooperate (Foreword to the Handbook on Inter- state Crime Control, prepared by the Interstate Commission on Crime (1942), 12-13	473
Ex parte Tenner, 20 Cal.2d 670, 128 P.2d 338 (1942)	477
CHAPTER 4	
VARIOUS MEANS FOR MAKING LAWS EFFECTIVE	
SECTION 1. LIMITATIONS ON EFFECTIVE LAW MAKING	483
Pound, The Limits of Effective Legal Action, 3 A.B.A.Jour. 55 (1917)	483
Cohen, Positivism and Idealism in the Law, 27 Colum.L.Rev. 237, 245-249 (1927)	490
Taft, The Legislature and the Execution of the Laws, 12 Rep. Pa.Bar Ass'n 239, 240-245 (1906).....	494
Dickinson, Legislation and the Effectiveness of Law, 37 Rep. Pa.Bar Ass'n 337, 346-355 (1931)	496
SECTION 2. A SPECIMEN REGULATORY STATUTE.....	506
“Securities Act of 1933”, 1933, c. 38, 48 Stat., as amended by 1934, c. 404, 48 Stat.; 15 U.S.C.A. § 77a et seq.	506
SECTION 3. SANCTIONS GENERALLY	519
A. Definitions	519
Salmond, Jurisprudence, 8th ed., p. 23 (1930)	519
Blackstone, 1 Commentaries, Introd. § 2., p. 37.....	519
B. Availability	520
Tigner v. State of Texas, 310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124 (1940)	520
SECTION 4. PENALTIES	524
American Bar Association, Report of the Special Committee on Legislative Drafting, Appendix B, 40 Rep.A.B.A. 569-594 (1915)	524

ANALYTICAL TABLE OF CONTENTS

	Page
SECTION 5. CONTEMPT PROCEEDINGS	532
Penfield Co. of California v. Securities and Exchange Com- mission, 330 U.S. 585, 67 S.Ct. 918 (1947)	532
SECTION 6. INVALIDATIONS AND DISABILITIES	537
Freund, Legislative Regulation, 56-58 (1932)	537
Thibault v. LaLumiere, 318 Mass. 72, 60 N.E.2d 349 (1945)	538
SECTION 7. ABATEMENT AND SUMMARY ENFORCEMENT IN EQUITY (Incidentally of Taxation)	541
State ex rel. Wilcox v. Gilbert, 126 Minn. 95, 147 N.W. 953 (1914)	541
SECTION 8. ADVERSE PRESUMPTIONS	549
Board of Commissioners of Excise of the City of Auburn v. Merchant, 103 N.Y. 143, 8 N.E. 484 (1886)	549
State v. Beswick, 13 R.I. 211, 43 Am.Rep. 26 (1881)	551
SECTION 9. CIVIL LIABILITIES	554
Freund, Legislative Regulation, 58-63 (1932)	554
Recommendation of the Law Revision Commission to the Leg- islature Relating to the Trust Fund Provisions in the New York Lien Law, N.Y.Leg.Doc.No.65(H), 13-15 (1942).....	557
Violation of Statutes as Negligence Per Se, Chapter 8, § 8, in- fra, p. 1279	560
SECTION 10. REQUIREMENT OF OATH	561
Jones, Statute Law Making in the United States, 260-265 (1923)	561
SECTION 11. REQUIREMENT OF BOND	564
Jones, Statute Law Making in the United States, 267-280 (1923)	564
SECTION 12. EFFECTUATION THROUGH ADMINISTRATIVE AGENCIES	570
Explanatory Note	570
Weeks, Administration Through Lawmaking, 24-26 (1947)	571
Hart, The Exercise of Rule-making Power, Studies on Ad- ministrative Management in the Government of the United States No. V, 12-14, 6-7, (1937)	572
Administrative Procedure in Government Agencies, Report of Committee on Administrative Procedure, 11-21 (1941)	574
Pound, For the "Minority Report", 27 A.B.A.Jour. 664 (1941)	585
Hart, Some Aspects of Delegated Rule-making, 25 Va.L.Rev. 810 (1939)	599

ANALYTICAL TABLE OF CONTENTS

	Page
Cook, Certainty in the Construction of the Law, 21 A.B.A.Jour. 19 (1935)	600
Federal Communications Commission v. Pottsville Broadcast- ing Co., 309 U.S. 134, 60 S.Ct. 437, 84 L.Ed. 656 (1940)	604
SECTION 13. LICENSING AND INSPECTION	611
Warp, Licensing as a Device for Federal Regulation, 16 Tulane L.Rev. 111-113, 118-119 (1941)	611
Jones, Statute Law Making in the United States, 281-286, (1923)	612
National Broadcasting Co. v. United States, 319 U.S. 190, 63 S. Ct. 997, 87 L.Ed. 1344 (1943)	614
State v. Cannon, 206 Wis. 374, 240 N.W. 441 (1932)	357
Beck v. Wallander, 71 N.Y.S.2d 237 (1947)	620
Consolidated Mines v. Securities and Exchange Commission, 97 F.2d 704 (1938)	622
Wallace v. Mayor of Reno, 27 Nev. 71, 73 P. 528 (1903)	626
SECTION 14. PUBLICITY	630
Examples of Publicity Provisions	630
The Kansas Milling Company v. Frank J. Ryan, 152 Kan. 137, 102 P.2d 970 (1940)	632
SECTION 15. SOME PREVENTIVE DEVICES	637
Lybolt, A Public Enemy Law for New York, N.Y.Leg Doc.No. 60(K) 7-36 (1935); 1935 Rep.Rec., St.Law Rev.Comm. 593- 622	637
State of Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 60 S.Ct. 523, 84 L.Ed. 744 (1940)	642
Western Union Telegraph Co. v. Lenroot, 232 U.S. 490, 65 S. Ct. 335, 89 L.Ed. 414 (1945)	729
Pirsig, Proposed Youth Correction Act, 28 Minn.L.Rev. 300 (1944)	146

CHAPTER 5

FORM OF LAWMAKING: THE PARTS OF A STATUTE

SECTION 1. BILL OR RESOLUTION	646
Petition to Parliament and Response, 14 Edw. III, Rot. Parl. ii, 122-123 (1341)	646
Order to Parliamentary Committees, 14 Edw. III, Rot. Parl. ii, 113 (1341)	648
Statute, 14 Edw. III, st. 1 and Cap V	649
Visor v. Waters, 320 Pa. 406, 182 A. 241 (1936)	651

ANALYTICAL TABLE OF CONTENTS

	Page
United States Constitution, Art. I, § 7	654
United States Revised Statutes, Title I, § 8.....	655
L. Littlejohn Co. v. United States, 270 U.S. 215, 46 S.Ct. 244, 70 L.Ed. 553 (1926)	655
Waits v. United States, 161 F.2d 511 (1947)	658
Constitution of Minnesota, Art. 4, §§ 12, 13	659
St. Paul & Chicago Ry. Co. v. Brown, 24 Minn. 517 (1877).....	659
Swann v. Buck, 40 Miss. 268 (1866)	662
SECTION 2. THE TITLE	667
A. Introductory	667
Rose, Titles of Statutes, 5 A.B.A.Rep. 221, 222-228 (1882).....	667
B. Constitutional Requirements	669
State v. Township Committee of Northampton, 50 N.J.L. 496, 14 A. 587 (1888)	669
Rader v. Township of Union, 39 N.J.L. 509 (1877)	672
H. L. Shaffer & Co. v. Prosser, 99 Colo. 335, 62 P.2d 1161 (1936)	677
Lien v. Board of Com'rs, In re Hegne-Hendrum Ditch No. 1, 80 Minn. 58, 82 N.W. 1094 (1900)	678
State v. Probate Court of Ramsey County, 205 Minn. 545, 287 N.W. 297 (1939)	681
Kedzie v. Town of Ewington, 54 Minn. 116, 55 N.W. 864 (1893)	683
State ex rel. Shissler v. Porter, 53 Minn. 279, 55 N.W. 134 (1893)	684
State ex rel. Olson v. Erickson, 125 Minn. 238, 146 N.W. 364 (1914)	688
C. Titles and Section Headings As Aids to Interpretation	691
Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1916)	691
Mackey v. Miller, 126 F. 161 (1903)	406
State ex rel. Emerson v. Erickson, 159 Minn. 287, 198 N.W. 1000 (1924)	695
Brotherhood of Railroad Trainmen v. B. & O. R. Co., 331 U.S. 519, 67 S.Ct. 1387 (1947)	695
D. Drafting Titles	699
Minnesota Attorney General's Memorandum on Form of Bills (1941)	699
Manson, The Drafting of Statute Titles, 10 Ind.L.J. 155, 165- 167 (1934)	700
Note—Drafting Amendatory Statutes, 43 Harv.L.Rev. 1143 (1930)	701
<i>Illustrative Styles in Titles</i>	702

ANALYTICAL TABLE OF CONTENTS

	Page
SECTION 3. THE PREAMBLE	704
Huntworth v. Tanner, 87 Wash. 670, 152 P. 523 (1915)	704
Downing v. Independent School District, 207 Minn. 292, 291 N.W. 613 (1940)	711
SECTION 4. THE ENACTING CLAUSE	716
Sjoberg v. Security Savings & Loan Ass'n, 73 Minn. 203, 75 N. W. 1116 (1898)	716
SECTION 5. DEFINITION OR INTERPRETATION CLAUSE.....	720
McCarthy v. State, 170 Wis. 516, 175 N.W. 785 (1920)	720
State v. Standard Oil Co., 61 Or. 438, 123 P. 40 (1912)	721
Ivey v. Railway Fuel Co., 218 Ala. 407, 118 So. 583 (1928)	725
Suspine v. Compania Transatlantica Centroamericana, 37 F. Supp. 268 (1941)	727
Western Union Telegraph Co. v. Lenroot, 323 U.S. 490, 65 S. Ct. 335, 89 L.Ed. 414 (1945)	729
SECTION 6. THE PURVIEW	736
A. Unity of Subject	736
Johnson v. Harrison, 47 Minn. 575, 50 N.W. 923 (1891).....	736
B. Terms Incorporated by Reference	738
Read, Is Referential Legislation Worthwhile? 18 Can.Bar. Rev. 415 (1940); 25 Minn.L.Rev. 261 (1941)	738
SECTION 7. EXCEPTIONS, PROVISOS AND SAVINGS CLAUSES	761
Rowell v. Janvrin, 151 N.Y. 60, 45 N.E. 398 (1896)	761
Pierson v. Cady, 84 N.J.L. 54, 86 A. 167 (1913)	765
Commonwealth v. Desmond, 123 Mass. 407 (1877)	767
SECTION 8. SEVERABILITY CLAUSE	769
Williams v. Standard Oil Co., 278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287 (1929)	769
State v. Neveau, 237 Wis. 85, 294 N.W. 796 (1940)	774
SECTION 9. CLAUSE AS TO TAKING EFFECT	777
Turnipseed v. Jones, 101 Ala. 593, 14 So. 377 (1893)	777
Parkinson v. Brandenburg, 35 Minn. 294, 28 N.W. 919 (1886)	779
Robertson v. Bradbury, 132 U.S. 491, 10 S.Ct. 158, 33 L.Ed. 405 (1889)	781
Payne v. Graham, 118 Me. 251, 107 A. 709 (1919)	782

CHAPTER 6

LEGISLATIVE LANGUAGE, ITS ARRANGEMENT, AND THE
MECHANICS OF DRAFTING

	Page
SECTION 1. INTRODUCTORY	786
Randolph, Deliberate Legislation. 25 Rep.N.Y.S.B.A. 172 (1902)	786
Bryce, The Conditions and Methods of Legislation. 31 Rep. N.Y.S.B.A. 153, 162-163 (1908)	786
Parkinson, Legislative Contribution to Progress, 12 A.B.A. Jour. 95 (1926)	787
Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum.L.Rev. 527, 545-546 (1947)	789
Evans, Introduction to Collection of Statutes, P. xxx (1829)	790
Burdick, Can a Statute be Well Written in English. 6 Rep. N.Y.S.B.A. 130, 133-134 (1882)	791
Ogden and Richards, The Meaning of Meaning, 11 (1936)	792
Chafee, The Disorderly Conduct of Words, 41 Colum.L.Rev. 381, 382-394 (1941)	793
SECTION 2. SOME PROBLEMS OF LANGUAGE AS JUDICIALLY DETER- MINED	798
Introductory Note	798
Freund, The Use of Indefinite Terms in Statutes, 30 Yale L.J. 437 (1921)	799
A. The Meaning of Words	800
(i) <i>Determined by Subject Matter</i>	800
Nix v. Hedden, 149 U.S. 304, 13 S.Ct. 881, 37 L.Ed. 745 (1893)	800
Katzman v. Commonwealth, 140 Ky. 124, 130 S.W. 990 (1910)	801
Town of Plymouth v. Hey, 285 Mass. 357, 189 N.E. 100 (1934)	803
City Affairs Committee v. Board of Commissioners, 134 N.J.L. 180, 46 A.2d 425 (1946)	805
(ii) <i>Determined by Context. Herein of Certain So-called Canons</i>	808
Suwannee Fruit & S. S. Co. v. Fleming, 160 F.2d 897 (1947)....	808
Lenroot v. Western Union Telegraph Co., 141 F.2d 400 (1944)	812
Western Union Telegraph Co. v. Lenroot, 323 U.S. 490, 65 S. Ct. 335, 89 L.Ed. 414 (1945)	729
Vlasak v. Vlasak, 204 Minn. 331, 283 N.W. 489 (1939).....	816
Caminetti v. U. S., 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1916)	691
Here of Certain Canons	817
(1) <i>Noscitur a Sociis</i>	818

ANALYTICAL TABLE OF CONTENTS

	Page
Carson Co. v. Shelton, 128 Ky. 248, 107 S.W. 793 (1908)	818
Russell Motor Co. v. U. S., 261 U.S. 514, 43 S.Ct. 428, 67 L.Ed. 778 (1923)	819
(2) <i>Ejusdem Generis</i>	823
Cleveland v. U. S., 329 U.S. 14, 67 S.Ct. 13, 91 L.Ed. 1 (1946)....	823
People v. Kaye, 212 N.Y. 407, 106 N.E. 122 (1914)	827
(3) <i>Expressio Unius</i>	831
State ex rel. Curtis v. De Corps, 134 Ohio St. 295, 16 N.E. 459 (1938)	831
(iii) <i>Determined by Other Law</i>	833
(1) Statutes in <i>Pari Materia</i>	833
Rex v. Dojacek, 48 D.L.R. 36 (1919)	833
(2) The Common Law	837
Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908).....	837
B. Incomplete Expression: The Casus Omissus	840
State v. Partlow, 91 N.C. 550 (1884)	840
State ex rel. Hughes v. Reusswig, 110 Minn. 473, 126 N.W. 279 (1910)	842
People v. Patten, 338 Ill. 385, 170 N.E. 280 (1930)	845
Haworth v. Chapman, 113 Fla. 591, 152 So. 663 (1934).....	848
C. Constitutional Limitations on Indefinite Expression	852
(i) <i>In Self-Executing Statutes</i>	852
Taft, The Legislature and the Execution of the Laws, 12 Rep. Pa.Bar Ass'n 239, 246-247 (1906)	852
Yu Cong Eng v. Trinidad, 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059 (1926)	853
Bushuizen v. Thompson & Taylor Co., 360 Ill. 160, 195 N.E. 625 (1935)	858
State v. Langley, 53 Wyo. 332, 84 P.2d 767 (1938).....	865
Gorin v. United States, 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488 (1941)	871
United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538 (1947)	878
State v. Chicago & N. W. Ry. Co., 147 Neb. 970, 25 N.W.2d 824 (1947)	883
Marlin v. United States, 100 F.2d 490 (1939)	885
Pound, What of Stare Decisis? 10 Fordham L.Rev. 1, 10-11 (1941)	886
(ii) <i>In Administratively Executed Statutes</i>	887
Mahler v. Eby, 264 U.S. 32, 46 S.Ct. 283, 68 L.Ed. 549 (1923)....	887
People ex rel. Rice v. Wilson Oil Co., 364 Ill. 406, 4 N.E.2d 847 (1936)	889
Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944)	892

ANALYTICAL TABLE OF CONTENTS

	Page
Jaffe, An Essay on Delegation of Legislative Power, 47 Colum. L.Rev. 561, 581, 583-592 (1947). (Delegation in the States)	901
 SECTION 3. ARRANGEMENT OF LANGUAGE AND SOME OTHER MECHANICS OF DRAFTING	
A. Establishment of Policy and Substance of the Bill	909
Ordronaux, Constitutional Legislation in the United States, pp. 578-586 (1891)	909
Kennedy, Legislative Bill Drafting, 31 Minn.L.Rev. 103-105 (1946)	911
Explanatory Note	912
Questionnaire to be Answered in Preparing a Memorandum as the Basis for Drafting a Bill	912
 B. Style and Arrangement of Language	914
Kennedy, Drafting Bills for the Minnesota Legislature, 7 (1946)	914
Conard, New Ways to Write Laws, 56 Yale L.J. 458 (1947)....	914
Drafting Rules and Suggestions, Nat. Conf. of Comm. on Uniform State Laws (1917, 1918, 1932)	936
Willard, A Legislative Handbook, §§ 278, 285, 324, 352 (1890)	937
Henderson, Report of Revisor of Statutes to the Minnesota Legislature, 1941, p. 60.....	938
Report of Committee on Legislative Drafting, Conf. of Comm. on Uniformity of Legislation in Canada, 1919, pp. 9-11, 14-15; 1942, pp. 90-94, 96, 98.....	939
Sutton, Use of "Shall" in Statutes, 4 John Marshall L.Q. 204 (1939)	942
Brossard, Punctuation of Statutes, Rep. Conf. Comm. Uniform St. Laws, 3-4, 8-9, 19-20 (1938)	951
Santos v. Dondero, 11 Cal.App.2d 720, 54 P.2d 764 (1936)	954
Note on "And/Or"	954
Read, Regulations Revision Committee Manual, Canadian Naval Service, 1943, 11-18, 24.....	955
Preface to 1945 Minnesota Statutes, p. 6 (Note on Decimal System of Numbering)	962
Illustrations of Various Devices for Aiding Clarity and Convenience of Laws (from Regulations for the Canadian Naval Service, 1945)	962
Kennedy, Drafting Bills for the Minnesota Legislature, 25-29 (1946) (Specifications of Measures for Introduction, and Model Legislative Forms)	968

ANALYTICAL TABLE OF CONTENTS

CHAPTER 7

THE METHODS OF INTERPRETATION AND CONSTRUCTION

	Page
SECTION 1. INTRODUCTORY	972
Introductory Note	972
Freund, Legislative Regulation, 182 (1932)	972
Llewellyn, The Modern Approach to Counselling and Advocacy, 46 Colum L Rev. 167, 179-183 (1946).....	973
Note on "Interpretation" and "Construction"	975
de Sloovere, Steps in the Process of Interpreting Statutes, 10 N.Y.U.L.Q.Rev. 1, 17, 22 (1932)	976
Jones, The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Statutes, 25 Wash.U.L.Q. 2, 8-9 (1939).....	978
SECTION 2. POSTULATES AND APPROACHES	979
A. Introductory Note	979
B. Historical Origins and Development in England	979
Plucknett, A Concise History of the Common Law, 292-298 (1940)	979
Thorne, Introduction to Ellesmere "A Discourse Upon the Statutes", 42-68 (1942)	985
Plucknett, Review of Thorne's "Ellesmere on Statutes", 60 Law Q.Rev. 242, 246-248 (1944)	991
Corry, Administrative Law and the Interpretation of Statutes, 1 U. of Toronto L.J. 286, 297-298 (1936)	993
C. Enunciation of Postulates by American Courts	995
Spencer v. The State, 5 Ind. 41 (1853)	995
In re Coburn, 165 Cal. 202, 131 P. 352 (1913)	1006
State v. Parsons, 206 Iowa 390, 220 N.W. 328 (1928)	1008
Gorin v. United States, 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488 (1941)	871
In re Cameron's Estate, 249 Wis. 531, 25 N.W.2d 504 (1946)....	1009
D. The Literal Approach and the Plain Meaning Rule.....	1011
Wall v. Pfanschmidt, 265 Ill. 180, 106 N.E. 785 (1914)	1011
E. The Equity of the Statute	1015
Plowden's Note to Eyston v. Studd, 2 Plow. 465, 75 E.R. 695 (1574)	1015
Baker v. Jacobs, 64 Vt. 197, 23 A. 588 (1891)	1016
In re Tyler's Estate, 140 Wash. 679, 250 P. 456 (1926)	1018
Duncan v. Magette, 25 Tex. 245 (1860)	1021
Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942)	1024

ANALYTICAL TABLE OF CONTENTS

	Page
F. The Mischief Rule Approach	1028
Heydon's Case, 3 Co. 7a, 76 E.R. 637 (1584)	1028
Thorne, The Equity of a Statute, 31 Ill.L.Rev. 202, 214-215, 217 (1936)	1028
Nashville & K. R. Co. v. Davis, 78 S.W. 1050 (1902)	1030
Sanderson v. Hartford Eastern Ry. Co., 159 Wash. 472, 294 P. 241 (1930)	1031
Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192, 61 L. Ed. 442 (1916)	691
Cabell v. Markham, 148 F.2d 737 (1945)	1034
Judd v. Landin, 211 Minn. 465, 1 N.W.2d 861 (1942)	1037
G. The Golden Rule Approach	1041
State v. Clark, 29 N.J.L. 96 (1860)	1042
Chung Fook v. White, 264 U.S. 443, 44 S.Ct. 361, 68 L.Ed. 781 (1924)	1044
American Trucking Ass'ns v. U. S., 21 F.Supp. 35 (1939).....	1046
U. S. v. American Trucking Ass'ns, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940)	1051
Beach v. U. S., 79 App.D.C. 208, 144 F.2d 533 (1944).....	1057
People v. Minter, 73 Cal.App.2d Supp. 994, 167 P.2d 11 (1946)	1062
Western Union Telegraph Co. v. Lenroot, 323 U.S. 490, 65 S. Ct. 335, 89 L.Ed. 414 (1945)	729
Radin, A Case Study in Statutory Interpretation, 33 Calif.L. Rev. 219, 228 (1945)	1063
 SECTION 3. INTRINSIC AND EXTRINSIC AIDS AND THE PROBLEM OF AMBIGUITY	 1065
A. Introductory	1065
Introductory Note	1065
Holmes, The Theory of Legal Interpretation, Collected Papers 203-204, 206-207 (1899).....	1066
Nutting, The Ambiguity of Unambiguous Statutes, 24 Minn. L.Rev. 509-513 (1940)	1067
Radin, Statutory Interpretation, 43 Harv.L.Rev. 863, 868-869 (1930)	1070
B. The Words	1072
Nix v. Hedden, 39 F. 109, and same case in 149 U.S. 304, 13 S. Ct. 881, 37 L.Ed. 745 (1889)	800
Katzman v. Commonwealth, 140 Ky. 124, 130 S.W. 990 (1910)	801
Town of Plymouth v. Hey, 285 Mass. 357, 189 N.E. 100 (1934)	803
City Affairs Committee v. Board of Commissioners, 134 N.J. 180, 46 A.2d 425 (1946)	805

ANALYTICAL TABLE OF CONTENTS

	Page
C. The Context	1072
Suwannee Fruit & S. S. Co. v. Fleming, 160 F.2d 897 (1947)....	808
Haworth v. Chapman, 113 Fla. 591, 152 So. 663 (1934)	848
State v. Chicago & N. W. Ry. Co., 147 Neb. 970, 25 N.W.2d 825 (1947)	883
Lenroot v. Western Union, 141 F.2d 400, and same case in 323 U.S. 490, 65 S.Ct. 335, 89 L.Ed. 414 (1944)	812
D. Statutes in Pari Materia	1072
Rex v. Dojacek, 49 D.L.R. 36 (1919)	833
Spencer v. The State, 5 Ind. 41 (1853)	995
Suwannee Fruit & S. S. Co. v. Fleming, 160 F.2d 897 (1947)	808
Old Homestead Bakery v. Marsh, 75 Cal.App. 247, 242 P. 749 (1926)	1073
Keifer & Keifer v. R. F. C., 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784 (1939)	1275
E. The Common Law	1078
In re Tyler's Estate, 140 Wash. 679, 250 P. 456 (1926)	1018
Robinson's Case, 131 Mass. 376, 41 Am.Rep. 239 (1881)	1213
Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908)	837
Reeves & Co. v. Russell, 28 N.D. 265, 148 N.W. 654 (1914)	1262
F. Previous Judicial Interpretation	1078
(i) <i>By the Same Court.</i>	1078
Patridge v. Palmer, 201 Minn. 387, 277 N.W. 18 (1937)	57
Van Vranken v. Helvering, 115 F.2d 709 (1940)	82
Buradus v. General Cement, 159 Pa.Super. 501, 48 A.2d 883 (1946)	77
(ii) <i>Of Statutes Adopted from Other Jurisdictions.</i>	1078
Cathcart v. Robinson, 5 Pet.(U.S.) 264 (1831)	1079
State v. Chaplain, 101 Kan. 413, 166 P. 238 (1917)	1081
Colver v. McInturff, 112 Kan. 604, 212 P. 908 (1923)	1083
Christgau v. Woodlawn Cemetery Ass'n, 208 Minn. 263, 293 N.W. 619 (1940)	1084
(iii) <i>Of Re-enacted Statutes</i>	1088
Girouard v. U. S., 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 422 (1946)	1088
Winder, The Interpretation of Statutes Subject to Case Law, 58 Jurid.Rev. 93 (1946)	1101
Cleveland v. U. S., 329 U.S. 14, 67 S.Ct. 13 (opinion of Rutledge, J.)	1102
G. Previous Administrative Interpretation	1103
Hennepin County v. Ryberg, 168 Minn. 385, 210 N.W. 105 (1926)	1103

ANALYTICAL TABLE OF CONTENTS

	Page
U. S. v. American Trucking Ass'n, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940)	1051
Fishgold v. Sullivan Drydock & Repair Corporation, 154 F.2d 785 (1945), and 328 U.S. 375, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946)	1109, 1115
Social Security Board v. Nierotko, 327 U.S. 358, 66 S.Ct. 637, 90 L.Ed. 718 (1946)	1117
H. History of Legislation on the Subject and Conditions at Time of Enactment	1122
State v. Kelly, 71 Kan. 811, 81 P. 450 (1905)	1122
Chatwin v. U. S., 326 U.S. 455, 66 S.Ct. 233, 90 L.Ed. 198 (1946)	1129
Kelly v. Dewey, 111 Conn. 280, 149 A. 840 (1930)	1132
In re Hall, 50 Conn. 131, 47 Am.Rep. 625 (1882)	402
Gutteridge, A Comparative View of the Interpretation of Stat- ute Law, 8 Tulane L.Rev. 1, 11-13 (1933)	1139
I. Contemporary Opinion	1140
State v. Partlow, 91 N.C. 550, 49 Am.Rep. 652 (1884)	840
J. Legislative History: Herein of Journals, Committee Reports and Debates	1140
Gosselin v. The King, 33 Can.S.C. 255 (1903)	1140
Pellett v. Industrial Commission, 182 Wis. 596, 156 N.W. 956 (1916)	1143
Commonwealth v. West Philadelphia, Fidelio Mannerchor, 115 Pa.Super. 241, 175 A. 434 (1934)	1144
Ah Kow v. Nunan, 5 Sawy. 552 (1879)	1149
Jones, The Plain Meaning Rule and Extrinsic Aids in the In- terpretation of Statutes, 25 Wash.U.L.Q. 2, 10-11 (1939)	1151
Boston Sand & Gravel Co. v. U. S., 278 U.S. 41, 49 S.Ct. 52, 73 L.Ed. 170 (1928)	1152
U. S. v. American Trucking Ass'ns, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940)	1051
U. S. v. Dickerson, 310 U.S. 554, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940)	1155
Beach v. United States, 79 App.D.C. 208, 144 F.2d 533 (1944)	1057
Western Union Telegraph v. Lenroot, 323 U.S. 490, 65 S.Ct. 335, 89 L.Ed. 414 (1945)	1160
Radin, A Case Study in Statutory Interpretation, 33 Cal.L.Rev. 219, 222-225 (1945)	1165
Cox, Judge Learned Hand and the Interpretation of Statutes, 60 Harv.L.Rev. 370, 384-390 (1947)	1166
American Stevedores v. Porello, 330 U.S. 446, 67 S.Ct. 847 (1947)	1169

ANALYTICAL TABLE OF CONTENTS

	Page
K. Methods of Presentation of Extrinsic Aids	1174
SECTION 4. CURRENT POINTS OF VIEW ON BASIC THEORY	1177
Pound, Enforcement of Law, 20 Green Bag 401, 404-406 (1908)	1177
Mitchell, Legislative and Judicial Desiderata, 25 Rep.N.Y.S. B.A. 289, 300-301 (1902)	1179
Radin, "Statutory Interpretation", 43 Harv.L.Rev. 863, 870-884 (1930)	1180
Landis, A Note on "Statutory Interpretation", 43 Harv.L.Rev. 886 (1930)	1184
Horack, In the Name of Legislative Intention, 38 W.Va.L.Q. 119, 126-127 (1932)	1187
de Sloovere, The Equity and Reason of a Statute, 21 Cornell L.Q. 591, 608-609 (1936)	1188
Farley, Interpretation Reinterpreted, 11 Tulane L.Rev. 266 (1937)	1189
Radin, A Short Way With Statutes, 56 Harv.L.Rev. 388, 405-407 (1942)	1189
Frank, J., in <i>Guisseppi v. Walling</i> , 144 F.2d 608, 620-622 (1944)	1191
Cox, Judge Learned Hand and the Interpretation of Statutes, 60 Harv.L.Rev. 370-375 (1947)	1194
Frankfurter, Some Reflections on the Reading of Statutes, 2 Rec.A.B.C.N.Y. No. 6, 47 Colum.L.Rev. 527 (1947)	1198

CHAPTER 8

FITTING LEGISLATION INTO A UNIFIED LEGAL SYSTEM

SECTION 1. INTRODUCTORY	1207
Pound, Common Law and Legislation, 21 Harv.L.Rev. 388, 385-386, 406-7 (1908)	1207
Stone, The Common Law in the United States, 50 Harv.L. Rev. 4, 12-16 (1936)	1208
Willis, Statute Interpretation in a Nutshell, 16 Can.Bar Rev. 1, 17-18 (1938)	1211
SECTION 2. PRESUMPTIONS OF LEGISLATIVE INTENT. HEREIN OF STRICT AND LIBERAL INTERPRETATION	1212
A. Concerning Changes From the Common Law	1212
Plucknett, A Concise History of the Common Law, 292-298 (3rd ed. 1940)	979
Thorne, Introduction to Ellesmere, "A Discourse Upon the Statutes," 42-68 (1942)	985

ANALYTICAL TABLE OF CONTENTS

	Page
Ash v. Abdy, 3 Swans.App. 664, 36 E.R. 1014 (1678)	102
Robinson's Case, 131 Mass. 376, 41 Am.Rep. 239 (1881)	1213
Cardozo, The Paradoxes of Legal Science, 9-10 (1928)	1215
Coral Gables v. Christopher, 108 Vt. 414, 189 A. 147 (1937)	1215
Teders v. Rothermel, 205 Minn. 470, 286 N.W. 353 (1939)	1217
B. Concerning Derogation of Common Right	1219
In re Hall, 50 Conn. 131, 47 Am.Rep. 625 (1882)	402
Beck v. Wallander, 71 N.Y.S.2d 237 (1947)	620
C. Concerning Deprivation of Life and Liberty: "Penal Laws"	1219
Thorne, Introduction to Ellesmere "A Discourse Upon the Statutes", 46-68 (1942)	985
Spencer v. The State, 5 Ind. 41 (1853)	995
O'Day v. People, 114 Colo. 373, 166 P.2d 789 (1946)	1220
United States v. Gaskin, 320 U.S. 527, 64 S.Ct. 318, 38 L.Ed. 287 (1944)	1221
Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv.L.Rev. 748, 756-768 (1935)	1223
Pound, Common Law and Legislation, 21 Harv.L.Rev. 383, 386-388 (1908)	1229
D. Concerning Remedies	1231
Wigington v. Mid-Continent Royalty Co., 130 Kan. 785, 288 P. 749 (1930)	1231
Jackson v. Northwest Airlines, 70 F.Supp. 501 (1947)	1235
E. Concerning Territorial Application	1238
In re Robinson's Estate, 138 Neb. 101, 292 N.W. 48 (1940)	1238
F. Concerning Taxing Statutes	1241
State v. Glander, Ohio App., 69 N.E.2d 226 (1946)	1241
G. Concerning the Sovereign	1242
United States v. United Mine Workers of America, 70 F. Supp. 42 (1946), and same case in 330 U.S. 258, 67 S.Ct. 677 (1947)	1242
SECTION 3. COMMON LAW STATUTES	1253
Moss Point Lumber Co. v. Board of Supervisors, 89 Miss. 448, 42 So. 290 (1906)	1253
SECTION 4. USE OF COMMON LAW AS A MATERIAL OF INTERPRETA- TION	1257
Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641 (1908)	837
SECTION 5. STATUTE COVERING ENTIRE SUBJECT	1258
Commonwealth v. Allen, 240 Mass. 244, 133 N.E. 625 (1922)....	1258
Reeves & Co. v. Russell, 28 N.D. 265, 148 N.W. 654 (1914)	1262

ANALYTICAL TABLE OF CONTENTS

	Page
SECTION 6. UNIFORM LAWS	1268
Sutherland v. Mead, 80 App.Div. 103, 80 N.Y.S. 504 (1903)	459
Union Trust v. McGinty, 212 Mass. 205, 98 N.E. 679 (1912)	463
SECTION 7. ANALOGICAL REASONING FROM LEGISLATION	1268
Landis, Statutes and the Sources of Law, Harvard Legal Es- says, 213, 221 (1934)	1268
Schuster, The Principles of German Civil Law, 10-11 (1906)	1269
Amory v. Meredith, 7 Allen 397 (1863)	1269
Ebers v. MacEachern, 4 M.P.R. 333 (1932)	1271
Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784 (1939)	1275
SECTION 8. VIOLATION OF STATUTES AS NEGLIGENCE PER SE	1279
Landis, Statutes and the Sources of Law, Harvard Legal Es- says, 213, 220 (1934)	1279
Evers v. Davis, 86 N.J.L. 196, 90 A. 677 (1914)	1279
Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn.L.Rev. 361 (1932)	1283
SECTION 9. JUDICIAL ADAPTATION OF COMMON LAW TO BASIC LEG- ISLATIVE CHANGES	1285
Mathewson v. Mathewson, 79 Conn. 23, 63 A. 285 (1906)	1285
Schuler v. Henry, 42 Colo. 367, 94 P. 360 (1908)	1288
Oppenheim v. Kridel, 236 N.Y. 156, 140 N.E. 227 (1923)	86
Johnson v. United States, 157 F.2d 209 (1946)	1290
Thompson v. Delaware, Lackawanna & Western Railroad Co., 41 Pa.Super. 617 (1910)	1291
Jung v. St. Paul Fire Dept. Relief Ass'n, 223 Minn. 402, 27 N. W.2d 151 (1947)	1296
SECTION 10. THE PROBLEM OF CODIFICATION AND RESTATEMENT	1300
Report of the Committee on the Establishment of a Perma- nent Organization for Improvement of the Law Proposing the Establishment of an American Law Institute, Am.Law Inst.Proceedings, Vol. 1, pp. 6-11 (1923)	1300
Pound, Sources and Forms of Law, 22 Notre Dame Lawyer 1, 71-79 (1946)	1303
Freund, Legislative Regulation, pp. 5-10 (1932)	1308
Goodhart, Precedent in English and Continental Law, 50 Law Q.Rev. 40, 43, 61-63 (1934)	1310
Pound, Sources and Forms of Law, 22 Notre Dame Lawyer 1, 63-66 (1946)	1312
Final Report of the New York Code Commission (1865)	1313

ANALYTICAL TABLE OF CONTENTS

	Page
Fenner, Jurisprudence of the Supreme Court of Louisiana, 133 La. lvi, lxiii (1913)	1319
Burdick, A Revival of Codification, 10 Colum.L.Rev., 118 (1910)	1321
Report of the Committee on the Establishment of a Perma- nent Organization of Improvement of the Law Proposing the Establishment of an American Law Institute, A.L.I. Proc. Vol. 1, 12-28 (1923)	1324
American Law Institute Proceedings, Vol. 7, pp. 86-89 (1929)	1330
Goodrich, Restatement, 36 Neb.S.B.A.J. 159, 160-168 (1945)....	1333

TABLE OF CASES

[References are to pages. Cases printed in roman type are the cases reported as the text of this volume. Cases printed in italic type are found in the footnotes and text.]

- Abrams v. Smith*, 376
 Aero Spark Plug Co. v. B. G. Corporation, 31
 Ah Kow v. Nunan, 1149
 Allison v. Corker, 376
Altringham Electric Supply Co., Ltd. v. Sale Urban District Council, 1043
 American Stevedores v. Porello, 1169
 American Trucking Ass'ns v. United States, 1016
 Amory v. Meredith, 1269
Anderson v. Board of Com'rs of Douglas Co., 376
Anderson v. Wilson, 1202
 Ash v. Abdy, 102, 1212
Atlantic Coast Line R. Co. v. Commonwealth, 798
Attorney-General of Ontario v. Canada Temperance Federation, 22
- Baker v. Jacobs, 1016
Baum v. Thoms, 1267
 Beach v. United States, 1057, 1160.
Beavan v. Went, 1267
 Beck v. Wallander, 620, 1219.
 Becker v. Faber, 121.
Beckin v. Beckin, 412.
Bell v. Bell, 805
 Bender v. United States, 389
Benson v. Chicago, St. P. M. & O. Ry., 827
Birdwell, Matter of, 636
Blakemore v. Dolan, 374
Block v. Chicago, 901
Bloomer v. Todd, 975
Blumenihal v. United States, 1011
 Board of Commissioners of Excise of the City of Auburn v. Merchant, 549
Board of Education of San Francisco v. Alliance Assurance Co., 448
 Board of Supervisors v. Heenan, 286
Bogardus v. Trinity Church, 1256
Borella v. Borden Co., 1195, 1198
 Boshuizen v. Thompson & Taylor Co., 858
 Boston Sand & Gravel Co. v. United States, 1152
- Brass v. North Dakota*, 570
Briggs v. Patridge, 106, 107
Brooklyn Nat. Corp. v. Commissioner of Internal Revenue, 1036
 Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co., 695
Brown v. Scherrer, 1295.
Bull v. King, 316
 Buradus v. General Cement Products Co., 77
Burke, In re, 754
Burnet v. Guggenheim, 1204
 Burns v. Sewell, 305
Buttfield v. Stranahan, 603
- Cabell v. Markham, 1034
Cake v. Los Angeles, 949
 Cameron's Estate, In re, 1009
 Caminetti v. United States, 691, 817, 1033
Cargo of Brig Aurora v. United States, 757
 Carlton v. Grimes, 309
 Carson & Co. v. Shelton, 818
Carter v. Carter Coal Co., 1199
 Cathcart v. Robinson, 1079
Central Hanover B. & T. Co. v. Commissioner of Internal Revenue, 1036
 Central of Georgia Ry. Co. v. State, 396
 Chatwin v. United States, 1129
Chelan County v. Navarre, 747
Cherry, Matter of v. Board of Regents, 908
 Christgau v. Woodlawn Cemetery Ass'n, 1084
 Chung Fook v. White, 1044
 City Affairs Committee v. Board of Commissioners, 805
Clark v. R. R. Co., 946
 Cleveland v. United States, 823, 1102
Clow v. Chapman, 1290
 Coburn, In re, 1006
 Cochran v. Taylor, 108
Colcord v. Conroy, 1295
 Colver v. McInturff, 1083
Commercial Nat. Bank v. Canal-Louisiana Bank & Trust Co., 465

TABLE OF CASES

- Commissioner v. Beck's Estate*, 1193
Commissioner of Immigration v. Gottlieb, 1046
Commonwealth v. Alderman, 754
Commonwealth v. Allen, 1258
Commonwealth v. Desmond, 767
Commonwealth v. Dougherty, 754
Commonwealth v. Kenneson, 373
Commonwealth v. Sanderson, 384
Commonwealth v. West Philadelphia Fidelio Mannerchor, 1144
Conn v. United States, 1117
Consolidated Mines v. Securities and Exchange Commission, 622
Coral Gables v. Christopher, 1215
Crowley v. Lewis, 106, 107
Cudahy Bros. Co. v. La Budde et al., 389
Cushing v. Worrick, 951

Daily v. Parker, 91
DeRuiz v. DeRuiz, 1046
Devonshire v. O'Connor, 952
Doney v. Northern Pac. Ry., 67
Downing v. Independent School Dist. No. 9, 711
Doyle v. Hofstadter, 273
Dramstaetter v. Moloney, 749
Duncan v. Magette, 1021
Dutcher v. Culver, 1256

Ebers v. MacEachern, 1271
Edwards v. Porter, 1290
Edwards v. United States, 304
Englewood Mfg. Co., In re, 1027
Employer's Mut. Liability Ins. Co. Tullefson, 955
Epstein v. Gluckin, 61
Erle Railroad Co. v. Tompkins, 41
Evansville v. State, 325
Evers v. Davis, 1279
Eyston v. Studd, Reporters Note, 1015

Federal Communications Comm. v. Columbia B. System, 1100, 1165
Federal Communications Commission v. Pottsville Broadcasting Co., 604
Federal Crop. Ins. Corporation v. Merrill, 1117
Federal Trade Comm. v. Raladam Co., 1151
Fides A. G. v. Commissioner of Internal Revenue, 1057

Field v. Clark, 895
First Trust Company v. Smith, 1068
Fisher v. Ruislip-Northwood U.D.C., 21
Fishgold v. Sullivan Drydock & Repair Corporation, 1109, 1116
Fitzsimons v. Ford Motor Co., Ltd., 21
Fletcher v. Prather, 371
Fontheim v. Third Ave. Ry. Co., 1149
Freeman v. Goff, 313

Gaston v. Merriam, 389
Girouard v. United States, 1088
Gorin v. United States, 871, 1009
Gosselin v. The King, 1140
Great Northern Ry. v. Sunburst Oil & Refining Co., 67
Greenough v. Greenough, 348
Greenville Baseball v. Bearden, 1024
Grey v. Pearson, 1041
Guiseppi v. Walling, 1192, 1196

Hague, In re, 303
Hall, In re, 402, 1139, 1219
Hammock v. Loan & Trust Co., 951
Hampton Jr. & Co. v. United States, 895
Harbage v. Tracy, 317
Harding v. Commissioner of Stamps for Queensland, 352
Harpending v. Haight, 304
Hawes & Co. v. Wm. R. Trigg & Co., 655
Hawke v. Smith No. 1, 341
Haworth v. Chapman, 848, 1072
Helvering v. Hallock, 52, 64, 85
Hennepin County v. Ryberg, 1103
Henry v. United States, 805
Hess v. Pawloski, 134
Hewitt v. Board of Medical Examiners, 908
Heydon's Case, 1028
Higgins v. Smith, 62
H. L. Shaffer & Co. v. Prosser, 677
Hoeper v. Tax Comm'n, 1201
Hole v. Rittenhouse, 71
Holiday State Bank v. Hoffman, 466
Hoyt v. Sprague, 666
Huntworth v. Tanner, 704

International Brotherhood v. Wisconsin Employ. R. Bd., 1149
Interstate Commerce Commission v. U. S. ex rel. Humboldt Steamship Company, 1122

TABLE OF CASES

- Ivey v. Railway Fuel Co., 725
- Jackson v. Northwest Airlines, 1235
- Jewish Kosher Provision Corp. v. Gottfried*, 1064
- Johnson v. Harrison, 736
- Johnson v. United States, 1274, 1290
- Jones v. Dexter*, 746
- Judd v. Landin, 1037
- Jung v. St. Paul Fire Dept. Relief Ass'n, 1296
- Kansas Milling Company, The v. Frank J. Ryan, 632
- Karr v. Robinson*, 1295
- Katz v. Wolff & Reinheimer, Inc.*, 1284
- Katzman v. Commonwealth, 801
- Kedzie v. Town of Ewington, 683
- Keifer & Keifer v. Reconstruction Finance Corporation, 1077, 1275
- Kelly v. Dewey, 1132
- Kelso & Co. v. Ellis*, 462
- Kendall v. United States*, 744
- Kirby v. Gibson Refrigerator Co.*, 468
- Knill v. Towse*, 750
- Knoop v. Anderson*, 136
- La Abra Silver Mining Co. v. U. S.*, 304
- La Bourgoynne*, 601
- Lambertson v. Hogan*, 351
- Leader v. Duffey*, 1051
- Leighton v. City of Minneapolis, 445
- Lenroot v. Western Union Telegraph Co., 812
- Levy v. McCartee*, 1267
- Lieberman v. Van De Carr*, 903
- Lien v. Board of Commissioners, 678
- Little v. Chicago, St. P., M. & O. Ry. Co., 37
- Littlejohn & Co. v. United States, 655
- Liversidge v. Anderson*, 1051
- Lockhart et al. v. City of Troy*, 382
- Lukens v. Nye, 325
- McAdam v. Federal Mutual Liability Ins. Co.*, 366
- McCarthy v. State, 720
- McCleary v. Babcock, 378
- McClelland v. Judge of Records Court of Detroit*, 316
- McGibbon v. Abbot*, 1271
- McGinnis v. State*, 1257
- McGrain v. Daugherty, 267
- McKee Land & Improvement Co. v. Swickhard*, 356
- Mackey v. Miller, 406, 694
- Mahler v. Elby, 887
- Marano v. Finn, 139
- Marquis of Linlithgow v. North British Railway*, 1139
- Marshall Field & Co. v. Clark*, 316
- Martin v. United States, 885
- Mathewson v. Mathewson, 1285
- Meadowcroft v. People*, 914
- Minnesota Mutual Life Ins. Co. v. Johnson*, 316
- Mirchouse v. Rennell*, 19
- Montana Horse Products Co. v. Great Northern Ry.*, 67
- Morrison v. Session's Estate, 362
- Moss Point Lumber Co. v. Board of Supervisors, 1253
- Moulton v. Scully*, 341
- Murrell v. Western Union Tel. Co., 413
- Mushel v. Board of County Commissioners for Benton County*, 781
- Nashville & K. R. Co. v. Davis, 1030
- National Broadcasting Co. v. United States, 614
- Nebbia v. People of the State of New York, 260
- New England Coal & Coke Co. v. Rutland R. Co.*, 1193
- Nix v. Hedden, 800
- N. R. Bagley Co. v. Cameron*, 774
- O'Day v. People, 1220
- Old Homestead Bakery v. Marsh, 1073
- Oppenheim v. Kridel, 86, 1290
- O'Pry v. United States, 367
- Panama R. R. v. Johnson*, 742
- Parkinson v. Brandenburg, 779
- Pattridge v. Palmer, 57
- Payne v. Graham, 782
- Pellett v. Industrial Commission of Wisconsin, 1143
- Penfield Co. of California v. Securities and Exchange Commission, 532
- People v. Admire*, 1043
- People v. Briggs*, 356
- People v. Crossley*, 748
- People v. Frankovich*, 754
- People v. Kaye, 827
- People v. Minter, 1062

TABLE OF CASES

- People v. Patten*, 845
People v. Reardon, 299
People ex rel. Gomber v. Sholem, 901
People ex rel. Gramlich v. City of Peoria, 382
People ex rel. Purdy v. The Com'rs of Highways of Marlborough, 317
People ex rel. Rice v. Wilson Oil Co., 889
People of State of New York v. Parker, 672
Perry v. Strawbridge, 837, 1078, 1257
Phillips v. Britannia Hygienic Laundry Co., 1285
Pierson v. Cady, 765
Platt Institute v. City of New York, 412
Plymouth, Town of, v. Hey, 803
Posadas v. National City Bank, 366
Post v. Supervisors, 316
Postmaster General, The, v. Early, 351

Queen v. Jackson, 1274

Rader v. Township of Union, 672
Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd., 23
Read v. Lyons, 23
Reed v. Wellman, 947
Reeves & Co. v. Russell, 1078, 1262
Regina v. Pearce, 736
Replege v. Little Rock, 906
Rex v. Dojacek, 838, 1072
Rhode Island Hospital Trust Co. v. Hodgkin, 1294
Rhone v. Loomis, 827
Richborg Motor Co. v. U. S., 949
Robertson v. Bradbury, 781
Robinson's Case, 1078, 1213
Robinson's Estate, In re, 1238
Rowell v. Janvrin, 761
Rubert Hermanos, Inc. v. People of Puerto Rico, 370
Russell Motor Car Co. v. United States, 819
Rye v. Phillips, 55

St. Louis v. Fischer, 904
St. Louis-San Francisco Ry. v. Middlekamp, 1202
St. Paul & Chicago Railway Co. v. Brown, 659
Sanderson v. Hartford Eastern Ry. Co., 1031

Sandy v. Walter Butler Shipbuilders, 1036
Santee Mills v. Query, 755
Santos v. Dondera, 954
Schechter Poultry Corp. v. United States, 895
Schuler v. Henry, 1288
Sedgwick v. Stanton, 1268
Seignious v. Rice, 907
Shattls v. Watson, 637
Sjoberg v. Security Savings & Loans Ass'n, 716
Sloan's Estate, In re, 1268
Smith v. Eau Claire, 395
Smithberger v. Bannin, 756
Social Security Board v. Nierotko, 1117
Southern Pacific Co. v. Jensen, 26
Southern Ry. Co. v. Machinists' Local Union, 1033
Spencer v. The State, 387, 995, 1072, 1220
State v. Andrew Brothers, 757
State v. Beswick, 551
State v. Cannon, 357, 620
State v. Chaplain, 1081
State v. Chicago & N. W. Ry. Co., 883, 1072
State v. City of St. Paul, 1132
State v. Clark, 1042
State v. Cunningham, 666
State v. Glander, 1241
State v. Herndon, 1291
State v. Howell, 336
State v. Johnson, 364
State v. Kelly, 1122
State v. Kiesewetter, 320
State v. Langley, 865
State v. Mangiaracina et al., 334
State v. Montgomery, 772
State v. Neveau, 774
State v. Osborn, 342
State v. Parsons, 1008
State v. Partlow, 840, 1140
State v. Probate Court of Ramsey County, 681
State v. Standard Oil Co., 721
State v. Stewart, 347
State v. Superior Court, 710
State v. Superior Court of Thurston County, 345
State v. Thornbury, 388
State v. Township Committee of Northampton, 669

TABLE OF CASES

- State v. Wilson*, 1261
State ex rel. Attorney General v. Borough of Somers Point, 436
State ex rel. Bergin v. Washburn, 409
State ex rel. Board of Courthouse & City Hall Com'rs v. Cooley, 438
State ex rel. City Loan & Sav. Co. v. Moore, 387
State ex rel. Curtis v. De Corps, 831
State ex rel. Emerson v. Erickson, 695
State ex rel. Hughes v. Reusswig, 842
State ex rel. Johnson v. Broderick, 1011
State ex rel. Kohman v. Wagner, 291
State ex rel. Markham v. Elmquist, 376
State ex rel. Martin v. Zimmerman, 329
State ex rel. Olson v. Erickson, 688
State ex rel. Shissler v. Porter, 684
State ex rel. Sum v. Archibald, 385
State ex rel. Wilcox v. Gilbert, 541
State of Minnesota ex rel. Pearson v. Probate Court, 642
Stuart v. Bank of Montreal, 22
Sturges v. Crowninshield, 1046
Suspine v. Compania Transatlantica Centroamericana, 727
Sutherland v. Mead, 459
Savannee Fruit & Steamship Co. v. Fleming, 808, 1072, 1116
Swann v. Buck, 662
Swift v. Tyson, 42

Taff Vale Ry. v. Amalgamated Society of Ry. Servants, 1278
Teders v. Rothermel, 1217
Tenner, Ex parte, 477
Teopfer v. Kaeufer, 1295
Thibault v. Lalumiere, 538
Thompson v. Delaware, Lackawanna & Western Railroad Co., 1291
Thomson Electric Welding Co. v. Peerless Wire Fence Co., 714
Tierney v. Dodge, 383
Tigner v. State of Texas, 520
Truelove v. Truelove, 1257
Turnipseed v. Jones, 777
Tyler's Estate, In re, 1018, 1078

Union Trust Co. v. McGinty, 463
United Mine Workers of America v. Coronado Coal Co., 1278
United States v. American Trucking Ass'ns, 1051, 1109, 1153, 1175
United States v. Boyd, 945
United States v. Constantine, 1204

United States v. Dickerson, 1155
United States v. Fisher, 1205
United States v. Gaskin, 1221
United States v. Hutcheson, 1077
United States v. Keitel, 975
United States v. Lacher, 951
United States v. Lapp, 370
United States v. Moreland, 1199
United States v. One Zumstein Briefmarken Katalog, 827
United States v. Petrillo, 878
United States v. Rock Royal Coop., 522
United States v. Ruzika, 1122
United States v. St. Paul, Minneapolis & Manitoba Ry. Co., 1144
United States v. Schwimmer, 1095
United States v. Shreveport Grain & Elevator Co., 951
United States v. United Mine Workers of America, 1212, 1245

Van Vranken v. Helvering, 82
Virginia v. Tennessee, 470
Visor v. Waters, 651
Vlasak v. Vlasak, 816

Walker v. United States, 1108
Wall v. Pfanschmidt, 1011
Wallace v. Mayor of Reno, 628
Wallingford & Arango v. McCarty, 1037
Warring v. Colpoys, 71
Waters & Co. v. Gerard, 1258
Watts v. United States, 658
Welch's Estate, In re, 1021
Western Union Telegraph Co. v. Lenroot, 645, 729, 816, 1063, 1160
Wetlaufer v. Baxter, 465, 1257
Wharton v. Wise, 471
Wigington v. Mid-Continent Royalty Co., 1231
Wilents v. Sears, Roebuck & Co., 754
Williams v. Mayor and City Council of Baltimore, 426
Williams v. Standard Oil Co., 769
Wimbish v. Tailbois, 97
Woodward v. Pearson, 307

Yakus v. United States, 892
Young v. Bristol Aeroplane Co., 21
Young Men's Christian Association of Seattle v. Parish, 433
Yu Cong Eng v. Trinidad, 853

Zazove v. United States, 1046, 1117

TABLE OF PERIODICAL AND TEXT MATERIALS

ALTER, GEORGE E.

Legislation, Its Volume, Its Tendencies and the Causes and Processes
Through Which It is Being Brought Into Being—p. 143

AMERICAN BAR ASSOCIATION

Report of the Special Committee on Legislative Drafting; Appendix
B—p. 524

AMERICAN LAW INSTITUTE

Discussion of Conflict of Laws Restatement Tentative Draft—p. 1330
Report of the Committee on the Establishment of a Permanent Or-
ganization for Improvement of the Law Reposing the Establishment
of an American Law Institute—pp. 1300, 1324

ANDERSON, WILLIAM

Special Legislation in Minnesota—p. 415

ARMSTRONG, WALTER P.

Specific Steps for Improving Legislation—p. 259
Unsolved Problems of Leadership and Powers—p. 331

ARNOLD, THURMAN W.

Law Enforcement—An Attempt at Social Dissection—p. 503

BAER, HERBERT R., AND WASHINGTON, GEORGE T.

Lawyers, Taxes and the Supreme Court—p. 62

BLACKSTONE, SIR WILLIAM

1 Commentaries—p. 519

BOARD OF COMMISSIONERS ON UNIFORM STATE LAWS (MINNE-
SOTA)

Report to the Minnesota State Legislature at its 1933 Session—p. 450

BROSSARD, E. E.

Punctuation of Statutes—p. 951

BROWN, ESTHER LUCILE

Lawyers, Law Schools and the Public Service—p. 9

BROWNE,

Statute of Frauds—p. 103

BRYCE, JAMES

The Conditions and Methods of Legislation—p. 786

BURDICK, FRANCIS M.

A Revival of Codification—p. 1321
Can a Statute be Well Written in English—p. 791

CANTWELL, FRANK V.

Public Opinion and the Legislative Process—p. 200

CARDOZO, BENJAMIN N.

The Paradoxes of Legal Science—p. 1215

CHAFEE, ZECHARIAH, JR.

The Disorderly Conduct of Words—p. 793

READ & MACDONALD U.C.B. LEG. xliii

TABLE OF PERIODICAL AND TEXT MATERIALS

- COHEN, MORRIS R.
Positivism and Idealism in the Law—p. 490
- COMMITTEE ON ADMINISTRATIVE PROCEDURE
Report on Administrative Procedure in Government Agencies—p. 574
- COMMITTEE ON LEGISLATIVE DRAFTING
Report of Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada—p. 939
- CONARD, ALFRED F.
New Ways to Write Laws—p. 914
- COOK, WALTER WHEELER
Certainty in the Construction of the Law—p. 600
- CORRY, J. A.
Administrative Law and the Interpretation of Statutes—p. 993
- COX, ARCHIBALD
Judge Learned Hand and the Interpretation of Statutes—pp. 1166, 1194
- CULLEN, ROBERT K.
Mechanics of Statutory Revision—p. 408
- CULP, MAURICE S.
Process in Actions against Nonresidents doing Business within a State—p. 136
- DE SLOOVERE, FREDERICK J.
Steps in the Process of Interpreting Statutes—p. 976
The Equity and Reason of a Statute—p. 1188
- DICKINSON, JOHN
Legislation and the Effectiveness of Law—p. 496
- EGGLESTON, SIR FREDERICK
Legal Development in a Modern Community—p. 493
- EVANS, SIR W. D.
Introduction to Collection of Statutes—p. 790
- FARLEY, ROBERT J.
Interpretation Reinterpreted—p. 1189
- FENNER, CHARLES PAYNE
The Jurisprudence of the Supreme Court of Louisiana—p. 1319
- FRANKFURTER, FELIX
Some Reflections on the Reading of Statutes—pp. 11, 789, 1198
- FREEMAN, ROBERT HILL
The Protection Afforded against the Retroactive Operation of an Overruling Decision—p. 81
- FREUND, ERNST
"Interpretation of Statutes—p. 1269
Legislative Regulation—pp. 537, 554, 972, 1308
Standards of American Legislation—p. 128
The Use of Indefinite Terms in Statutes—p. 799
- GOODHART, A. L.
Precedent in English and Continental Law—p. 1310

TABLE OF PERIODICAL AND TEXT MATERIALS

- GOODRICH, HERBERT F.
Restatement—p. 1333
- GUTTERDIGE, H. C.
A Comparative View of the Interpretation of Statute Law—p. 1139
- HALL, LIVINGSTON
Strict or Liberal Construction of Penal Statutes—p. 1223
- HARDGROVE, J. GILBERT
Futility of Resort to Roman Law for Interpretation of Statutes on Adoption—p. 363
- HART, JAMES
Some Aspects of Delegated Rule-Making—pp. 599, 603
The Exercise of Rule-Making Power—p. 572
- HARTSHORNE, RICHARD
Inter-Governmental Cooperation—The Way Out—p. 469
- HENDERSON, WILLIAM B.
Report of Revisor of Statutes to the Minnesota Legislature—p. 938
- HOAR, ROGER SHERMAN
Uniformity of Uniform Laws—p. 466
- HOLMES, O. W.
The Common Law—p. 25
The Theory of Legal Interpretation—p. 1066
- HOPKINS, RUSSELL
The Literal Canon and the Golden Rule—p. 1044
- HORACK, FRANK E.
In the Name of Legislative Intention—p. 1187
- HUTCHESON, JOSEPH C., JR.
Cincinnati Conference on the Status of the Rule of Judicial Precedent—p. 53
- INTERSTATE COMMISSION ON CRIME
The States Cooperate—p. 473
- JAFFE, LOUIS I.
An Essay on Delegation of Legislative Power—p. 901
- JOLLIEFE, J. E. A.
The Constitutional History of Medieval England—p. 5
- JONES, CHESTER LLOYD
Statute Law Making in the United States—pp. 561, 564, 612
- JONES, HARRY WILLMER
The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes—pp. 978, 1151
- KEETON, G. W.
Problem of Law Reform after the War—p. 145
- KENNEDY, DUNCAN L.
Drafting Bills for the Minnesota Legislature—pp. 661, 914, 968
Legislative Bill Drafting—pp. 394, 911
The Legislative Process With Particular Reference to Minnesota—p. 286

LANDIS, JAMES M.

- A Note on Statutory Interpretation—p. 1184
- Statutes and the Sources of Law—pp. 1268, 1279

LAW REVISION COMMISSION, NEW YORK

- Recommendation of the Law Revision Commission to the Legislature Relating to Restitution for Property Transferred in Contemplation of Marriage—p. 540
- Recommendation to the Legislature Relating to Discharge of Surety or Guarantor—p. 119
- Recommendation to the Legislature Relating to the Seal and to the Enforcement of Certain Written Contracts—p. 112
- Recommendation to the Legislature Relating to the Trust Fund Provisions in the New York Lien Law—p. 557

LEE

- Legislative and Interpretive Regulations—p. 603

LEWIS, WILLIAM DRAPER

- Adaptation of the Law to Changing Economic Conditions—p. 14

LINCOLN, ALEXANDER

- The Relation of Judicial Decisions to the Law—p. 24

LLEWELLYN, KARL N.

- Impressions of the Cincinnati Conference on Judicial Precedent—p. 23
- The Modern Approach to Counselling and Advocacy—p. 973

LOWNDES, CHARLES L. B.

- Civil Liability Created by Criminal Legislation—p. 1283

LYBOLT, MARGARET V.

- A Public Enemy Law for New York—p. 637

MANSON, CARL H.

- The Drafting of Statute Titles—p. 700

MITCHELL, JAMES M.

- Legislative and Judicial Desiderata—p. 1179

MOFFAT, ABBOT LOW

- The Legislative Process—pp. 125, 215

MORGAN, EDMUND M.

- Tot v. United States: Constitutional Restrictions on Statutory Presumptions—p. 554

NEW YORK LEGISLATIVE COMMITTEE

- Final Report on Legislative Methods, Practices, Procedures and Expenditures—p. 225

NORRIS, GEORGE W.

- One House Legislatures—p. 281

NOTES

- Drafting Amendatory Statutes—p. 701
- Drafting of Statute Titles—p. 680
- Improving the Legislative Process: Federal Regulation of Lobbying—p. 178
- Legislation—Legislative Inquiries—Validity of Subpena by Senate Committee for all Telegraphic Correspondence Over Named Period—p. 278

TABLE OF PERIODICAL AND TEXT MATERIALS

- NUTTING, CHARLES B.
The Ambiguity of Unambiguous Statutes—p. 1067
- O'CONNOR, SIR JAMES
Thoughts About the Common Law—p. 14
- OGDEN AND RICHARDS
The Meaning of Meaning—p. 792
- ORDRONAUX
Constitutional Legislation in the United States—p. 909
- PARKINSON, THOMAS I.
Legislative Contribution to Progress—p. 787
- PIRSIG, MAYNARD E.
Proposed Youth Correction Act—pp. 146, 645
- PLUCKNETT, THEODORE F. T.
A Concise History of the Common Law—pp. 979, 1212
Review of Thorne's "Ellesmere on Statutes"—p. 991
- POUND, ROSCOE
Common Law and Legislation—pp. 1207, 1229
Enforcement of Law—p. 1177
For the "Minority Report"—p. 585
Sources and Forms of Law—pp. 1, 1303, 1312
The Limits of Effective Legal Action—p. 483
What of Stare Decisis—pp. 30, 886
- RADIN, MAX
A Case Study in Statutory Interpretation—pp. 1063, 1165
A Short Way with Statutes—p. 1189
"Statutory Interpretation"—pp. 1070, 1180
The Trail of the Calf—p. 22
- RANDOLPH, CARMAN F.
Deliberate Legislation—p. 786
- READ, HORACE E.
Congestion in the Minnesota Legislature Caused by Requirements of
Local Government—p. 448
Is Referential Legislation Worth While?—p. 738
Regulations Revision Committee Manual—p. 955
- RIESENFELD, STEFAN A.
The Development of American Poor Laws in General—p. 131
- RIESENFELD, STEFAN A., and MUSSMAN, WILLIAM E.
Suretyship and the Statute of Frauds—p. 104
- ROSE, U. M.
Titles of Statutes—p. 667
- SALMOND, SIR JOHN
Jurisprudence—pp. 12, 519
- SCHUSTER
The Principles of German Civil Law—p. 1269
- SENATE JOINT COMMITTEE
Report on the Organization of the Congress of the United States
Pursuant to H. Con. Res. 18—p. 238

TABLE OF PERIODICAL AND TEXT MATERIALS

- SHULL, CHARLES W.
The Legislative Reorganization Act of 1946—p. 254
- SPRECHER, ROBERT A.
The Development of the Doctrine of Stare Decisis and the Extent to Which It should be Applied—p. 17
- STERLING, PHILIP
Some Practical Aspects of Legislation—pp. 141, 297
- STONE, HARLAN F.
The Common Law in the United States—p. 1208
- STONE, ROYAL A.
The Waning Justification for Consideration as the Sole Test of Contractual Obligation—p. 54
- SUTTON, DALE E.
Use of "Shall" In Statutes—p. 9442
- TAFT, WILLIAM H.
The Legislature and the Execution of the Laws—pp. 494, 852
- THORNE, SAMUEL E.
Introduction to Ellesmere "A Discourse upon the Statutes"—pp. 985, 1212, 1219
The Equity of a Statute—p. 1028
- TIME MAGAZINE
"Mister Speaker"—p. 235
- TREANOR
Cincinnati Conference on Status of Rule of Judicial Precedent—p. 107
- UNITED STATES NEWS
Remodeled Congress at Work—p. 259
- VON MEHREN, ARTHUR
The Judicial Conception of Legislation in Tudor England—p. 6
- WARP, GEORGE A.
Licensing as a Device for Federal Regulation—p. 611
- WEEKS, O. DOUGLAS
Administration Through Lawmaking—p. 571
Recent Developments in the State Legislative Process—p. 285
- WHITESIDE, FREDERICK W., JR.
Effect of Adoption of the Uniform Sales Act Upon Arkansas Law—p. 467
- WICKERSHAM, GEORGE W.
The Program of the Commission on Law Observance and Enforcement—p. 501
- WILLARD, ASHTON R.
A Legislative Handbook—p. 937
- WILLIS, JOHN
Statute Interpretation in a Nutshell—p. 1211
- WINDER, W. H. D.
The Interpretation of Statutes Subject to Case Law—p. 1101

Chapter 1

SOME COMPARATIVE ASPECTS OF GROWTH OF LAW THROUGH THE JUDICIAL AND LEGISLA- TIVE PROCESSES

INTRODUCTORY NOTE

A comparison of judicial and legislative functions and methods is incidental to the treatment of almost every topic in this book. This introductory chapter is designed to demonstrate some salient historical and contemporary differences and similarities that influence the relative efficacy, scope, and interplay of the judiciary and the legislatures as law-making agencies.

Other differences and similarities are more conveniently and effectively considered in the context of following chapters.

SECTION 1. TRANSITION OF THE GROWING POINT OF THE LAW

ROSCOE POUND, SOURCES AND FORMS OF LAW

22 Notre Dame Lawyer 1-3, *5-8 (1946).

Recalling Maine's well known generalization that the agencies of growth of law are fictions, equity, and legislation, it may be said that the order of their appearance is in a large view (1) special fictions, (2) sweeping changes (sometimes as in equity in Roman law using special procedural fictions) under the cover of a general fiction, and (3) avowed, deliberate lawmaking. In the first there is a belief or pretence that law is not made or altered. In the second there is a belief or pretence of interpretation or that law of higher authority is discovered and applied. In the third all pretence is given up, and new rules and new standards are avowedly invented and imposed.

It is long before the political organization of a society is well enough developed to take over the work of lawmaking as a proper function of government. Those who exercise the powers of a society in the beginnings of a legal order do not think of making law. They think of recognizing law which has an independent existence as ethical custom or precepts of religion. At this stage the state has not become the paramount agency of social control. The governing authority in a modern state may recognize law found at hand or may make new law. But the idea that law may be made and that the state has not only the power but the duty of making it is relatively modern. It came to Germanic peoples through the influence of Roman law, as it

was said, *iuxta exemplum Romanorum*, with the idea of union of all political powers in a sovereign who can make law by exercise of will. Modern legislation comes from Constantinople rather than from Rome. The maturity of law is marked by regular and frequent resort to legislation as the agency of change and improvement. Legislation, indeed, exists before this stage of legislation. What, however, marks the stage of legislation in the development of a legal system is the use of legislation not as an instrument of occasional legal revolution, but as the regular, everyday agency of growth and development of law.

For example, compare in Roman law the period from Augustus to Diocletian with that from Diocletian to Justinian. In the Roman law of the classical era the agency of growth was juristic science largely under the influence of the theory of natural law. The regular, everyday development of the law took place through juristic writing. Here and there changes were made by occasional statutes but it was not till the third century that the balance begins to incline toward the imperative element. After Diocletian, juristic writing substantially comes to an end, and from Diocletian to Justinian growth takes place through legislation. In the same way compare sixteenth, seventeenth and eighteenth-century English law with that of the nineteenth and of the twentieth century. Allowing for the legislation of Henry VIII and of the Commonwealth, none the less almost all growth down to the nineteenth century took place through judicial decision or juristic writing. On the other hand, the great reform movement of the nineteenth century was legislative. The rise of the Court of Chancery and the absorption of the law merchant marked a reforming of the law through the traditional element. The nineteenth-century reform movement, inaugurated by Bentham, involved a substitution of the imperative for the traditional element. Note also workmen's compensation legislation and the reform of English real property law by legislation in the present century. Compare German law before the empire (the *Pandektenrecht*) with the German law of the twentieth century in which legislation overwhelmingly preponderates. Also compare the minute American legislation of today on all sorts of matters of private law with the all but purely judicial and juristic development which went before. Unquestionably in the modern state the growing point of the law has shifted to legislation.

In the modern state the chief activities are not war and religion, as in antiquity, but administration and legislation. Both of these are growing at the expense of the traditional element, the purely professional element, in legal systems. Instead of leaving all or nearly all controversies to tribunals which apply traditional guides to decision, the modern state more and more seeks to forestall controversy by legislatively prescribed rules or summarily adjusts relations through administration. . . .

We may now turn to the history of legislation as an agency in the growth of law. Five stages in the development of legislation on purely legal matters may be suggested for convenience of treatment: (1) unconscious legislation in the period of customary law; (2) declara-

tory legislation in the period when the traditional law is reduced to writing; (3) selection and amendment when by the political union of peoples having in some particulars divergent customs it becomes necessary to choose in declaring the custom of the new whole; (4) conscious constructive lawmaking, as an occasional expedient at first to meet political exigencies, but gradually to effect important changes here and there in the legal system in emergencies; (5) habitual legislation as an ordinary agency of legal development, often culminating in codification of the entire legal system.

1. *Unconscious legislation.* I speak here of the beginnings of law, i. e. of law in the analytical sense; not of the beginnings of social control but of the beginnings of a specialized form of social control by politically organized society. In the first stage of legal development, the stage of traditional modes of decision based upon repeated decisions by supposed inspiration, a great deal of unconscious lawmaking goes on. The case in hand may not be exactly one which has arisen previously, but those who have the custody of the tradition assimilate it thereto. Or they may warp the tradition more or less unconsciously to meet new needs. Maine describes how he saw this going on in India. "In point of fact," he says, ". . . the various shades of the power lodged with the village council under the empire of the ideas proper to it, are not distinguished from one another, nor does the mind see a clear difference between making a law, declaring a law, and punishing an offender against a law. If the powers of this body must be described by modern names, that which lies most in the background is legislative power, that which is most distinctly conceived is judicial power. The laws obeyed are regarded as having always existed, and usages really new are confounded with the really old." Again he says: ". . . if very strict language be employed, legislation is the only term properly expressing the invention of customary rules to meet cases which are really new. Yet, if I may trust the statements of several eminent Indian authorities, it is always the fact or the fiction that this council only declares customary law." A like phenomenon is to be seen in Hebrew law. Just as, using law to mean the body of received precepts, the judge precedes the law historically, so historically the court precedes the legislature. The judicial function is the first to be conceived distinctly, since the first problem of the legal order is simply to decide peaceably. The legislative function is the last so to be conceived. Logically according to the idea of separation of powers we have first a lawmaker who makes laws and second a court which applies them. But this is not the actual course of legal development.

2. *Declaratory legislation.* All legislation for a long time in the history of a legal system is of this type. It is not an authoritative making of new laws, it is or is taken to be an authoritative publication of law already existing. Thus, ten patricians reduced the *ius civile* to writing in the Twelve Tables. Theretofore it was an oral tradition. The prologue to the *Senchus Mor*, the great book of the Brehon (old Irish) law tells how the "bards" came together and recited the tra-

ditional law to St. Patrick. The prologue to the Lex Salica tells how certain old men from the villages of the Salian Franks were brought together and wrote out the customary law. Remnants of this idea persisted in Roman law in the formula by which the assembly of the people rejected a proposed *lex-antiquo*, i. e. let the customary law be stated as it was stated of old, and the reiterated proposition, which seems to us today to go without saying, that the later legislative enactment prevails over the earlier. A remnant may be seen in the common law in Blackstone's seventh rule of statutory interpretation: "Where the common law and a statute differ the common law gives place to the statute; and an old statute gives place to a new one." The idea of the declaratory nature of legislation hung on for a long time. But if statutes were declaratory of custom it might be asked: Why was not the older declaration the more reliable?

3. *Selection and amendment.* A certain conscious making of law takes place where choice must be made between conflicting traditions or conflicting traditions must be harmonized through amendment. This necessity arises whenever an attempt is made to declare the common custom of a political unit formed by the union of formerly distinct tribes or people with customs of their own. An example may be seen in Alfred's laws. He tells us he had to pick and choose and even amend, but that he "durst not set down much of [his] own." There is a like disclaimer in the laws of Howell the Good. From this there is an easy progress, but one long, only occasionally and gradually achieved, to intentional and avowed making of laws as something wholly new.

4. *Conscious constructive lawmaking.* A first step in this direction comes when men perceive that by changing the written record of the law they can change the law, which theretofore had been held eternal and immutable. Usually at this point a legislative ferment sets in, e. g. the early republican legislation at Rome, the Frankish capitularies on the Roman imperial model, the legislation of Edward I on the Byzantine model. But this outburst of legislation is commonly soon superseded by a purely professional development of the law and it is not until the maturity of legal systems that we enter upon a real stage of legislation. There is little conscious constructive lawmaking till a legal system reaches the stage of equity and natural law. It comes first with the theory of natural law; of a law as a declaration not of custom but of natural law. It becomes wholly conscious in the maturity of law, with the analytical theory of law as a body of laws and of laws as made, not found.

HISTORICAL PLACE OF LEGISLATION IN DEVELOPMENT OF LAW

(Diagram based on Roscoe Pound, "Sources and Forms of Law." Ed.)

Four Stages in Historical Develop- ment of Law	Chief & Characteris- tic Means of Growth in Each Stage	Types of Legislation Characteristic in Each Stage
(a) Primitive	(a)	(a) Unconscious & Declaratory
(b) Strict	(b) } — Fictions (Special & Deliber- ately devised to achieve an end)	(b) } Declaratory (Selection & Amendment)
(c) Equity	(c) General Fictions (Equity & Natural Law)	(c) } — Conscious — (c) Declaratory
(d) Maturity	(d) Legislation	(d) } (d) Creative

[Note that: (1) general fiction as an incidental means of growth takes the form of spurious interpretation in stage (d);

(2) in stages (c) and (d) special fictions are largely dogmatic (and conceived after the event); and

(3) early resorts to conscious legislation on any large scale have occurred only when social conflict or upheaval, threatened or actual, necessitated a reconciliation in permanent and solemn form.]

NOTES

1. With respect to the statement in Maine, "Ancient Law", Ch. 2, that fictions, equity and legislation are the chronological agencies by which law is brought into harmony with a developing society, Holdsworth, "Sources and Literature of English Law", at p. 2, says: "Now this general proposition as to the sources and agencies by which legal systems have been developed will not fit the facts of English legal history". (His explanation is found at pp. 2-4.)

2. In Eggleston, "Legal Development in a Modern Community", in Interpretations of Modern Legal Philosophies (1947), 168 at 169, the author says: "There are three phases in lawmaking which supervene on the primitive law:

"(a) Command by established leaders; (b) Bargains between various classes to secure the acceptance of desired principles; (c) The free exercise of authority to establish a change in the legal relations of the members of society. These are not separate historically, but (a) is generally earlier and (c) is the final phase."

J. E. A. JOLLIFFE, THE CONSTITUTIONAL HISTORY
OF MEDIEVAL ENGLAND

London: 1937. A. & C. Black Ltd., 239-240.

It is certain that, however far back in English or Norman history we go, we shall find that the function of judgment was inherent in assemblies of notables. So much is basic in the public life of the northern world, and, while the reign of law was supreme and legislation as such unknown, this one function embodied public life at its

fullest in the *curia*. This was true of honour and kingdom alike. But by the twelfth century it was no longer enough. Innovations in custom were becoming too numerous to pass uncriticized, and refinements in the procedure of courts were in sum altering their whole basis. Acts of state could no longer be explained solely as judgments or recognitions of custom. With the reign of Henry II a new device, the assize, comes into politics. It is something set by agreement—*assisa statuta*, *assisam statuere* are common amplifications—and it marks the first realization that custom can be changed by the will of those who live under it or govern by it. With the assize we are at the headspring of English legislation, which, strangely, descends not from the national code-making of the eleventh century, but from the agreements of feudal tenants and their lords. The assize may be used for a number of cognate purposes, but it keeps within a narrow range. It may settle and declare points of custom which are open, it may bring inequalities of custom to a common rule among peers of any honour or procedure or service such as are felt to lie within the spirit, but not the letter, of existing custom. The same principle of agreed and established, assized clarification or innovation may be found in the *redditus assisae*, *opera assisa*, of most manors, in the standards set for the staple trades, such as the assizes of Cloth, Bread, and Ale, or in the assizes of the Forest or of Arms, which bind all freemen of the realm. The distinguishing marks of the assize, by which in combination it is distinguished from the *judicia* or recognitions of the past, are that it is admittedly new enactment, that it requires the consent of the lord or prince, and that it must apply throughout the area of administration for which it is promulgated. In this it is *communis assisa*, and is not the effect of individual submission but of common assent, though such assent may be expressed without the formality and conclusiveness of the decisions of assemblies in later days. Such assizes, essentially legislative, will, if they are applied often enough and to matters of sufficient importance, bring the problems of will and authority, counsel and the initiative of the prince into an entirely new light.

ARTHUR VON MEHREN, THE JUDICIAL CONCEPTION OF LEGISLATION IN TUDOR ENGLAND

From *Interpretations of Modern Legal Philosophies*. 751, 755-757.*

New York: 1946. Copyright by Oxford University Press, New York, Inc.

The Tudor period, the first in English history to see economic and social change carried forward by statutes, clearly represents, moreover, a marked development towards the modern conception of law as consciously made, and away from the conception of statutory law manifested by the records of the English medieval Parliaments, laws that were in the main a body of custom which had merely been

* [Footnotes are omitted. Ed.]

authoritatively declared by earlier Parliaments. The Reformation Parliament of Henry VIII had a revolutionary effect upon the institutions of the time, even though England may not have recognized a law making, as distinct from a law-declaring, Parliament until the Long Parliament. Institutional development and increasing Parliamentary activity forced the sixteenth century to modify the older medieval idea of law as declared custom; and the resultant modifications in the older conception opened the way for the conception of consciously made law. Henry VIII, in perhaps a rather modern fashion, talked to his Parliament of the advantage of a large output of statutes. The detail and length of statutes increased. It is even more important that statutes now first came to deal with all branches of life: with detailed regulations of the developing economy of trade; with men's religious life; with the dynastic arrangements of the state; with the relation of church and state. The impact of parliamentary activity upon the average Englishman was becoming not only more extensive and pervasive but also more constant.

This evolution toward a conception of law as deliberately made seems to have begun in the time of Henry VII. However, the great majority of the public acts from his reign did not alter fundamental customs or institute general rules. Most of them, as Pickthorn has shown, were designed for the enforcement of what was already law. Statutes were already in existence, however, which dealt with the clergy and sanctuary, with the Star Chamber, with 'Navigation,' with Fines, and with the maintenance of husbandry. There were also the 'De Facto Act,' the acts for the subordination of local legislation, the act dispensing with indictment in certain cases, and the 'shoring or underpropping act for the benevolence.' None of these, however, was an undoubtedly 'new' law. The most novel was the act dispensing with indictments, which, as Coke was to say, 'tended in execution . . . to . . . the utter subversion of the common law.' Such a fundamental interference with the enforcement of law is hardly a mere matter of procedure; yet it is not full-fledged law-making, and it stands alone. The 'De Facto Act' of 1494 is interesting as well for its non-repeal clause. Sir Francis Bacon wrote of that Act that 'a supreme and absolute power cannot conclude itself, neither can that which is in nature revocable be made fixed. . . .' The presence of such clauses in the legislation of the Tudor period indicates that the Parliament had not grasped, as Bacon had, the conception of legislative sovereignty; and such clauses are an interesting Parliamentary parallel to the judicial notion of fundamental law, which was also present in the period; both are essentially transitional doctrines between a conception of law as declared custom and a conception of law as consciously made.

In the reign of Henry VIII, statutes assume a greater importance. Henry was even to admit by statute that his powers of prerogative required a statutory backing. And the Reformation Parliament was to change the relationship of church and state, and was also to expropriate property. The Statute of Uses was passed in 1536; the Statute

of Wills in 1539. In the first years of Henry's reign there were numerous statutes repealing earlier acts. But the activities of the Parliament during Henry's reign did not represent, on the whole, a sharp break with the past. Most of the changes which were effected were not revolutionary, and apparently did not necessarily have to be considered new law. The statute of 1536 against the smaller monasteries was, however, clearly without earlier precedent. The act of expropriation of the Alien Priories had been directed against French mother houses in time of war. And the statute which took land from the reversioners of the Templars to give it to the Hospitalers is in the nature of a doctrine of *cy pres* rather than an outright taking of lands. Neither of these earlier acts, moreover, was directed against the medieval church-state relationship. This concern of the English state with religious matters, a concern vigorously expressed in the statute of 1536, steadily increased thereafter, and Parliament soon became accustomed to acting in this new sphere.

The reigns of Edward VI, Mary, and Elizabeth do not have any statutes that are so new or so untraditional as were the religious acts of Henry VIII. Most of the legislation of the Elizabethan period is concerned, indeed, with England's expanding trade and regulation of that trade. Probably the most important statute of the period, from a constitutional point of view, was the Uniformity Act of the first year of Elizabeth's reign. And yet that Act, perhaps for political reasons, was phrased as an affirmation of the old law. And the courts of law in *Caudrey's* case accepted this medieval explanation of the legislation.

The Tudor period has witnessed, therefore, a *de facto* widening of the legislative scope of Parliament. Now and then within the period, Parliament unmistakably made 'new' law. Nevertheless the idea that law is declared custom persists both as conscious intellectual tradition and as habit. This persistence is perhaps a sufficient explanation of the vast majority of Tudor statutes. It is characteristic, indeed, that Fitzherbert, in his *Abridgment*, omits to draw a distinction between statutes which declare common law and statutes which create new law. Brooke, however, has made this distinction, a distinction which would seem by then (1573) to be one of sufficient importance to merit the attention of the average practitioner. In his approach to statutes the Tudor judge may have understood the new tendencies in part, but he was essentially attempting to fit together the new (statutory law) and the old (customary law), an attempt which parliamentary activity had not yet made impossible. The common law of England, said Sir John Davys, "Comming nearest to the lawe of *Nature*, which is the root and touch stone of all good lawes . . . doth far excell our *written* lawes, namely our Statutes or Acts of Parliament: which is manifest in this, that when our Parliament have altered or changed any fundamentall points of the Common Lawe, those alterations have been found by experience to be so inconvenient for the Common-Wealth, as that

the common lawe hath in effect beene restored againe, in the same points by other Actes of Parliament, in succeeding ages."

NOTES

1. In Cam, "The Legislators of Medieval England", Raleigh Lecture, 1945, at p. 2, the author states: "There are three main sources of legislative activity in medieval England: the directive or planning urge in the ruler, the need for clarifying and defining experienced by the judicature, and the demand from the ruled for redress of grievances."

2. Further discussion of the origin of English legislation, showing that the modern statute did not emerge, and legislation was not a separate function of government, until the end of the Middle Ages, is found in the following: Allen, "Law in the Making", 3rd Ed., pp. 357-362; Holdsworth, "2 History of English Law," 2nd Ed., pp. 219-220; and Plucknett, "A Concise History of the Common Law", 3rd Ed., pp. 282-288.

The last writer says at p. 286: "As far as we can see, a statute in the reign of Edward I simply means something established by royal authority; whether it is established by the King in Council, or in a Parliament of nobles, or in a Parliament of nobles and commons as well, is completely immaterial. It is equally immaterial what form the statute takes, whether it be a charter, or a statute enrolled and proclaimed, or merely an administrative expression of the royal will notified to the judicial authorities by means of a letter close (which at this period was a species of interdepartmental correspondence). In short, while we are in the reign of Edward I we feel the typical mediaeval atmosphere, which was, above all, intensely practical. The great concern of the government was to govern, and if in the course of its duties legislation became necessary, then it was effected simply and quickly without any complications or formalities. Even after parliamentary legislation had begun to appear, we still find the Council exercised a preponderant influence and that among the councillors were frequently to be found the judges, for it is only natural in so practical an age that the Council should call upon the judges to draft legislation, and such in fact was the case".

ESTHER LUCILE BROWN, LAWYERS, LAW SCHOOLS
AND THE PUBLIC SERVICE

Russell Sage Foundation, 1948.

*Legislation, Legislative Drafting, and Other Public Law Courses **

. . . Legislation now is generally thought of as the pre-eminent instrument for law-making. However, this method which appeared at an early period in English history was used but sparingly both in England and the United States until comparatively recent times. Professors Durfee and Dawson have dramatically demonstrated this fact with figures from the English record where the span of Anglo-Saxon history is longer than in the United States.¹ The first volume

* From the manuscript with permission of the author and Russell Sage Foundation.

¹ Durfee, Edgar N. and Dawson, John P., Cases on Remedies, Book I, Mimeographed, pp. 2-3.

of the Statutes at Large covers the 115 years from 1225 to 1340. The next three volumes embrace two centuries, averaging 66 years to a book. The next three average 38 years each, and bring the legislative record to the Restoration of 1660. The remaining forty years of the century almost fill three volumes, averaging 13 years to the book. It required 31 volumes to cover the eighteenth century, or approximately three years to the volume. The nineteenth century filled 95 volumes. Since then there has been a volume for each year. Durfee and Dawson might have added that the trend in the amount of *delegated legislation* emanating from administrative agencies is the same. The size of the British Statutory Rules and Orders is greater even than that of the Statutes at Large, and so far as the public is concerned these rules and orders have the same effect as legislation.

Why was this method of law-making utilized so little in earlier centuries and is now utilized so extensively? A variety of answers comes to mind. In a relatively static and uncomplicated society, the adjudication of disputes on a case-by-case basis undoubtedly worked reasonably well. There was probably little felt need for laying down rules, other than the precedents growing out of judicial decisions, that would be applicable to future similar controversies or that would prevent such controversies from arising. As the body of judicial doctrine developed, furthermore, and was strengthened by scholarly exegesis, the scales were increasingly weighted in favor of the judicial process as an established institution.

No defined concept of the service state had arisen. The church, in fact, provided in rudimentary form many of the social welfare services now performed by the state. Hence there was no occasion to enact a multiplicity of statutes charging the executive branch of government with performing designated functions in behalf of society. The legislative process, moreover, is a difficult one. It requires thorough knowledge of the particular situation which should be remedied, imaginative ability to devise practical means for remedying the situation, and skill in drafting a rule stating those means which will be understandable to persons charged with administration. Only a society prepared to engage in scientific research, broad social analysis, formulation of intricate policy, prediction of probable acceptance and success, and highly technical drafting can use this instrument of law-making effectively for the solution of more than simple problems.

The events of history reversed the balance of power between the common law and statutory law. With the economic and social complexity that the Industrial Revolution introduced, the common law was often unable to cope. Its concern was with the *broken contract* and a variety of other kinds of *wrong doing*. It could not impose affirmative duties in an era of unprecedented expansion which called for planning and organization, and supervision of those processes. The judiciary did not even have the machinery necessary for obtaining the facts, other than those relating to a particular controversy, whereby it might determine desirable policy.

Because many of the judges, furthermore, failed to bring to the bench the ability, experience, sociological outlook, and non-partisan courage needed, the judiciary was frequently unable to reinterpret common-law doctrine to meet new exigencies, even in areas where adaptation to changing conditions was possible. The common law, in fact, had become impotent to grapple with the enormous problems of the late nineteenth and twentieth centuries. It was slow, expensive, and uncertain.

Thus legislation came largely to replace the judicial process as a means for rapid and radical change of law. The legislature has machinery, such as the standing committees, the appointed investigation commission, and the special investigating organizations within the executive branch for securing requisite information. Many *types* of law-making and many sanctions are available to it which the courts do not possess. Thus it can regulate those areas which it has become convinced should be brought under supervised control. It can engage in social planning of long-term, wide-range policy in fields such as taxation, housing, penology and prison reform, child welfare, co-ordination of production and purchasing power, improvement in the structure and procedures of government, re-organization of the administration of justice. The paramount issues of our time lie within its domain rather than that of the common law.²

FELIX FRANKFURTER, SOME REFLECTIONS ON THE READING OF STATUTES *

47 Colum.L.Rev. 527 (1947).

A single volume of 320 octavo pages contains all the laws passed by Congress during its first five years, when measures were devised for getting the new government under way; 26 acts were passed in the 1789 session, 66 in 1790, 94 in 1791, 38 in 1792, 63 in 1793. For the single session of the 70th Congress, to take a pre-depression period, there are 993 enactments in a monstrous volume of 1014 pages—quarto not octavo—with a comparable range of subject matter. Do you wonder that one for whom the Statutes at Large constitute his staple reading should have sympathy, at least in his moments of bay-ing at the moon, with the touching Congressman who not so long ago proposed a "Commission on Centralization" to report whether "the Government has departed from the concept of the founding fathers" and what steps should be taken "to restore the Government to its original purposes and sphere of activity"? Inevitably the work of the Supreme Court reflects the great shift in the center of gravity

² See Harno, Albert J., "Social Planning and Perspective Through Law," in Handbook of the Association of American Law Schools, 1932, pp. 8-22.

* Sixth Annual Benjamin N. Cardozo Lecture delivered before the Association of the Bar of the City of New York, March 18, 1947. This address is reprinted with permission from 2 The Record of The Ass'n of the Bar of the City of New York, No. 6 (1947).

of law-making. Broadly speaking, the number of cases disposed of by opinions has not changed from term to term. But even as late as 1875 more than 40% of the controversies before the Court were common-law litigation, fifty years later only 5%, while today cases not resting on statutes are reduced almost to zero. It is therefore accurate to say that courts have ceased to be the primary makers of law in the sense in which they "legislated" the common law. It is certainly true of the Supreme Court that almost every case has a statute at its heart or close to it.

This does not mean that every case before the Court involves questions of statutory construction. If only literary perversity or jaundiced partisanship can sponsor a particular rendering of a statute there is no problem. When we talk of statutory construction we have in mind cases in which there is a fair contest between two readings, neither of which comes without respectable title.

SIR JOHN SALMOND, JURISPRUDENCE

London: 1930. Eighth ed. by Manning. Sweet & Maxwell, Ltd. 178.

So great is the superiority of legislation over all other methods of legal evolution, that the tendency of advancing civilisation is to acknowledge its exclusive claim, and to discard the other instruments as relics of the infancy of law. The expressed will of the state tends to obtain recognition not only as the sole formal source of law, but as its exclusive material source also. Statute law has already become the type or standard, from which the other forms are more or less abnormal variations. Nothing is more natural than this from our modern point of view, nothing less natural from that of primitive jurisprudence. . . .

As it is the most powerful, so it is the latest of the instruments of legal growth.

In considering the advantages of legislation, it will be convenient to contrast it specially with its most formidable rival, namely precedent. So considered, the first virtue of legislation lies in its abrogative power. It is not merely a source of new law, but is equally effective in abolishing that which already exists. But precedent possesses merely constitutive efficacy; it is capable of producing very good law—better in some respects than that which we obtain by way of legislation—but its defect is that, except in a very imperfect and indirect manner, its operation is irreversible. What it does, it does once for all. It cannot go back upon its foot-steps, and do well what it has once done ill. Legislation, therefore, is the indispensable instrument, not indeed of legal growth, but of legal reform. As a destructive and reformatory agent it has no equivalent, and without it all law is as that of the Medes and Persians.

The second respect in which legislation is superior to precedent is that it allows an advantageous division of labour, which here, as elsewhere, results in increased efficiency. The legislature becomes dif-

ferentiated from the judicature, the duty of the former being to make law, while that of the latter is to interpret and apply it. Speaking generally, a legal system will be best administered, when those who administer it have this as their sole function. Precedent, on the contrary, unites in the same hands the business of making the law and that of enforcing it.

It is true, however, that legislation does not necessarily involve any such division of functions. It is not of the essence of this form of legal development that it should proceed from a distinct department of the state, whose business it is to give laws to the judicature. It is perfectly possible for the law to develop by a process of true legislation, in the absence of any legislative organ other than the courts of justice themselves. . . .

Yet though not theoretically necessary, it is certainly expedient, that at least in its higher forms the function of law-making should be vested in a department of the state superior to and independent of the judicature.

A third advantage of statute-law is that the formal declaration of it is a condition precedent to its application in courts of justice. Case-law, on the contrary, is created and declared in the very act of applying and enforcing it. Legislation satisfies the requirement of natural justice that laws shall be known before they are enforced; but case-law operates retrospectively, being created *pro re nata*, and applied to facts which are prior in date to the law itself.¹

Fourthly, legislation can by way of anticipation make rules for cases that have not yet arisen, whereas precedent must needs wait until the actual concrete instance comes before the courts for decision. Precedent is dependent on, legislation independent of, the accidental course of litigation. So far as precedent is concerned, a point of law must remain unsettled, until by chance the very case arises. Legislation can fill up a vacancy, or settle a doubt in the legal system, as soon as the existence of this defect is called to the attention of the legislature. Case-law, therefore, is essentially incomplete, uncertain, and unsystematic; while if statute-law shows the same defects, it is only through the lethargy or incapacity of the legislature. As a set-off against this demerit of precedent, it is to be observed that a rule formulated by the judicature in view of the actual case to which it is to be applied is not unlikely to be of better workmanship, and more carefully adapted to the ends to be served by it, than one laid down *a priori* by the legislature.

Finally, statute-law is greatly superior to case-law in point of form. The product of legislation assumes the form of abstract propositions,

¹ On this and other grounds "judge-made law," as he called it, was the object of constant denunciation by Bentham. "It is the judges," he says in his vigorous way (Works, V. 235), "that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him. This is the way you make laws for your dog, and this is the way the judges make laws for you and me."

but that of precedent is merged in the concrete details of the actual cases to which it owes its origin. Statute-law, therefore is brief, clear, easily accessible and knowable, while case-law is buried from sight and knowledge in the huge and daily growing mass of the records of bygone litigation. Case-law is gold in the mine—a few grains of the precious metal to the ton of useless matter—while statute-law is coin of the realm ready for immediate use. . . .

SIR JAMES O'CONNOR,
THOUGHTS ABOUT THE COMMON LAW

3 Camb.L.J. 161, 163-164 (1928).

. . . In tracing the development of our case law, the sequence is usually this. A fairly simple case comes along, and a general principle is laid down. Upon facts that have something in common with the facts of the leading case, but comprise some new element, an action is brought. The new case is held to be within the leading case or is distinguished from it. The general principle may be either extended or restricted. Sometimes a case is overruled. The body of our Common Law is that which stands without dissent or being overruled. All the time the structure is growing. All the time the judges are, in a sense, making law, drawing of course upon previous decisions when there are any and exercising their common sense upon established lines when there are not. If they consult Roman law they will use it or reject it as seems to them proper. The principles thus established by our judges are as much the law of the land as if they had been enacted at Westminster. . . .

Between our case law—the principles of which, in the nature of things, are more or less stationary—and modern requirements—which are constantly changing—there must always be a gap. This gap it is the function of the Legislature to lessen or close up from time to time. . . .

WILLIAM DRAPER LEWIS, ADAPTATION OF THE LAW
TO CHANGING ECONOMIC CONDITIONS

11 A.B.A.Jour. 11 (1925)*

. . . In the United States today there are two processes by which our municipal law is made—the legislative process, and the judicial process. The first gives us our statutory law, the second our common law.

At any one time a better adjustment of municipal law to the needs of progress is to a considerable extent dependent on the degree and extent of the common knowledge of the operation of the machinery

*Address before the Association for Labor Legislation and the American Economic Association at meeting in Chicago, December, 1924.

by which that law is developed and expressed. In a republic or democracy such knowledge should be widespread. I often wonder at the ignorance concerning a large part of the machinery for developing law in the United States exhibited even by persons actively interested in the improvement of the law. . . .

The American Law Institute, for instance, was founded in 1923 at a notable gathering of members of the legal profession. Its chief object, as announced at the time, is to restate the law with a view to its simplification and clarification. The Restatement will have little to do with the statutory law. The Institute is not a legislature and could not restate the statutory law even if it desired to do so. Yet, as its Director, immediately after its formation, I was in receipt of two or three hundred editorials and many letters from educated laymen commenting with enthusiasm on the prospect of a clarification and simplification of our congressional and state statutes. "Law" to the newspaper editors and my correspondents meant "statutory law" and nothing else. They were, and in spite of my efforts I think still are, entirely oblivious of the fact that a great part of the law is not statutory law, that the law usually designated as "common law" has been developed and is now being expressed and developed by the courts.

There are several reasons for their ignorance. Chief among them is the way in which we are taught as children about the separation in America of the legislative, executive and judicial branches of government; the function of the first being to make, of the second to execute, and of the third to interpret law. This instruction, often repeated, naturally leaves on the mind the impression that the law, which the executive enforces and the court interprets, is a thing which the legislative branch of the government has an exclusive monopoly to manufacture. Indeed, the formula about the separation of the three departments of government, like other half-truths or two-thirds-truths, is responsible, not only for this, but for several other misconceptions concerning our fundamental institutions.

Another reason for the general failure to recognize the part played by the courts in making the law is the way in which a court operates. A case is presented for decision. The question to which the judge addresses his mind is: What, according to the law, should be the judgment? not: What change should I make in the law in order to do justice? The assumption is that there are rules of law which will decide the case and that the judge's task is not to invent these rules, but to seek them out and apply them. Furthermore in one sense the assumption is true. For several centuries after the establishment of the Kings Courts in England, the judges, as they went from shire to shire or sat at Westminster, decided cases mainly in accordance with what they believed to be right and in accord with Norman or English custom. But for several centuries the recorded decisions have been growing more and more numerous; the net result being that today there is a great body of principles and rules based on these decisions called the common law, and it is these prin-

ciples and rules, hammered out on the anvil of experience, which the judge endeavors to apply to the case before the court.

Yet, in spite of the thousands of recorded decisions, every year many cases arise which are cases of first impressions, cases essentially different from any previously recorded case, and to decide which the judge has to turn to his own felt sense of justice. Again, no matter how frequently a principle of law may be established by prior decisions in analogous cases, if under the particular facts of the case before the court, a manifest injustice would be done by applying the principle, the judge has always the power, and not infrequently the instinct, to apply his own felt sense of justice by announcing an exception to the principle.

Thus the courts make law, but they do so by a totally different process from legislatures.

The judicial process of making law not only exists as a fact but is as necessary as the legislative process, if our municipal law is to reach an approximate adjustment to changing economic conditions.

Indeed, if we are to test the excellence of municipal law by the degree of its approximation to the needs of human progress, even a cursory examination will show that there is much to be said in favor of awarding the prize to the law of the judges rather than to the law of the legislatures. To take only a few instances. Practically our entire law of Contracts is judge-made. Yet from the point of view of its adaptation to the needs of life, it is far better law than our law of crimes which, as it exists today, has been the subject of much statutory enactment. Again, although many doubt the wisdom of the more recent expansion in America of the process of injunction to industrial disputes between large economic groups, taken as a whole perhaps the most perfect part of our law is our system of equitable remedies. This system is wholly judge-made. True there have been notable failures on the part of the courts which have had to be remedied by legislation, as the failure of the judges to adapt the law applicable to the injury of an employee by a fellow employee to modern industrial conditions—a failure which made necessary our Workmen's Compensation Acts. Again, it is probable that our whole law of negligence, which is judge-made law, needs radical revision. But against these whole or partial failures, we may place the steady development of most of our law of torts to meet the new needs of a changing world.

Finally, if we turn to history, we find periods covering the life of a whole generation marked by little or no useful advance in legislation in which the courts developed principles and rules of lasting value. The first thirty years of the nineteenth century did not produce much legislation either of permanent or temporary worth, yet during those years Lord Eldon in the English Court of Chancery probably made more useful private law than any other man of modern times, and John Marshall, as Chief Justice of our Supreme Court, laid down the fundamental principles of our constitutional law. . . .

SECTION 2. THE NATURE AND LIMITATIONS OF JUDICIAL LAW MAKING

A. *Method and Effect of the Doctrine of Judicial Precedent in General*

ROBERT A. SPRECHER, THE DEVELOPMENT OF THE DOCTRINE OF STARE DECISIS AND THE EXTENT TO WHICH IT SHOULD BE APPLIED

31 A.B.A.Jour. 501-504 (1945).*

. . .

I

The doctrine of *stare decisis et non quieta movere*, "to stand by the decisions and not to disturb settled points," developed during "the infancy of our law." Historians agree that Bracton's *Note Book*, containing one of the first collections of English decisions, gave early impetus to the doctrine.⁹ Bracton did not understand the modern implications of stare decisis, but he directed the attention of the legal profession to past decisions in "an attempt to bring back the law to its ancient principles."¹⁰ The first comprehensive law reports, the *Year Books*, not only constituted in and of themselves evidence of the importance of prior decisions,¹¹ but they also contained progressively frequent reference to earlier cases and often a direct statement that certain cases were of some authority, such as the words of Chief Justice Priscot in 1454: "If this plea were now adjudged bad, as you maintain, it would assuredly be a bad example to the young apprentices who study the *Year Books*, for they would never have confidence in their books if now we were to adjudge the contrary of what has been so often adjudged in the Books."¹²

* [Footnotes 1 to 8 are omitted. Ed.]

⁹ Winfield, *Chief Sources of English Legal History* (1925) 147; Pound, *Readings on the History and System of the Common Law* (1921) 98-9; Shroder, "The Doctrine of Stare Decisis" (1904) 58 *Cent.L.J.* 23, at 24. The period of decisions covered by the *Note Book* is approximately 1217-1240. Henry de Bracton, a Judge of Assize during the reign of Henry III, obtained access to the Plea Rolls through his judicial position.

¹⁰ Plucknett, *A Concise History of the Common Law* (1929) 181, 303.

¹¹ Holdsworth, "Case Law" (1934) 50 *L.Q.Rev.* 180, at 181: "If they had not been regarded as being of some authority it would be difficult to see what value the *Year Books* would have been to the legal profession." Winfield, *op. cit.* supra n. 9, at 148: "And here, if anywhere, it might be thought that law reporting begins." The period of decisions covered by the *Year Books* is from Edward I to Henry VIII (about 1292-1535). For extracts from the *Year Books*, see Pound, *op. cit.* supra n. 9, at 99-100.

¹² Y.B. 33 Hen. VI, 41. Quoted in Plucknett, *op. cit.* supra n. 10, at 306; cited in Kent, *op. cit.* supra n. 8, at 477; Holdsworth, *op. cit.* supra n. 11, at 181; Shroder, *op. cit.* supra n. 9, at 24.

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Sir William Holdsworth has pointed out that the modern theory of *stare decisis* began to develop at the end of the fifteenth century when the changes in the system of pleading "concentrated the reporter's attention, not upon the oral debate in court as to what the pleading should be and what issue should be reached, but upon the decision of the court upon an issue reached by the written pleadings of the parties before the case had come into court."¹³ In Dyer's and Plowden's Reports prior cases are referred to extensively,¹⁴ and "with Lord Coke the citation of cases reached a height which it has never equalled since."¹⁵ In his great *Commentaries*, written in 1765, five hundred years after Bracton's *Note Book*, Blackstone was able to say that "it is an established rule to abide by former precedents, where the same points come again in litigation."¹⁶ The modern doctrine of the authority of decided cases was reached substantially by the end of the eighteenth century.¹⁷

Under the modern doctrine, "a judicial precedent speaks in England with authority."¹⁸ "It is more than a model; it has become a fixed and binding rule."¹⁹ *Absolute authority* is said to exist in the following cases:

1. Every court is absolutely bound by the decisions of all courts superior to itself, and usually of all courts of coordinate jurisdiction.²⁰

¹³ Holdsworth, *op. cit.* supra n. 11, at 181.

¹⁴ Plucknett, *op. cit.* supra n. 10, at 307; Winfield, *op. cit.* supra n. 9, at 157; "It has been pointed out that in the first ten cases in Plowden's Reports about thirty cases are cited and stated as authority by court and counsel." The period of King's Bench decisions covered by Dyer's Reports are 1513-1582, and by Plowden's Reports are 1550-1580.

¹⁵ Gray, *Nature and Sources of Law*, Sec. 450, quoted by Holdsworth, *op. cit.* supra n. 11, at 182. See also Plucknett, *op. cit.* supra n. 10, at 307-8. The period of King's Bench decisions covered by Coke's Reports is 1572-1616. The King's Bench Reports of Croke (1582-1641), Winfield, *op. cit.* supra n. 9, at 157, the King's Bench Reports of Hobart (1603-1625) and the later Exchequer Reports of Jenkins (1220-1623), Holdsworth, *op. cit.* supra n. 11, at 182, also contained a wealth of cited precedents. Chief Justice Vaughan, whose Common Pleas Reports cover the period 1665-1674, is credited with aiding substantially in the development of the doctrine. See *Bole v. Horton* (1670) Vaughan, 360, at 382; Plucknett, *op. cit.* supra n. 10, at 308.

¹⁶ Blackstone, *Commentaries* (Cooley's 3rd Ed., 1884) at 69.

¹⁷ Holdsworth, *op. cit.* supra n. 11, at 180. Cf. Plucknett, *op. cit.* supra n. 10, at 308: "It is only in the nineteenth century that the present system of case law with its hierarchy of authorities was established."

¹⁸ Goodhart, *op. cit.* supra n. 1, at 175-6, quoting Sir John Salmond, and adding: "This unqualified statement of the binding nature of a precedent has, as far as I know, not been questioned by a single English authority."

¹⁹ Goodhart, "Precedent in English and Continental Law" (1934) 50 L.Q.Rev. 40, at 41.

²⁰ *Ibid.*, at 41-2: "A superior Court is never bound by the decisions of the lower Courts, although, if a general practice has developed in these Courts, the superior Court will hesitate to depart from it, nor will it, as a rule, reverse a case which has been generally accepted as a model by the Bar. Nor is one Court of first instance bound by the decision of another Court of similar jurisdiction, although it will pay it great respect." However, with the exception of courts of first instance, a decided case generally binds courts of coordinate jurisdiction. Holdsworth, *op. cit.* supra n. 11, at 180.

2. The House of Lords is absolutely bound by its own prior decisions.²¹

3. The Court of Appeal is probably bound by its own decisions, although there is some doubt.²²

However, Holdsworth has observed that the theory of precedents has been accepted in England only subject to reservations and conditions which modify its seemingly unyielding effect. The three important reservations and conditions, all of which ultimately rest on the declaratory theory of law, which is "the principle stated by Coke, Hale and Blackstone, that these cases do not make law, but are only the best evidence of what the law is,"²³ are: (1) the rule laid down in a case need not be followed if it is "plainly unreasonable and inconvenient"—that is, if it is obviously contrary to a statute or to well established principle;²⁴ (2) a judge has some freedom of choice in instances where courts of equal authority have handed down conflicting decisions; and (3) the authority of a decision is attached, not to the words used, nor to all the reasons given, but to the principle or principles necessary for the decision of the case.

The American doctrine of *stare decisis* approximated the English doctrine until the twentieth century and the advent of the socialization of the law, but "the modern and present trend is characterized by the overruling and distinguishing of precedents to an extent that would strike an English judge and lawyer as revolutionary."²⁵ . . .

II

Clearly the first step in determining the extent to which the doctrine of *stare decisis* should be applied is to decide whether the doctrine is to be applied at all, and the answer to that question has largely been supplied by the history of the development of our legal system. The

²¹ *Attorney-General v. Dean and Canons of Windsor* (1860) 8 H.L.C. 369, at 391-2; *London Street Tramways Co. v. London County Council* (1898) A. C. 375, at 379; Pollock, *A First Book of Jurisprudence* (3rd Ed., 1911) 327-334, at 334: "No other court of last resort has gone quite so far, it is believed, in disclaiming power to correct itself."

²² Goodhart, *op. cit. supra* n. 19, at 42; Pollock, *op. cit. supra* n. 21, at 316.

²³ Holdsworth, *op. cit. supra* n. 11, at 181. The view that decisions are merely evidence of what the law is has been supplanted somewhat by the view that court decisions constitute the law. Carpenter, "Court Decisions and the Common Law" (1917) 17 *Col.L.Rev.* 593; Goodhart, *op. cit. supra*, n. 19, at 44. Cardozo has taken a third view that court decisions and statutes constitute law. Cardozo, *The Nature of the Judicial Process* (1921), at 124 et seq.

²⁴ Baron Parke in *Mirehouse v. Rennell* (1833) 1 Cl. & Fin. at 546. This goes somewhat beyond Blackstone, *op. cit. supra* n. 16, at 69-70: "Yet this rule [of *stare decisis*] admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law." Holdsworth also lists as a condition the fact that a judge can contradict a report by resorting to a more accurate report. Holdsworth, *op. cit. supra* n. 11, at 187-8. This condition survives from the eighteenth century when several private reporters would often report a case.

²⁵ Kocourek and Koven, "Renovation of the Common Law Through *Stare Decisis*" (1935) 29 *Ill.L.Rev.* 971, at 976.

functional definition of law furnished by the sociological jurists⁴¹ has served to emphasize that the science of law, like the other sciences, is a search for probability rather than a search for certainty. Cardozo has expressed it well: "The more we study law in its making, at least in its present stages of development, the more we gain the sense of a gradual striving toward an end, shaped by a logic which, eschewing the quest for certainty, must be satisfied if its conclusions are rooted in the probable."⁴²

Lacking universal truths to serve as the ultimate source of judgment, a legal system is faced with the alternatives of permitting judges to function arbitrarily and according to individual whim or impulse, or of imposing upon judges from without some objective standard. The decision is not a difficult one. Even the earliest judges, the Homeric kings, unwilling to admit that they were unfettered in their judgments, pointed to divine inspiration as their source of law, and when they were superseded by a juristical aristocracy to whom the knowledge of the laws was confided from generation to generation, a true objective standard was imposed upon the judges—a standard defined by tribal customs.⁴³ Throughout the history of legal systems there is a constant shifting between subjective and objective judging. Anglo law became committed to the objective method when Sir Edward Coke reminded James I that the medieval doctrine of the supremacy of the law took precedence over the divine right of monarchy by quoting to him the words of Bracton: "The King is subject not to men, but to God and the law."⁴⁴ The political philosophy of a government of laws rather than of men was embodied in the Constitution of the United States and became a living doctrine in the decisions of Chief Justice Marshall.⁴⁵ Cardozo recognized that "the destruction of all rules and the substitution in every instance of the individual sense

[Footnotes 26 to 40 are omitted. Ed.]

⁴¹ Holmes, *Collected Legal Papers* (1921) 173: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Cardozo, *The Growth of the Law* (1924) 44: "We shall unite in viewing as law that body of principle and dogma which with a reasonable measure of probability may be predicted as the basis for judgment in pending or in future controversies."

⁴² Cardozo, *op. cit. supra* n. 41, at 70. Cf. Cook, "The Logical and Legal Bases of the Conflict of Laws" (1924) 33 *Yale L.J.* 457-8: "In the field of the physical sciences, therefore, the deductive method of ascertaining the truth about nature has given way to what is called—perhaps with not entire accuracy—the inductive method of modern science, in which the so-called 'laws of nature' are reached by collecting data, i. e. by observing concrete phenomena, and then forming, by a process of 'trial and error,' generalizations which are merely useful tools by means of which we describe in mental shorthand as wide a range as possible of the observed physical phenomena, choosing that form of description which on the whole works most simply in the way of enabling us to describe past observations and to predict future observations." Application of the physical science method to the law is suggested in Oliphant, "A Return to *Stare Decisis*" (1928) 14 *A.B.A.J.* 71, at 76. Oliphant believes that the multiplication of cases is good rather than bad because the science of law must rest on the observation of cases, and the more cases the more accurate the observation.

⁴³ Maine, *Ancient Law* (1st American Ed., 1867) 4, 9-12.

⁴⁴ Plucknett, *op. cit. supra* n. 10, at 40.

⁴⁵ See, for example, *Marbury v. Madison*, 5 U.S. 137 (1803).

of justice" might result in "a benevolent despotism if the judges were benevolent men" but "it would put an end to the reign of law."⁴⁶ . . .

NOTES

1. See also Allen, "Law in the Making", 3rd Ed., pp. 350-2, for that author's comparison of legislation with precedent.

2. In English jurisprudence, statute law is sometimes called "written" or "enacted" law whereas all other forms are "unwritten" or "unenacted". The former not only declares the law, "but in its very words constitutes the law", whereas the latter is "an exposition of the law and not the law itself". (Pollock, "Jurisprudence", 6th Ed., pp. 233-4). This writer distributes the sources of English law under these two heads as follows (pp. 247-250):

"Enacted"—(1) By original legislative authority. Acts of Parliament.

(2) By delegated legislative authority. Orders-in-Council, By-laws and regulations of local governing bodies and the like.

(3) By customary authority (now of little importance).

"Not Enacted"—(1) Judicial declarations and expositions of law, namely the decisions of the superior courts of justice and the reasons assigned to them.

(2) Non-judicial declarations or expositions, namely 'books of authority' (a limited and exceptional class) and writings not of authority but which help toward the formation of authority."

3. In 1944 the English Court of Appeal in *Young v. Bristol Aeroplane Co.* [1944] K.B. 719 categorically stated that it is absolutely bound by its own previous decisions. However, the decision says there are three exceptions, viz:—

(1) the court is entitled and bound to decide which of two conflicting decisions of its own it will follow;

(2) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords;

(3) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam; e.g. where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court.

Since this case was decided, the court has found it necessary to overwork the exceptions in order to avoid earlier decisions which prima facie appeared clearly to be binding.

Examples: *Fisher v. Ruislip-Northwood U.D.C.*, [1945] K.B. 584 discussed in Note, 62 T.L.R. (1946) at p. 6;

Fitzsimons v. Ford Motor Co. Ltd. [1946] 1 All E.R. 429, discussed in Note, 62 L.Q.R. 313 (1946), at p. 314, as follows: "The present case is one more illustration of how unsatisfactory is the rule in *Young v. Bristol Aeroplane Co. Ltd.* If that rule really provided the certainty it purported to achieve, then there might be some justification for it, even though it made impossible that flexibility

⁴⁶ Cardozo, op. cit. supra n. 23, at 136. Cf. at page 106: "A jurisprudence that is not constantly brought into relation to objective or external standards, incurs the risk of degenerating into what the Germans call 'Die Gefühlsjurisprudenz,' a jurisprudence of mere sentiment or feeling."

that has been one of the advantages of the common law, but what certainty is there when the most recent case may be overruled because it is in conflict with a prior case in the Court of Appeal itself, or is inconsistent with a prior decision of the House of Lords. In the present case, the Court of Appeal has reached a result which is an obviously fair and reasonable one, but . . . it is arguable that a more direct method of overruling a precedent, which had been clearly recognized as inconvenient or unjust, would be both simpler and more in accord with *elegantia juris*".

4. The Privy Council, which is the final court of appeal for most states in the British Commonwealth outside the United Kingdom rarely, if ever, has expressly refused to follow its own previous decisions, but holds itself entitled so to do. (Technically, the Privy Council is not a court, but an advisory body to the King.) This rule has been re-affirmed in a recent case in which a constitutional question had arisen under the British North America Act, 1867, (Canada's constitution), *Attorney-General of Ontario v. Canada Temperance Federation* [1946] 2 D.L.R. 1, A.C. 193, 85 Can.S.C.C. 225.

5. The Supreme Court of Canada has adopted for itself a rule slightly less rigid than that followed by the House of Lords. In *Stuart v. Bank of Montreal* (1900) 41 S.C.R. 516, it was held that "unless in very exceptional circumstances, a previous deliberate and definite decision of this court will be held binding, if it is clear that it was not the result of some mere slip or inadvertence".

W. F. Bowker.

MAX RADIN, THE TRAIL OF THE CALF

32 Cornell L.Q. 137, 143 (1946).*

And just as it is not as easy as the words imply to "follow" a precedent, so it is sometimes not so easy as it looks to refuse to follow it, to do what is called "overruling" it. We shall find that in a great many instances when the court says it is "overruling" a decision, it need not have done so at all: They could have "distinguished" it. This process, that of distinguishing, is derived from a technique of interpretation particularly developed in medieval times and applied both to legal and theological texts. I shall deal with it again later. Here I merely wish to say that the English House of Lords which in modern times has rarely in set terms "overruled" a previous decision, has carried the technique of distinguishing to a very high pitch of ingenuity. In many instances, where they have "distinguished" a precedent advanced, many an American court would have bluntly "overruled" it. On the other hand, when a precedent has been overruled in our courts, critics of the overruling decision have often declared that the two cases were perfectly compatible and could easily have been distinguished.

What the House of Lords or other court means by "distinguishing" is that without considering whether they would have decided the previous case in the way the previous court did, they certainly do not

* [Footnotes are omitted. Ed.]

approve of the doctrinal generalization which the previous court used. And the American court, when it "overrules" a precedent, equally is not so much concerned with the question of whether the previous case was rightly decided as it is to express its emphatic disagreement with the doctrine or doctrines set forth in the previous case.

They are quite justified in using the term "overruling" because when they do, they are fairly sure that, if they use that word, the case is not likely to be cited again before them. The term "overrule" in practice means just that. It means: "Do not cite this case hereafter in your arguments." For lawyers in citing cases rarely consider the actual case involved but merely use the opinion in order to cull from it such general statements as they think will afford good major premises for their own conclusions. It is just these general statements which the court has decided to reject and their "overruling" enforces this rejection.

NOTE

There is a recent extreme example of the House of Lords' technique of "distinction". In *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.*, [1921] 2 A.C. 465, the House of Lords seemingly held that the operation of an explosives plant even in wartime is a non-natural use of land for the purposes of the doctrine of *Rylands v. Fletcher*. When a similar case arose in World War II, the Court of Appeal held that the *Rainham* case had so decided (*Read v. Lyons*, 61 T.L.R. 154). However, on appeal to the House of Lords (1946 2 All. Eng.Rep. 471) their Lordships held that the *Rainham* case had not so decided.

KARL N. LLEWELLYN, IMPRESSIONS OF THE CINCINNATI CONFERENCE ON JUDICIAL PRECEDENT

14 U. of Cinc.L.Rev. 343, 350-351 (1940).

(1) Common to all (of the views expressed at the Conference by the judges) are lines of compulsion in the precedents, which to a great extent limit, and which to some extent control their action. And which, to some extent, control them even when their judgment is that the case would better be decided the other way.

(2) But when the urge of justice and policy are clear enough, they can find a distinction to avoid or whittle almost any precedent or line of precedent.

(3) Within limits wide enough to spell success or disaster for a lawyer's case, the precedents are capable of being *shaped* as they are followed or applied so as to bring judgment out on one side or the other.

(4) But such shaping is *not* arbitrary. And

(5) Such shaping or its non-occurrence is indeed largely predictable. And

(6) The judges who do the shaping, as they are doing it, *feel* to a large degree, *controlled*. They *feel* that the Rules as They Stand should allow and do allow only one proper answer.

And the trouble for lawyers, and indeed for judges, comes, I submit, from the confusion which now follows:

(7) *Feeling* controlled, as they apply and shape precedent to the tough and troubling case in hand, the judges *attribute* the manner and nature of the control *to the Rules as They Stand*, as if it was those Rules which contained but a single possible and legitimate answer.

(8) Whereas in fact the control is a control over the way in which the judges may properly *use* those Rules; the actual final control lies not in any rules of law or rules of precedent, but lies instead in a combination of judicial conscience, judicial judgment, and what I can best describe as the net lines of force of the particular field of law, which press judgment in a given direction, and resist any expansion or turning in another direction. A judge, like a lawyer, sizes up the situation in terms of the way The Law sizes it up; there is no rule and no precedent to lay down how to do that—we just do it. We classify the case in terms of the feel of the law. And the feel of the law then proceeds to push judgment in one direction, and proceeds to block judgment off from moving in another technically possible direction. When the feel of The Law and the feel of good sense are at odds, courts may be expected to divide, because their office is, somehow, to combine the two.

ALEXANDER LINCOLN, THE RELATION OF JUDICIAL DECISIONS TO THE LAW.

21 Harv.L.Rev. 120-121 (1907).

The commonly accepted view of the law, or the common law, as an abstract ideal, is that it is a complete body, existing from time immemorial, and therefore the same in every jurisdiction except in so far as it is altered by statute. This law is known or discovered by the judges. They interpret the law, and the reports of their decisions are authoritative evidence of it.

This doctrine was proclaimed by Blackstone. It is upheld by Professor Beale, who says in his *Summary of the Conflict of Laws*: "Wherever, therefore, there is a political society, there must be some complete body of law, which shall cover every event there happening;" and again, "Law once established continues until changed by some competent legislative power." It has been adopted by the Supreme Court of the United States in the case of *Swift v. Tyson* [16 Pet. (U.S.) 1], followed by *Baltimore & Ohio R. R. Co. v. Baugh* [149 U.S. 368]. In the former case Mr. Justice Story expresses the opinion that:

"In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective or ill-founded, or otherwise incorrect."

As a corollary to this doctrine it follows that judges do not properly, in the exercise of their judicial functions, make new concrete laws. They merely declare the old existing law as an abstract entity. Thus Blackstone says: "The subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation." It also follows as a further corollary that all differences between judicial decisions must be due to some error made by the judges in their interpretation of the law.

This conception of the law is not, however, universally accepted, and I believe many of us cannot escape a feeling of dissatisfaction with its hard and fast conclusions. We are all acquainted with legal problems arising from the new relationships and wider experience which come with advance in civilization and greater complexity in human affairs, where there appears to be no solution which is absolutely and exclusively true, but on the contrary two opposing solutions seem to contain a measure of reason and truth. We are compelled to admit the force of the proposition that a judge confronted with such a problem, since he must decide the case in one way or the other, so far as his decision is an authoritative precedent, does and must make law. Accordingly, Austin, in his *Lectures on Jurisprudence*, has declared that a law may properly be made judicially, since though the direct purpose of its author is the decision of a specific case, he may and indeed must, so far as his decision serves as a precedent, legislate substantially or in effect.

NOTE

Further criticisms of Blackstone's view appear in the following: (1) Gray, "The Nature and Sources of the Law", 2nd Ed. (1927) pp. 218-240; (2) Frank, "A Sketch of an Influence", in "Interpretations of Modern Legal Philosophies", (1946) pp. 232-4; (3) Haines "The Role of the Supreme Court 1789-1835", (1944) pp. 29-41.

O. W. HOLMES, JR., THE COMMON LAW.

Boston: 1881. Little, Brown, and Co. 35-37.

. . . In substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and

at last a new form, from the grounds to which they have been transplanted.

But hitherto this process has been largely unconscious. It is important, on that account, to bring to mind what the actual course of events has been. If it were only to insist on a more conscious recognition of the legislative function of the courts, as just explained, it would be useful, as we shall see more clearly further on.¹

What has been said will explain the failure of all theories which consider the law only from its formal side, whether they attempt to deduce the *corpus* from a *priori* postulates, or fall into the humbler error of supposing the science of the law to reside in the *elegantia juris*, or logical cohesion of part with part. The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow. . . .

However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is.

Again, the process which I have described has involved the attempt to follow precedents, as well as to give a good reason for them. When we find that in large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact survivals from more primitive times, we have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide anew whether those reasons are satisfactory. They may be, notwithstanding the manner of their appearance. If truth were not often suggested by error, if old implements could not be adjusted to new uses, human progress would be slow. But scrutiny and revision are justified.

SOUTHERN PACIFIC CO. v. JENSEN

Supreme Court of the United States, 1917.

244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann.Cas.1917E, 900.

In error to the Supreme Court, Appellate Division, Third Department, of the State of New York, to review a judgment, affirmed by the Court of Appeals of that state, approving an award of the state Workmen's Compensation Commission to the dependents of a long-shoreman killed on an ocean-going steamship.

¹ See Lecture III, *ad fin.*

(The longshoreman was killed while on board engaged in unloading one of the appellant company's ships which was tied up to a wharf in navigable waters.)

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court: . . . In *New York C. R. Co. v. White* (decided March 6th), 243 U.S. 188, 61 L.Ed. 667, 37 S.Ct. 247, we held that statute valid in certain respects; and, considering what was there said, only two of the grounds relied on for reversal now demand special consideration. First. Plaintiff in error, being an interstate common carrier by railroad, is responsible for injuries received by employees while engaged therein under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. chap. 149, p. 65, Comp. Stat. 1916, § 8657), and no state statute can impose any other or different liability. Second. As here applied, the Workmen's Compensation Act conflicts with the general maritime law, which constitutes an integral part of the Federal law under art. 3, § 2, of the Constitution, and to that extent is invalid. . . .

Article 3, § 2, of the Constitution, extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction;" and article 1, § 8, confers upon the Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof." Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. *Butler v. Boston & S. S. S. Co.*, 130 U.S. 527, 32 L.Ed. 1017, 9 S.Ct. 612; *Re Garnett*, 141 U.S. 1, 14, 35 L.Ed. 631, 634, 11 S.Ct. 840. And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. *The Lottawanna* (*Rodd v. Heartt*) 21 Wall. 558, 22 L.Ed. 654; *Butler v. Boston & S. S. S. Co.*, 130 U.S. 527, 557, 32 L.Ed. 1017, 1024, 9 S.Ct. 612; *Workman v. New York*, 179 U.S. 552, 45 L.Ed. 314, 21 S.Ct. 212.

In *The Lottawanna*, Mr. Justice Bradley, speaking for the court, said: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character

affecting the intercourse of the states with each other or with foreign states."

By § 9, Judiciary Act of 1789 (1 Stat. at L. 76, 77, chap. 20), the district courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." And this grant has been continued. Judicial Code, §§ 24 and 256 [36 Stat. at L. 1091, 1160, chap. 231, Comp. Stat. 1916, §§ 991 (1), 1233]. . . . The work of a stevedore, in which the deceased was engaging, is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction.

If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien, condemned in *The Roanoke*. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid.

Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal district courts, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction. . . .

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE HOLMES, dissenting:

The Southern Pacific Company has been held liable under the statutes of New York for an accidental injury happening upon a gang-plank between a pier and the company's vessel, and causing the death of one of its employees. The company not having insured as permitted, the statute may be taken as if it simply imposed a limited but absolute liability in such a case. The short question is whether the power of the state to regulate the liability in that place and to enforce it in the state's own courts is taken away by the conferring of exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction upon the courts of the United States.

There is no doubt that the saving to suitors of the right of a common-law remedy leaves open the common-law jurisdiction of the state courts, and leaves some power of legislation, at least, to the states. For the latter I need do no more than refer to state pilotage statutes, and to liens created by state laws in aid of maritime contracts. Nearer to the point, it is decided that a statutory remedy for causing death may be enforced by the state courts although the death was due to a collision upon the high seas. . . .

No doubt there sometimes has been an air of benevolent gratuity in the admiralty's attitude about enforcing state laws. But of course there is no gratuity about it. Courts cannot give or withhold at pleasure. If the claim is enforced or recognized it is because the claim is a right, and if a claim depending upon a state statute is enforced, it is because the state had constitutional power to pass the law. Taking it as established that a state has constitutional power to pass laws giving rights and imposing liabilities for acts done upon the high seas when there were no such rights or liabilities before, what is there to hinder its doing so in the case of a maritime tort? Not the existence of an inconsistent law emanating from a superior source, that is, from the United States. There is no such law. The maritime law is not a *corpus juris*—it is a very limited body of customs and ordinances of the sea. . . .

Now, however, common-law principles have been applied to sustain a libel by a stevedore in personam against the master for personal injuries suffered while loading a ship. *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 58 L.Ed. 1208, 51 L.R.A., N.S., 1157, 34 S.Ct. 733, and *The Osceola*, 189 U.S. 158, 175, 47 L.Ed. 760, 764, 23 S.Ct. 483, recognizes that in some cases, at least, seamen may have similar relief. From what source do these new rights come? The earliest case relies upon "the analogies of the municipal law" (*The Edith Godden*, 23 Fed. 43, 46),—sufficient evidence of the obvious pattern, but inadequate for the specific origin. I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, "I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court." No more could a judge, exercising the limited jurisdiction of admiralty, say, "I think well of the common-law rules of master and servant, and propose to introduce them here en bloc." Certainly he could not in that way enlarge the exclusive jurisdiction of the district courts and cut down the power of the states. If admiralty adopts common-law rules without an act of Congress, it cannot extend the maritime law as understood by the Constitution. It must take the rights of the parties from a different authority, just as it does when it enforces a lien created by a state. The only authority available is the common law or statutes of a state. For from the often-repeated statement that there is no common law of the United States (*Wheaton v. Peters*, 8 Pet. 591, 658, 8 L.Ed. 1055, 1079; *Western U. Teleg. Co. v. Call Pub. Co.*, 181 U.S. 92, 101, 45 L.Ed. 765, 770, 21 S.Ct. 561), and from the principles recognized in *Atlantic*

Transport Co. v. Imbrovek having been unknown to the maritime law, the natural inference is that in the silence of Congress, this court has believed the very limited law of the sea to be supplemented here as in England by the common law, and that here that means, by the common law of the state. . . .

The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact. It always is the law of some state, and if the district courts adopt the common law of torts, as they have shown a tendency to do, they thereby assume that a law not of maritime origin, and deriving its authority in that territory only from some particular state of this Union, also governs maritime torts in that territory,—and if the common law, the statute law has at least equal force, as the discussion in *The Osceola* assumes. . . .

[MR. JUSTICE PITNEY also wrote a dissenting opinion.]

ROSCOE POUND, WHAT OF STARE DECISIS?

10 *Fordham L.Rev.* 1, 12-13 (1941).

For rules and settled principles which require change, except in a few extreme cases, the orthodox common-law technique looks to legislation to abrogate the old and formulate and establish the new precept. The English courts have been and are firm in adherence to this doctrine. But a few months ago the House of Lords was confronted with the remnants of the fellow servant rule which had not been done away with by Workmen's Compensation laws. Lord Wright put tersely the unanimous view of the Lords of Appeal, saying: "This house cannot usurp the function of the legislature in a matter of this nature." Lord Westbury and Mr. Justice Brandeis, who will certainly rank among the most liberal of common-law judges, have both insisted upon this in clear and vigorous terms, not only as to rules of property, but as to rules governing conduct. . . .

Caution is necessary in introducing new ideas by judicial decision rather than by legislation because in the technique of our law judicial decisions are starting points for legal reasoning. They are developed by analogy for other cases. On the other hand, statutes make rules only for the cases within their purview. Hence when a new proposition comes in by legislation it does not disturb the general legal system, no matter how radically it departs from what went before. But when something radically new comes in by judicial decision, no one can foretell what its disturbing effects may be. It not merely decides the exact state of facts which it served to adjudicate, it is potentially a starting point for analogical reasoning for cases in widely distinct parts of the legal system. That a court has overturned rule A at once puts rules B, C, and D, rules M, and N, and rules P, and Q in question, because all rules at all analogous to A are likely to be challenged on the analogy of rule X which has taken the place of A.

AERO SPARK PLUG CO. v. B. G. CORPORATION

Circuit Court of Appeals of the United States, 1942. 130 F.2d 290, 294-299.

FRANK, CIRCUIT JUDGE (concurring). . . . Perhaps the central theme in most discussions of the judicial process is the obligation of judges to consider the future consequences of their specific decisions. Such discussions usually stress the "rule" or precedent aspect of decisions. Thus Dickinson, in 1927, paraphrasing (it may be unconsciously) Aristotle's remarks made almost twenty-two hundred years earlier,⁶ writes, "One danger in the administration of justice is that the necessities of the future and the interest of parties not before the court may be sacrificed in favor of present litigants"; he thinks it imperative that judges should "raise their minds above the immediate case before them and subordinate their feelings and impressions to a practice of intricate abstract reasoning, . . . centering their attention on a mass of considerations which lie outside the color of the case at bar."⁷

Although much can be said for that attitude—of considering a decision primarily with reference to its significance in future cases—it is sometimes given too much weight. Excessive concentration of attention, by some upper court judges, on the formulation in their opinions of so-called legal rules, with an eye chiefly to the impact of those rules on hypothetical future cases not yet before the court, sometimes results in their allotting inadequate attention to the interests of the actual parties in the specific existing cases which it is the duty of courts to decide. Such judges never quite catch up with themselves; for, in cases which actually occur, they are deciding future cases that may never occur. Legal history shows that such an attitude leads to judicial pronouncements which, at times, are none too happy in their effects on future cases. For the future develops unanticipated happenings; moreover, it does not stay put, it refuses to be trapped.

⁶ "Next, laws are made after long consideration, whereas decisions are given at short notice, which makes it hard for those who try the case to satisfy the claims of justice and expediency. The . . . decision of the lawgiver is not particular but prospective and general, whereas members of the [court] find it their duty to decide on definite cases brought before them. They will often have allowed themselves to be so much influenced by feelings of friendship or hatred or self-interest that they lose any clear vision of the truth and have their judgment obscured by considerations of personal pleasure or pain. In general, then, the judge should, we say, be allowed to decide as few things as possible. But questions as to whether something has happened or has not happened, will be or will not be, is or is not, must of necessity be left to the judge, since the lawgiver cannot foresee them." Aristotle, *Rhetoric*, Bk. 1, Ch. 1, 1354b; cf. Bk. 1, Ch. 2, 1356b, 31-32.

⁷ In a somewhat similar vein, Mr. R. Cohen writes that the "fact that every case is presented as an issue between two parties" is "a circumstance about our judicial system which is always tending to produce an inadequate view of social justice. . . . A judge looking only to the interests of the two parties before him is apt to forget that his decision will affect countless others who are not present and whose circumstances are not at all identical. Human society is not so organized that a dispute between A and B can be of no concern to anybody else." *Law and The Social Order* (1933) 144. See also, Salmond, *Introduction to The Science of Legal Method*, lxxv, lxxvi, lxxx, lxxxiv.

The intended consequences of efforts to govern the future often fail; the actual consequences—which may be good or evil—are frequently, utterly different. Results are miscalculated; there is an “illusion of purpose.”⁸ Of course, present problems will be clarified by reference to future ends, but, as I have elsewhere suggested, such ends, although they have a future bearing, must obtain their significance in present consequences, otherwise those ends lose their significance. For, it is the nature of the future that it never arrives. “Tomorrow today will be yesterday.” Any future, when it becomes the present, is sure to bring new and unexpected problems.⁹ There is much wisdom in Valery’s reference to the “anachronism of the future.”

And the paradox is that when judges become unduly interested in the future consequences of their rulings, they are (as Walter Bingham pointed out years ago) doing precisely what they say they must avoid—they are deciding not real but hypothetical cases, with no one present to speak for the imaginary contestants.¹⁰ The interests of the parties to cases actually before the court are thus sacrificed to the shadowy unvoiced claims of supposititious litigants in future litigation which may never arise; and the judicial process becomes the pursuit of an elusive horizon which is never reached. No one—except perhaps those judges—is satisfied, since the interests of the parties to real present cases are overlooked, and the interests of the parties in subsequent cases are often inadequately determined in their absence. No doubt it expands the ego of a judge to look upon himself as the guardian of the general future. But his more humble yet more important and immediate task is to decide individual, actual, present cases. The exaggerated respect paid today to upper court judges, as distinguished from trial court judges, is both a cause and a result of this overemphasis on the rule-aspect of decisions.¹¹ Such judicial legislation as inheres in formulating legal rules is inescapable.¹² But courts should be modest in their legislative efforts to control the future, since they cannot function democratically, as legislative committees and administrative agencies can, by inviting the views of all who may be affected by their prospective rules. And, because they do not learn those views, and must largely rely on their own imaginations, they should be cautious about attempting, in present cases, to project their formulations too far and too firmly into the days yet to come. To cope with the present is none too easy, in part because the present is only a moving

⁸ Cf. Berolzheimer, *The World's Legal Philosophies* (transl.) XLIII-XLIV, 114, 142, 168, 350, 435; Kocourek, *The Legislative Function, in the Science of Legal Method*, L-LI, LV; but cf. Chesterton, *What's Wrong With The World*, 282-283.

⁹ Cf. *Commissioner v. Marshall*, 2 Cir., 125 F.2d 943, 946.

¹⁰ Cf. concurring opinion of Stone, J., in *Willing v. Chicago Auditorium Association*, 277 U.S. 274, 290, 291, 48 S.Ct. 507, 72 L.Ed. 880.

¹¹ Cf. *Green, Judge and Jury* (1930), 91-92; *United States v. Forness*, 2 Cir., 125 F.2d 928.

¹² See, *Commissioner v. Beck's Estate*, 2 Cir., 129 F.2d 243, third paragraph of note 4, for a discussion of the view that fact-findings in specific cases involves a kind of judicial legislation.

line dividing yesterdays and tomorrows, so that reflections on what will happen are unavoidable elements of current problems. But, although continuity, both backwards and forwards, is to some extent a necessity, judges should not shirk the present aspect of today's problems in favor of too much illusory tinkering with tomorrow's.¹³ The future can become as perniciously tyrannical as the past. Posterity-worship can be as bad as ancestor-worship.¹⁴

Dean Leon Green's tentative analysis of the factors which affect upper court decisions helps to reveal the extent to which the judges of those courts, when deciding cases, often interest themselves in the future at the expense of the present.¹⁵ He refers to (1) the "administrative" factor, (2) the "ethical or moral" factor, (3) the "economic" factor, (4) the "prophylactic or preventive" factor, and (5) the "justice" factor (the "merits" of the particular case). The "administrative" factor, for instance, relates to "the workability" of a rule, its "ease and certainty of performance" in the future. Thus we find courts saying that, if recovery were allowed "in this class of cases, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection";¹⁶ or that "in practice it is impossible satisfactorily to administer any other rule";¹⁷ or that a rule "is an arbitrary exception, based upon a notion of what is practicable."¹⁸ The "prophylactic" factor, bred of a desire of judges "to fashion rules for a healthy future," is frequently operative, for "judges are inveterate prophets and legislators"; they "scale their penalties, they impose damages, both punitive and exemplary, not merely for the individual offender's lesson, but as a preventive of future harms"; they "spend much time fashioning prophylactic rules both of substantive and procedural design in their efforts to purify the social stream through the judicial process."¹⁹ Those and similar factors are undeniably important. But it is not always fortunate when judges

¹³ It is noteworthy that in constitutional cases, where there is a peculiar necessity of regarding the interests of those who are not parties to the suits which raise constitutional questions, the Supreme Court has increasingly given less and less weight to stare decisis, recognizing the need for adaptation to changing circumstances. Cf. *Graves v. Schmidlapp*, March 30, 1942, 62 S.Ct. 870, 86 L.Ed. 1097.

¹⁴ The problem can be restated, in age-old terms, as that of reconciling the need for generality in legal rules and the need for the individualization of—or equitable treatment—of specific cases. Cf. Aristotle, *Rhetoric*, Bk. 1, Ch. 13, 1374a, 25 to 1374b, 22; Bk. 1, Ch. 2, 1356b, 31–32; Aristotle, *Nicomachean Ethics*, Bk. 5, Ch. 10; Aristotle, *Politics*, Bk. 3, Ch. 16, 1287a, 15–29; Kiss, *Law and Equity*, in the *Science of Legal Method* (transl. 1917) 146, 151–152; Demogue, *Analysis of Fundamental Notions*, in *Modern French Legal Philosophy* (transl. 1916) 345, 481.

¹⁵ Green, *loc. cit.* 76, 77 et seq.

¹⁶ *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 110, 45 N.E. 354, 34 L.R.A. 781, 56 Am.St.Rep. 604.

¹⁷ *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 288, 47 N.E. 38, 89, 38 L.R.A. 512, 60 Am.St.Rep. 393.

¹⁸ *Holmes, C. J.*, in *Homans v. Boston El. Ry. Co.*, 180 Mass. 456, 457, 62 N.E. 737, 57 L.R.A. 291, 91 Am.St.Rep. 324.

¹⁹ Green, *loc. cit.*, 98. He cites *MacPherson v. Buick Motor Co.*, 1916, 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, Ann.Cas.1916C, 440; and *Priestly v. Fowler*, 1837, 3 Mees. & W. as striking illustrations.

tend first to consider such factors before turning their attention to the parties to the particular actual cases which they are called upon to decide.

The elaborate (and sometimes fatuous) concern with the future potentialities of expressions in judicial opinions, which accompany and justify specific decisions is, in considerable measure, due to uncritical veneration of the doctrine of "standing by the precedents"; for, if an opinion does, in truth, lay down rules which must thereafter be followed by the courts themselves in later cases, the responsibility in deciding existing controversies is far greater than that of being fair to the parties to those controversies, for then a judge is playing the important role of legislator. That responsibility, however, can be too much underscored.

Stare decisis, within limits, has undeniable worth. As we said recently, "Of course, courts should be exceedingly cautious in disturbing (at least retrospectively) precedents in reliance on which men may have importantly changed their positions."²⁰ As I have said elsewhere, "undeniably, in order to achieve impartial administration of justice, 'equality before the law,' and legal certainty, as far as is practicable, it is important, generally, that a court should not deviate, except prospectively, from its own decision in a prior case, even if that decision was in error, especially where such deviation will harm persons who acted in reliance upon that decision—as, for instance, a decision assigning specific legal consequences to specific words in a deed or lease."²¹ But precedent-worship has been so unreflective that there has been insufficient inquiry into its practical workings. There is need to apply to it more of that constructive scepticism voiced by Wigmore twenty-five years ago.²² We have paid too little heed to the way in which John Chipman Gray—a successful practicing lawyer in the field of real property where, above all, precedent has been traditionally sanctified—challenged the fundamental thesis of stare decisis when

²⁰ In re Barnett, 2 Cir., 124 F.2d 1005, 1011. Cf. Hammond-Knowlton v. United States, 2 Cir., 121 F.2d 192, 204, where we quoted Dicey: "If the Courts were to apply to the decision of substantially the same case one principle today and another tomorrow, men would lose rights they already possessed."

But, as we also there noted, some of the pressure for stare decisis stems from the desire of lawyers to protect their vested interest in their laboriously acquired knowledge of previous judicial rulings. See Wigmore's remarks quoted in the Barnett case, supra, at 1011, and also note 15.

Here the influence of the legal profession is of importance. Cf. Seagle, *The Quest for Law* (1941) Ch. XI.

²¹ In re Marine Harbor Properties, Inc., 2 Cir., 125 F.2d 296, 299, 300.

²² *The Judicial Function*, in *The Science of Legal Method*, Editorial Introduction (1917) XXXVI-XXXIX. Wigmore questions whether stare decisis has afforded the certainty which it is supposed to guaranty. And he makes this incisive comment: "Equality is not a product for which stare decisis is necessary. Equality is something desired for the persons now under the law; it does not call for sameness of treatment between those of the present and those of the past or the future generation. Gompers need not receive equal law with Hampden or with the citizen of Utopia, provided he receives equal law with Harriman. Allowing, therefore, a short time before and after now as necessary for the consciousness of equality with our own generation, equality calls for no longer period of stare decisis."

READ & MACDONALD U.C.B.L.B.

he said that few men, in the conduct of their practical affairs, actually rely on past judicial rulings.²³ Perhaps his scepticism went too far. Yet, in the twenty years which have elapsed since he issued that challenge, few persons have met it, and most lawyers and many judges go on declaiming that life would be unbearably uncertain if courts did not adhere to their earlier formulations of "rules" and "principles." We know virtually nothing of the extent to which men do, in fact, rely on past judicial utterances. If, as is often said, *stare decisis* is bottomed on something like *estoppel*, courts should not be too hesitant about changing their previous formulations when change is highly desirable, in the absence of proof of actual reliance by the litigant who opposes such a change. It might be well to hold that such reliance will be presumed but that that presumption is rebuttable. And, in any event, such changes, as Wigmore suggested, can be made prospective, and not retroactive, where there is any likelihood that there was reliance.²⁴ If the sanctity of *stare decisis* were thus moderately diminished, and if authorities were employed as they were by the much abused scholastics, i. e., only when shown to be reasonable,²⁵ up-

²³ "Practically, in its application to actual affairs, for most of the laity, the law, except for a few crude notions of the equity involved in some of its general principles, is all *ex post facto*. When a man marries, or enters into a partnership, or engages in any other transaction, he has the vaguest possible idea of the law governing the situation, and with our complicated system of jurisprudence, it is impossible it should be otherwise. If he delayed to make a contract or do an act until he understood exactly all the consequences it involved, the contract would never be made or the act done. Now the law of which a man has no knowledge is the same to him as if it did not exist." Gray, *The Nature and Sources of Law* (1921) s. 225. Cf. Austin, *Jurisprudence*, 4th Ed., 674.

Doubtless where lawyers draft instruments, there is reliance on the decisions as interpreted by the lawyers. Our larger institutions probably therefore are often *reliers*. But the great majority of men seldom consult lawyers before acting. Perhaps, even so, some vague knowledge of what the courts have decided filters through to them, but no one knows how much.

Patterson, who is keenly aware of the relatively small amount of actual reliance, seems, at times, to imply that, nevertheless, the judicial formulations often reflect community attitudes; but that implication appears to be a matter of faith not of proof. But he concludes that "definite rules and precedents have guidance value, if not for laymen, at least for lawyers and judges in the orderly functioning of the law." *Constructive Conditions in Contracts*, 42 *Col.L.Rev.* (1942) 903, 954. Is his reference, so far as it relates to lawyers, to their vested interests in their acquired knowledge or to the reliance of clients on their lawyers? And, so far as he refers to judges, does he have in mind what Green calls the "administrative factor"?

²⁴ Wigmore, *loc. cit.*; cf. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 365, 366, 53 S.Ct. 145, 77 L.Ed. 360, 85 A.L.R. 254; *People v. Maughs*, 149 Cal. 253, 86 P. 187; *People v. Ryan*, 152 Cal. 364, 92 P. 553; Cardozo, *The Nature of The Judicial Process*, 146-149.

The new rule could be made applicable, as Wigmore suggests, to cases arising after a given date, or to future cases in which there is no proof of actual reliance on the old rule.

Prospective over-ruling would relieve the courts of the embarrassment which retroactive over-ruling now occasions. For a recent reference to such embarrassment, see dissenting opinion of Mr. Justice Jackson in *State Tax Comm. of Utah v. Aldrich*, April 27, 1942, 316 U.S. 174, 62 S.Ct. 1008, 86 L.Ed. 1353, 139 A.L.R. 1438.

²⁵ "But the common criticism that scholastic problems were solved by reference only to authority is without foundation; a good scholastic was one who could find authority for either side of a question and who was convinced further that truth could be discovered best by examining the interplay of such possible contradictory statements. Authority was only the reason of past thinkers solidified in

per court judges might lose some of their prestige, but they could, by reducing their Jovian aloofness, devote more time to the interests of litigants in specific actual cases and less to the possible future harm of "just" decisions of those actual controversies.²⁶

Fortunately, wise judges have devised escapes from improvidently formulated rulings.²⁷ For instance, the courts have recognized the fact that chance circumstances—such as the peculiar interests of the parties to a suit²⁸ or the laziness or incompetence of their lawyers²⁹—may prevent the adequate presentation of all the aspects of a case and thus induce judicial neglect of those aspects, with resultant inadequacy in the judicial generalizations.³⁰ So the Supreme Court has

brief statements, and if reason could not be found for it, the opinion could not be held. Authority, as one of the scholastics remarked, has a nose of wax: it may be turned in any direction whatsoever unless it is fortified by reason." 1 McKeon, *Selections from Medieval Philosophers* (1929), General Introduction, XV. Roger Bacon said that one of the "four chief hindrances to the understanding of truth" is "the example of frail and unsuited authority."

It is of interest that Hobbes's criticism of the uncritical use of authorities, including Aristotle, on the ground that "the praise of ancient authors proceeds not from the reference of the dead, but from the competition and mutual envy of the living," is a sort of echo of Aristotle himself. See Hobbes, *Leviathan* (1651) 395; Aristotle, *Rhetoric*, Bk. 2, Ch. 10, 1388b, 4-10.

I confess that, at one time, I voiced the conventional comments on scholastic thinking.

²⁶ The word "just" is, of course, ambiguous. What is meant here by "just" is more adequate consideration of the specific facts of specific cases.

Of course the selection of the relevant "facts" of a case is not a simple process, especially where the evidence is conflicting. The choice of a pertinent legal rule may affect the selection of the "facts," and vice versa. The inter-action of those two choices may be highly complicated. And the process may not always be 100% conscious; intuition often plays an important role. *Perkins v. Endicott Johnson Corp.*, 2 Cir., 128 F.2d 208, 220 and note 46.

In this connection, it is tempting, but unsound, to classify judges as those who are stimulated primarily by rules—i. e., the general aspects of cases—and those who are activated primarily by particulars. Such a classification recalls Maurois' description of the differences between Gladstone and Disraeli: "Gladstone liked to choose an abstract principle and from that to deduce his preferences. Disraeli had a horror of abstract principles. He liked certain ideas because they appealed to his imagination. He left to action the care of putting them to the test. When Disraeli changed his views, he admitted the change and was ready to appear changeable; Gladstone fastened his constancy to blades of straw and thought they were planks. . . . Disraeli, the doctrinaire, prided himself on being an opportunist; Gladstone, the opportunist, prided himself on being a doctrinaire." Whether such clear-cut differences between those two men actually existed may be doubted. But assuming that they did, it might be said that every judge is in part a Gladstone and in part a Disraeli. The percentage of those components seems to vary from judge to judge—and even in a particular judge from time to time.

²⁷ Permitting arguments to be made by "friends of the court" is one device often helpful in preventing such improvident rulings.

²⁸ It has been said (perhaps not correctly) that, on occasions, neither side mentions a point because it is to the self-interest of both not to have it judicially decided.

²⁹ Cf. *Quong Wing v. Kirkendall*, 223 U.S. 59, 64, 32 S.Ct. 192, 56 L.Ed. 350; *In re Barnett*, 2 Cir., 124 F.2d 1005, 1006.

³⁰ Macaulay stated the conventional attitude when he said "that a tribunal will decide a judicial question most fairly when it has heard two able men argue, as unfairly as possible, on the two opposite sides of it. . . . Sometimes, it is true, superior eloquence and dexterity will make the worse appear the better reason; but it is at least certain that the judge will be compelled to contemplate the case

wisely said, "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon are not to be considered as having been so decided as to constitute precedents."³¹

But, no matter what is done, the problem of deciding cases so that decisions will not be hurtful, as precedents, to future litigants is not too easy of solution. . . .

B. Law Making by Refusal to Follow Persuasive Precedent

LITTLE v. CHICAGO, ST. P., M. & O. RY. CO.

Supreme Court of Minnesota, 1896. 65 Minn. 48, 67 N.W. 846, 60 Am.St.Rep. 421.

MITCHELL, J. This action was brought to recover damages for injuries to real estate situated in Wisconsin, caused by the negligence of the defendant. The question presented is, can the courts of this state take cognizance of actions to recover damages to real estate lying without the state; in other words, is such an action local or transitory in its nature? The history of the progress of the English common law respecting the locality of actions will aid in determining how this question ought to be decided on principle. Originally, all actions were local. This arose out of the constitution of the old jury, who were but witnesses to prove or disprove the allegations of the parties, and hence every case had to be tried by a jury of the vicinage, who were presumed to have personal knowledge of the parties as well as of the facts. But, as circumstances and conditions changed, the courts modified the rule in fact, although not in form. For that purpose they invented a fiction by which a party was permitted to allege, under a *videlicet*, that the place where the contract was made or the transaction occurred was in any county in England. The courts took upon themselves to determine when this fictitious averment should and when it should not be traversable. They would hold it not traversable for the purpose of defeating an action it was invented to sustain, but always traversable for the purpose of contesting a jurisdiction not intended to be protected by the fiction. Those actions in which it was held not traversable came to be known as transitory, and those in which it was held traversable as local, actions. Actions for personal torts, wherever committed, and upon

under two different aspects. It is certain that no important consideration will altogether escape note." *Essay on History* (1828).

Undoubtedly, the usual two-sided contentious mode of court procedure does often help to bring out most of the points. In *re Barnett*, *supra*, 124 F.2d at page 1011. But, for the reasons noted above, in the text, that is not what invariably happens in law suits.

Moreover, there are sometimes more than "two different aspects" of a case. As Demogue suggests, the "duellistic" nature of litigation may create a false dualistic attitude towards the facts or the pertinent legal rules. Demogue, *loc. cit.*, 397, 505. Cf. Green, *loc. cit.* 27 note 2, 197, 198.

³¹ Webster v. Fall, 266 U.S. 507, 511, 45 S.Ct. 148, 149, 69 L.Ed. 411; KVOS, Inc., v. Associated Press, 299 U.S. 269, 279, 57 S.Ct. 197, 81 L.Ed. 183; Perkins v. Endicott Johnson Corp., 2 Cir., 128 F.2d 208, 216.

contracts (including those respecting lands), wherever executed, were deemed transitory, and might be brought wherever the defendant could be found. As respects actions for injuries to real property, we cannot discover that it was definitely settled in England to which class they belonged prior to the American Revolution. As late as 1774, in the leading case of *Mostyn v. Fabrigas*, 1 Cowp. 161, 2 Smith, Lead.Cas.Eq. 916, Lord Mansfield, who did more than any other jurist to brush away those mere technicalities which had so long obstructed the course of justice, referred to two cases in which he had held that actions would lie in England for injuries to real estate situated abroad. In that same case he said: "Can it be doubted that actions may be maintained here, not only upon contracts, which follow the persons, but for injuries done by subject to subject, where the whole that is prayed is a reparation in damages or satisfaction to be made by process against the person or his effects within the jurisdiction of the court." While all that is there said as to actions for injuries to real property is obiter, yet it clearly indicates the views of that great jurist on the subject. And we cannot discover that it was fully settled in England that actions for injuries to lands were local until the decision of *Doulson v. Matthews*, 4 Term R. 503, in 1792,—16 years after the declaration of American independence. The courts of England seem to have finally settled down upon the rule that an action is transitory where the transaction on which it is founded might have taken place anywhere; but is local when the transaction is necessarily local,—that is, could only have happened in a particular place. As an injury to land can only be committed where the land lies, it followed that, according to this test, actions for such injuries were held to be local. As the distinction between local and transitory venues was abolished by the judicature act of 1873, we infer that actions for injuries to lands lying abroad may now be maintained in England. It is somewhat surprising that the American courts have generally given more weight to the English decisions on the subject rendered after the Revolution than to those rendered before, and hence have almost universally held that actions for injuries to lands are local. In the leading case of *Livingston v. Jefferson*, 1 Brock. 203, Fed.Cas. No.8,411, which has done more than any other to mold the law on the subject in this country, Chief Justice Marshall argued against the rule, showing that it was merely technical, founded on no sound principle, and often defeated justice; but concluded that it was so thoroughly established by authority that he was not at liberty to disregard it. But so unsatisfactory and unreasonable is the rule that since that time it has, in a number of states, been changed by statute, and in others the courts have frequently evaded it by meta-physical distinctions in order to prevent a miscarriage of justice. Chief Justice Marshall's own state of Virginia changed the rule by statute as early as 1819. Some courts have made a subtle distinction between faults of omission and of commission. Thus in *Titus v. Inhabitants of Frankfort*, 15 Me. 89, which was an action against a town for damages sustained by reason of defects in a highway, it was held that, while highways must be local, the neglect of the de-

fendant to do its duty, being a mere nonfeasance, was transitory. It has also been held that where trespass upon land is followed by the asportation of timber severed from the land, if the plaintiff waives the original trespass, and sues simply for the conversion of the property so carried away, the action would become transitory. *Telegraph Co. v. Middleton*, 80 N.Y. 408; *Whidden v. Seelye*, 40 Me. 247. Again, it has been sometimes held that an action for injuries to real estate is transitory where the gravamen of the action is negligence,—as for negligently setting fire to the plaintiff's premises. *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun, 182; *Barney v. Burstenbinder*, 7 Lans. 210. In Ohio the rule has been repudiated, at least as to causes of action arising within the state, as being wholly unsuited to their condition, because under their judicial system it would result in many cases in a total denial of justice. *Genin v. Grier*, 10 Ohio, 209. Almost every court or judge who has ever discussed the question has criticised or condemned the rule as technical, wrong on principle, and often resulting in a total denial of justice, and yet have considered themselves bound to adhere to it under the doctrine of *stare decisis*. An action for damages for injuries to real property is on principle just as transitory in its nature as one on contract or for a tort committed on the person or personal property. The reparation is purely personal, and for damages. Such an action is purely personal, and in no sense real.

Every argument founded on practical considerations against entertaining jurisdiction of actions for injuries to lands lying in another state could be urged as to actions on contracts executed, or for personal torts committed, out of the state, at least where the subject-matter of the transaction is not within the state. Take, for example, personal actions on contracts respecting lands which are conceded to be transitory. An investigation of title, of boundaries, etc., may be desirable, and often would be essential to the determination of the case, yet such considerations have never been held to render the actions local. Another serious objection to the rule is that under it a party may have a clear, legal right without a remedy where the wrongdoer cannot be found, and has no property, within the state where the land is situated. As suggested by plaintiff's counsel, if the rule be adhered to, all that the one who commits an injury to land, whether negligently or willfully, has to do in order to escape liability, is to depart from the state where the tort was committed, and refrain from returning. In such case the owner of the land is absolutely remediless. We recognize the respect due to judicial precedents, and the authority of the doctrine of *stare decisis*; but, inasmuch as this rule is in no sense a rule of property, and as it is purely technical, wrong in principle, and in practice often results in a total denial of justice, and has been so generally criticised by eminent jurists, we do not feel bound to adhere to it, notwithstanding the great array of judicial decisions in its favor. If the courts of England, generations ago, were at liberty to invent a fiction in order to change the ancient rule that all actions were local, and then fix their own

limitations to the application of the fiction, we cannot see why the courts of the present day should deem themselves slavishly bound by those limitations.

It is suggested that the statutes of this state, in conformity to the old rule, make actions for injuries to real property local. Gen.St. 1894, §§ 5182, 5183. This is true, and, strangely enough, in 1885, the legislature went so far as to provide that, if the county designated in the complaint is not the proper one, the court should have no jurisdiction of the action. But this statute has no application to causes of action arising out of the state. While it settles the rule, and indicates the policy of this state as to actions for injuries to real property within the state, we do not think it ought to have any weight in determining what the rule should be as to causes of action arising out of the state, which can have no local venue here under the provisions of the statute. It does not appear whether the plaintiff lives in this state or in Wisconsin, but this is immaterial, for the place of his residence cannot affect the nature of the action. It is also true that in this particular case jurisdiction of the defendant could be obtained in Wisconsin, but this fact is likewise immaterial, and for the same reason. Order reversed.

BUCK, J. I dissent. The doctrine laid down in the foregoing opinion is conceded to be against the great weight of judicial authority, and, according to my view, is unsound in principle, and contrary to a wise public policy. . . . I prefer that the rule should be that for injuries to real property the jurisdiction of our courts should only be co-extensive with its territorial sovereignty. This doctrine, which is so strongly imbedded in the common law and judicial authorities of the country, is further adhered to by our own statute, which provides that actions for injuries to real property shall be brought in the county where the subject of the action is situated, and prohibits the court from having jurisdiction if brought in any other county. Gen.St.1894, § 5183. Thus we have a legislative recognition of the doctrine that actions for injuries to real estate are local. If there is any implication arising from legislative enactments as to the jurisdiction of courts to try actions for injury to real estate elsewhere, it would be against the contention of the plaintiff. The statute makes no distinction between trespass to lands within and without the state. It does not make the action for trespass to lands outside the state transitory. There is no warrant in the language of the constitution or statute which justifies the majority opinion, and, if sound, it must rest upon some other foundation than is to be found in the letter of the law. It is a rule which is more favorable to the plaintiff than the defendant. The former can select his own forum; the latter is helpless. No change of venue can be granted, because none is authorized. . . .

C. Law Making in the United States by Over-Ruling Precedent

ERIE RAILROAD CO. v. TOMPKINS

Supreme Court of the United States, 1938.

304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson*¹ shall now be disapproved.

Tompkins, a citizen of Pennsylvania, was injured on a dark night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that state. He claimed that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee because on a commonly used beaten footpath which ran for a short distance alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars. To enforce that claim he brought an action in the federal court for Southern New York, which had jurisdiction because the company is a corporation of that state. It denied liability; and the case was tried by a jury.

The Erie insisted that its duty to Tompkins was no greater than that owed to a trespasser. It contended, among other things, that its duty to Tompkins, and hence its liability, should be determined in accordance with the Pennsylvania law; that under the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way—that is, a longitudinal pathway as distinguished from a crossing—are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or willful. Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts; and contended that, since there was no statute of the state on the subject, the railroad's duty and liability is to be determined in federal courts as a matter of general law.

¹ 1842, 16 Pet. 1, 10 L.Ed. 865. Leading cases applying the doctrine are collected in *Black & White Taxicab, etc., Co. v. Brown & Yellow Taxicab, etc., Co.*, 276 U.S. 518, 530, 531, 48 S.Ct. 404, 407, 408, 72 L.Ed. 681, 57 A.L.R. 426. Dissent from its application or extension was expressed as early as 1845 by Mr. Justice McKinley (and Mr. Chief Justice Taney) in *Lane v. Vick*, 3 How. 464, 477, 11 L.Ed. 681. Dissenting opinions were also written by Mr. Justice Daniel in *Rowan v. Runnels*, 5 How. 134, 140, 12 L.Ed. 85; by Mr. Justice Nelson in *Williamson v. Berry*, 8 How. 495, 550, 558, 12 L.Ed. 1170; by Mr. Justice Campbell in *Pease v. Peck*, 18 How. 595, 599, 600, 15 L.Ed. 518; and by Mr. Justice Miller in *Gelpcke v. City of Dubuque*, 1 Wall. 175, 207, 17 L.Ed. 520, and *U. S. ex rel. Butz v. City of Muscatine*, 8 Wall. 575, 585, 19 L.Ed. 400. Vigorous attack upon the entire doctrine was made by Mr. Justice Field in *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U.S. 368, 390, 13 S.Ct. 914, 37 L.Ed. 772, and by Mr. Justice Holmes in *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370, 30 S.Ct. 140, 54 L.Ed. 228, and in the *Taxicab Case*, 276 U.S. 518, at page 532, 48 S.Ct. 404, 408, 72 L.Ed. 681, 57 A.L.R. 426.

The trial judge refused to rule that the applicable law precluded recovery. The jury brought in a verdict of \$30,000; and the judgment entered thereon was affirmed by the Circuit Court of Appeals, which held (2 Cir., 90 F.2d 603, 604), that it was unnecessary to consider whether the law of Pennsylvania was as contended, because the question was one not of local, but of general, law, and that "upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. . . . Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. . . . It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train."

The Erie had contended that application of the Pennsylvania rule was required, among other things, by section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U.S.C. § 725, 28 U.S.C.A. § 725, which provides: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari. 302 U.S. 671, 58 S.Ct. 50, 82 L.Ed. 518.

First. Swift v. Tyson, 16 Pet. 1, 18, 10 L.Ed. 865, held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the state is—or should be; and that, as there stated by Mr. Justice Story, "the true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument,

or what is the just rule furnished by the principles of commercial law to govern the case."

The Court in applying the rule of section 34 to equity cases, in *Mason v. United States*, 260 U.S. 545, 559, 43 S.Ct. 200, 204, 67 L.Ed. 396, said: "The statute, however, is merely declarative of the rule which would exist in the absence of the statute."² The federal courts assumed, in the broad field of "general law," the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given section 34,³ and as to the soundness of the rule which it introduced.⁴ But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written.⁵

Criticism of the doctrine became widespread after the decision of *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 48 S.Ct. 404, 72 L.Ed. 681, 57 A.L.R. 426.⁶ There, *Brown & Yellow*, a Kentucky corporation owned by Kentuckians, and the *Louisville & Nashville Railroad*, also a Ken-

² In *Hawkins v. Barney's Lessee*, 5 Pet. 457, 464, 8 L.Ed. 190, it was stated that section 34 "has been uniformly held to be no more than a declaration of what the law would have been without it: to wit, that the *lex loci* must be the governing rule of private right, under whatever jurisdiction private right comes to be examined." See, also, *Bank of Hamilton v. Dudley's Lessee*, 2 Pet. 492, 525, 7 L.Ed. 496. Compare *Jackson v. Chew*, 12 Wheat. 153, 162, 168, 6 L.Ed. 583; *Livingston v. Moore*, 7 Pet. 469, 542, 8 L.Ed. 751.

³ *Pepper, The Border Land of Federal and State Decisions* (1889) 57; *Gray, The Nature and Sources of Law* (1909 ed.) §§ 533, 534; *Trickett, Non-Federal Law Administered in Federal Courts* (1906) 40 *Am.L.Rev.* 819, 821-824.

⁴ *Street, Is There a General Commercial Law of the United States* (1873) 21 *Am. L.Reg.* 473; *Hornblower, Conflict between State and Federal Decisions* (1880) 14 *Am.L.Rev.* 211; *Meigs, Decisions of the Federal Courts on Questions of State Law* (1882) 8 *So.L.Rev.* (n.s.) 452, (1911) 45 *Am.L.Rev.* 47; *Heiskell, Conflict between Federal and State Decisions* (1882) 16 *Am.L.Rev.* 743; *Rand, Swift v. Tyson versus Gelpcke v. Dubuque* (1895) 8 *Harv.L.Rev.* 328, 341-343; *Mills, Should Federal Courts Ignore State Laws* (1900) 34 *Am.L.Rev.* 51; *Carpenter, Court Decisions and the Common Law* (1917) 17 *Col.L.Rev.* 593, 602, 603.

⁵ *Charles Warren, New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 *Harv.L.Rev.* 49, 51-52, 81-88, 108.

⁶ *Shelton, Concurrent Jurisdiction—Its Necessity and its Dangers* (1928) 15 *Va. L.Rev.* 137; *Frankfurter, Distribution of Judicial Power Between Federal and State Courts* (1928) 13 *Corn.L.Q.* 499, 524-530; *Johnson, State Law and the Federal Courts* (1929) 17 *Ky.L.J.* 355; *Fordham, The Federal Courts and the Construction of Uniform State Laws* (1929) 7 *N.C.L.Rev.* 423; *Dobie, Seven Implications of Swift v. Tyson* (1930) 16 *Va.L.Rev.* 225; *Dawson, Conflict of Decisions between State and Federal Courts in Kentucky, and the Remedy* (1931) 20 *Ky.L.J.* 1; *Campbell, Is Swift v. Tyson an Argument for or against Abolishing Diversity of Citizenship Jurisdiction* (1932) 18 *A.B.A.J.* 809; *Ball, Revision of Federal Diversity Jurisdiction* (1933) 28 *Ill.L.Rev.* 356, 362-364; *Fordham, Swift v. Tyson and the Construction of State Statutes* (1935) 41 *W.Va.L.Q.* 131.

tucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Ky., railroad station; and that the Black & White, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the common law of Kentucky, it was arranged that the Brown & Yellow reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court for Western Kentucky to enjoin competition by the Black & White; an injunction issued by the District Court was sustained by the Court of Appeals; and this Court, citing many decisions in which the doctrine of *Swift v. Tyson* had been applied, affirmed the decree.

Second. Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity;⁷ and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.⁸

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen.⁹ Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote

⁷ Compare Mr. Justice Miller in *Gelpcke v. City of Dubuque*, 1 Wall. 175, 209, 17 L.Ed. 520. The conflicts listed in Holt, *The Concurrent Jurisdiction of the Federal and State Courts* (1888) 160 et seq. cover twenty-eight pages. See, also, Frankfurter, *supra* note 6, at 524-530; Dawson, *supra* note 6; Note, *Aftermath of the Supreme Court's Stop, Look and Listen Rule* (1930) 43 Harv.L.Rev. 926; cf. Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction* (1931) 79 U. of Pa.L.Rev. 889, 881-886. Moreover, as pointed out by Judge Augustus N. Hand in *Cole v. Pennsylvania R. Co.*, D.C., 43 F.2d 953, 956, 957, 71 A.L.R. 1096, decisions of this Court on common-law questions are less likely than formerly to promote uniformity.

⁸ Compare 2 Warren, *The Supreme Court in United States History*, Rev.Ed.1935, 89: "Probably no decision of the Court has ever given rise to more uncertainty as to legal rights; and though doubtless intended to promote uniformity in the operation of business transactions, its chief effect has been to render it difficult for business men to know in advance to what particular topic the Court would apply the doctrine. * * *" The Federal Digest through the 1937 volume, lists nearly 1,000 decisions involving the distinction between questions of general and of local law.

⁹ It was even possible for a nonresident plaintiff defeated on a point of law in the highest court of a State nevertheless to win out by taking a nonsuit and renewing the controversy in the federal court. Compare *Gardner v. Michigan Cent. R. R. Co.*, 150 U.S. 349, 14 S.Ct. 140, 37 L.Ed. 1107; *Harrison v. Foley*, 8 Cir., 206 F. 57; *Interstate Realty & Inv. Co. v. Bibb County*, 5 Cir., 293 F. 721; see Mills, *supra* note 4, at 52.

uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.

The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called "general law" as to which federal courts exercised an independent judgment.¹⁰ In addition to questions of purely commercial law, "general law" was held to include the obligations under contracts entered into and to be performed within the state, the extent to which a carrier operating within a state may stipulate for exemption from liability for his own negligence or that of his employee; the liability for torts committed within the state upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the state; and the right to exemplary or punitive damages. Furthermore, state decisions construing local deeds, mineral conveyances, and even devises of real estate, were disregarded.

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this jurisdiction individual citizens willing to remove from their own state and become citizens of another might avail themselves of the federal rule. And, without even change of residence, a corporate citizen of the state could avail itself of the federal rule by reincorporating under the laws of another state, as was done in the *Taxicab Case*.

The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction.²⁰ Other legislative relief has been proposed.²¹ If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.²² But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.

¹⁰ For a recent survey of the scope of the doctrine, see Sharp & Brennan, *The Application of the Doctrine of Swift v. Tyson since 1900* (1929) 4 *Ind.L.J.* 367.

[Footnotes 11 to 19 are omitted. Ed.]

²⁰ See, e.g., Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S. 937, S. 939, and S. 3243, 72d Cong., 1st Sess. (1932) 6-8; Hearing Before the House Committee on the Judiciary on H.R. 10594, H.R. 4526, and H.R. 11508, 72d Cong., 1st Sess., ser. 12 (1932) 97-104; Sen. Rep. No. 530, 72d Cong., 1st Sess. (1932) 4-6; Collier, *A Plea Against Jurisdiction Because of Diversity* (1913) 76 *Cent.L.J.* 263, 264, 266; Frankfurter, *supra* note 6; Ball, *supra*, note 6; Warren, *Corporations and Diversity of Citizenship* (1933) 19 *Val.L.Rev.* 661, 686.

²¹ Thus, bills which would abrogate the doctrine of *Swift v. Tyson* have been introduced. S. 4333, 70th Cong., 1st Sess.; S. 96, 71st Cong., 1st Sess.; H.R. 8094, 72d Cong., 1st Sess. See, also, Mills, *supra*, note 4, at 68, 69; Dobie, *supra*, note 6, at 241; Frankfurter, *supra*, note 6, at 530; Campbell, *supra*, note 6, at 811. State statutes on conflicting questions of "general law" have also been suggested. See Heiskell, *supra*, note 4, at 760; Dawson, *supra*, note 6; Dobie, *supra*, note 6, at 241.

²² The doctrine has not been without defenders. [Citing articles from legal periodicals. Ed.]

Third. Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U.S. 368, 401, 13 S.Ct. 914, 927, 37 L.Ed. 772, against ignoring the Ohio common law of fellow-servant liability: I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances; unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence."

The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes.²³ The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law":

"But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State whether called common law or not,

²³ *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-372, 30 S.Ct. 140, 54 L.Ed. 228; *Black & White Taxicab, etc., Co. v. Brown & Yellow Taxicab, etc., Co.*, 276 U.S. 518, 532-536, 48 S.Ct. 404, 408, 409, 72 L.Ed. 681, 57 A.L.R. 426.

is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . .

"The authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word."

Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." In disapproving that doctrine we do not hold unconstitutional section 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.

Fourth. The defendant contended that by the common law of Pennsylvania as declared by its highest court in *Falchetti v. Pennsylvania R. Co.*, 307 Pa. 203, 160 A. 859, the only duty owed to the plaintiff was to refrain from willful or wanton injury. The plaintiff denied that such is the Pennsylvania law. In support of their respective contentions the parties discussed and cited many decisions of the Supreme Court of the state. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

Reversed.

MR. JUSTICE CARDOZO took no part in the consideration or decision of this case.

MR. JUSTICE BUTLER (dissenting). . . .

The opinion just announced states that: "The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* [1842, 16 Pet. 1, 10 L.Ed. 865] shall now be disapproved."

That case involved the construction of the Judiciary Act of 1789, § 34, 28 U.S.C.A. § 725: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Expressing the view of all the members of the Court, Mr. Justice Story said (16 Pet. 1, at page 18, 10 L.Ed. 865): "In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often reexamined, reversed, and qualified by courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority

thereof, or long-established local customs having the force of laws. *In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed, that the true interpretation of the 34th section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules or conclusive authority, by which our own judgments are to be bound up and governed."* (Italics added.)

The doctrine of that case has been followed by this Court in an unbroken line of decisions. So far as appears, it was not questioned until more than 50 years later, and then by a single judge.¹ *Baltimore & O. Railroad Co. v. Baugh*, 149 U.S. 368, 390, 13 S.Ct. 914, 37 L. Ed. 772. In that case, Mr. Justice Brewer, speaking for the Court, truly said (149 U.S. 368, at page 373, 13 S.Ct. 914, 916, 37 L.Ed. 772): "Whatever differences of opinion may have been expressed have not been on the question whether a matter of general law should be settled by the independent judgment of this court, rather than through an adherence to the decisions of the state courts, but upon the other question, whether a given matter is one of local or of general law."

¹ Mr. Justice Field filed a dissenting opinion, several sentences of which are quoted in the decision just announced. The dissent failed to impress any of his associates. It assumes that adherence to section 34 as construed involves a supervision over legislative or judicial action of the states. There is no foundation for that suggestion. Clearly, the dissent of the learned Justice rests upon misapprehension of the rule. He joined in applying the doctrine for more than a quarter of a century before his dissent. The reports do not disclose that he objected to it in any later case. Cf. *Oakes v. Mase*, 165 U.S. 363, 17 S.Ct. 345, 41 L. Ed. 746.

And since that decision, the division of opinion in this Court has been of the same character as it was before. In 1910, Mr. Justice Holmes, speaking for himself and two other Justices, dissented from the holding that a court of the United States was bound to exercise its own independent judgment in the construction of a conveyance made before the state courts had rendered an authoritative decision as to its meaning and effect. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 30 S.Ct. 140, 54 L.Ed. 228. But that dissent accepted (215 U.S. 349, at page 371, 30 S.Ct. 140, 54 L.Ed. 228) as "settled" the doctrine of *Swift v. Tyson*, and insisted (215 U.S. 349, at page 372, 30 S.Ct. 140, 54 L.Ed. 228) merely that the case under consideration was by nature and necessity peculiarly local.

Thereafter, as before, the doctrine was constantly applied.² In *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 48 S.Ct. 404, 72 L.Ed. 681, 57 A.L.R. 426, three judges dissented. The writer of the dissent, Mr. Justice Holmes said, however (276 U.S. 518, at page 535, 48 S.Ct. 404, 72 L.Ed. 681, 57 A.L.R. 426): "I should leave *Swift v. Tyson* undisturbed, as I indicated in *Kuhn v. Fairmont Coal Co.*, but I would not allow it to spread the assumed dominion into new fields."

No more unqualified application of the doctrine can be found than in decisions of this Court speaking through Mr. Justice Holmes. *United Zinc Co. v. Britt*, 258 U.S. 268, 42 S.Ct. 299, 66 L.Ed. 615, 36 A.L.R. 28; *Baltimore & O. R. R. Co. v. Goodman*, 275 U.S. 66, 70, 48 S.Ct. 24, 25, 72 L.Ed. 167, 56 A.L.R. 645. Without in the slightest departing from that doctrine, but implicitly applying it, the strictness of the rule laid down in the *Goodman Case* was somewhat ameliorated by *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 54 S.Ct. 580, 78 L.Ed. 1149, 91 A.L.R. 1049.

Whenever possible, consistently with standards sustained by reason and authority constituting the general law, this Court has followed applicable decisions of state courts. . . . Unquestionably, the determination of the issues of negligence and contributory negligence upon which decision of this case depends are questions of general law. . . .

While amendments to section 34 have from time to time been suggested, the section stands as originally enacted. Evidently Congress has intended throughout the years that the rule of decision as construed should continue to govern federal courts in trials at common law. The opinion just announced suggests that Mr. Warren's research has established that from the beginning this Court has erroneously construed section 34. But that author's "New Light on the History of the Federal Judiciary Act of 1789" does not purport to be authoritative, and was intended to be no more than suggestive. The

² In *Salem Co. v. Manufacturers' Co.*, 264 U.S. 182, at page 200, 44 S.Ct. 266, 271, 68 L.Ed. 628, 31 A.L.R. 867, Mr. Justice Holmes and Mr. Justice Brandeis concurred in the judgment of the Court upon a question of general law on the ground that the rights of the parties were governed by state law.

weight to be given to his discovery has never been discussed at this bar. Nor does the opinion indicate the ground disclosed by the research. In his dissenting opinion in the *Taxicab Case*, Mr. Justice Holmes referred to Mr. Warren's work, but failed to persuade the Court that "laws" as used in section 34 included varying and possibly ill-considered rulings by the courts of a state on questions of common law. See, e. g., *Swift v. Tyson*, *supra*, 16 Pet. 1, 16, 17, 10 L.Ed. 865. It well may be that, if the Court should now call for argument of counsel on the basis of Mr. Warren's research, it would adhere to the construction it has always put upon section 34. Indeed, the opinion in this case so indicates. For it declares: "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." This means that, so far as concerns the rule of decision now condemned, the Judiciary Act of 1789, passed to establish judicial courts to exert the judicial power of the United States, and especially section 34 of that act as construed, is unconstitutional; that federal courts are now bound to follow decisions of the courts of the state in which the controversies arise; and that Congress is powerless otherwise to ordain. It is hard to foresee the consequences of the radical change so made. Our opinion in the *Taxicab Case* cites numerous decisions of this Court which serve in part to indicate the field from which it is now intended forever to bar the federal courts. It extends to all matters of contracts and torts not positively governed by state enactments. Counsel searching for precedent and reasoning to disclose common-law principles on which to guide clients and conduct litigation are by this decision told that as to all of these questions the decisions of this Court and other federal courts are no longer anywhere authoritative.

This Court has often emphasized its reluctance to consider constitutional questions and that legislation will not be held invalid as repugnant to the fundamental law if the case may be decided upon any other ground. In view of grave consequences liable to result from erroneous exertion of its power to set aside legislation, the Court should move cautiously, seek assistance of counsel, act only after ample deliberation, show that the question is before the Court, that its decision cannot be avoided by construction of the statute assailed or otherwise, indicate precisely the principle or provision of the Constitution held to have been transgressed, and fully disclose the reasons and authorities found to warrant the conclusion of invalidity. These safeguards against the improvident use of the great power to invalidate legislation are so well-grounded and familiar that statement of reasons or citation of authority to support them is no longer necessary. . . .

So far as appears, no litigant has ever challenged the power of Congress to establish the rule as construed. It has so long endured that its destruction now without appropriate deliberation cannot be justified. There is nothing in the opinion to suggest that consideration

of any constitutional question is necessary to a decision of the case. By way of reasoning, it contains nothing that requires the conclusion reached. Admittedly, there is no authority to support that conclusion. Against the protest of those joining in this opinion, the Court declines to assign the case for reargument. It may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statement of reasons to support it. Indeed, it would have been appropriate to give Congress opportunity to be heard before divesting it of power to prescribe rules of decision to be followed in the courts of the United States. See *Myers v. United States*, 272 U.S. 52, 176, 47 S.Ct. 21, 45, 71 L.Ed. 160.

The course pursued by the Court in this case is repugnant to the Act of Congress of August 24, 1937, 50 Stat. 751, 28 U.S.C.A. §§ 17 and note, 349a, 380a and note, 401. It declares that: "Whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General. In any such case the court shall permit the United States to intervene and become a party for presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument upon the question of the constitutionality of such Act. In any such suit or proceeding the United States shall, subject to the applicable provisions of law, have all the rights of a party and the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of such Act." Section 1, 28 U.S.C.A. § 401. That provision extends to this Court. Section 5, 28 U.S.C.A. § 380a note. If defendant had applied for and obtained the writ of certiorari upon the claim that, as now held, Congress has no power to prescribe the rule of decision, section 34 as construed, it would have been the duty of this Court to issue the prescribed certificate to the Attorney General in order that the United States might intervene and be heard on the constitutional question. Within the purpose of the statute and its true intent and meaning, the constitutionality of that measure has been "drawn in question." Congress intended to give the United States the right to be heard in every case involving constitutionality of an act affecting the public interest. In view of the rule that, in the absence of challenge of constitutionality, statutes will not here be invalidated on that ground, the Act of August 24, 1937 extends to cases where constitutionality is first "drawn in question" by the Court. No extraordinary or unusual action by the Court after submission of the cause should be permitted to frustrate the wholesome purpose of that act. The duty it imposes ought here to be willingly assumed. If it were doubtful whether this case is within the scope of the act, the Court should give the United States opportunity to intervene and, if so advised, to present argument on the constitutional

question, for undoubtedly it is one of great public importance. That would be to construe the act according to its meaning.

The Court's opinion in its first sentence defines the question to be whether the doctrine of *Swift v. Tyson* shall now be disapproved; it recites (third page, 58 S.Ct. 819) that Congress is without power to prescribe rules of decision that have been followed by federal courts as a result of the construction of section 34 in *Swift v. Tyson* and since; after discussion, it declares (seventh page, 58 S.Ct. 822) that "the unconstitutionality of the course pursued [meaning the rule of decision resulting from that construction] . . . compels" abandonment of the doctrine so long applied; and then near the end of the last page, 58 S.Ct. 823, the Court states that it does not hold section 34 unconstitutional, but merely that, in applying the doctrine of *Swift v. Tyson* construing it, this Court and the lower courts have invaded rights which are reserved by the Constitution to the several states. But, plainly through the form of words employed, the substance of the decision appears; it strikes down as unconstitutional section 34 as construed by our decisions; it divests the Congress of power to prescribe rules to be followed by federal courts when deciding questions of general law. In that broad field it compels this and the lower federal courts to follow decisions of the courts of a particular state.

I am of opinion that the constitutional validity of the rule need not be considered, because under the law, as found by the courts of Pennsylvania and generally throughout the country, it is plain that the evidence required a finding that plaintiff was guilty of negligence that contributed to cause his injuries, and that the judgment below should be reversed upon that ground.

MR. JUSTICE McREYNOLDS, concurs in this opinion.

MR. JUSTICE REED (concurring in part).

I concur in the conclusion reached in this case, in the disapproval of the doctrine of *Swift v. Tyson*, and in the reasoning of the majority opinion, except in so far as it relies upon the unconstitutionality of the "course pursued" by the federal courts. . . .

NOTES

1. The principal case wiped out a large segment of the law on federal jurisdiction, and has been the subject of innumerable articles. One very good discussion is Clark, "State Law in the Federal Courts. The Brooding Omnipresence of *Erie v. Tompkins*," 55 Yale L.J. 267 (1946). Cf. Reasons given for over-ruling in the principal case with those in *Girouard v. United States*, *infra*, p. 1088.

2. In *Helvering v. Hallock*, 309 U.S. 106 at pp. 119-122, 60 S.Ct. 444, at pp. 451-453, 84 L.Ed. 604, 125 A.L.R. 1368 (1940), Frankfurter, J., said: "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience. . . .

"This court, unlike the House of Lords (but the rule is otherwise in the Privy Council), has from the beginning rejected a doctrine of disability of self-correction."

JOSEPH C. HUTCHESON, JR., CINCINNATI CONFERENCE ON THE STATUS OF THE RULE OF JUDICIAL PRECEDENT

14 U. of Cinc.L.Rev. 203, 248-249 (1940).

I think the probable source of the only danger we have to fear from the court today, is the thing that finally killed *Swift v. Tyson*. The too complete acceptance of Gray's notion that judges don't find the law like they do the eggs on Easter Day, that they make it like the legislatures do, against Blackstone's and Carter's, that they find it. When you have that notion in mind very strongly and everybody lets you talk out in meeting and say, decisions are in reality legislation, a great many judges want to be legislating and not just judging. The doctrine of precedent relaxes too much and whirl tends to become king. Of course every decision is legislative in its grounds if it marks out a new way. But, if this idea is run into the ground and you get to a place where you have the power to legislate, administer and adjudicate at the same time, and all from the same bench, like Br'er Fox said to Br'er Rabbit, "You is getting to be a mighty big man—too big!"

But, my considered opinion is that after the zeal for being precedent makers has found vent for a while and has either dissipated itself or has worked itself out because the precedent makers have boxed the compass on the theories of the law—everything will settle down again in peace and quiet! I have been a judge myself for twenty-one years, but I never did have a crack at making a precedent anybody had to obey. I have been District Judge,—Circuit Judge,—but always there have been some fellows above me, and I really can't speak with authority. But, if you will read the history of the Supreme Court I believe you will find that the biggest bunch of precedent busters, and therefore precedent makers, will in good time turn out to be the biggest bunch of precedent followers. And you are going to have as hard a time getting them to abandon some precedent they have made, in favor of some rule of right that you see, as people have always had in the past history of the Court with precedent makers before them.

I would, I think, like to see a little of the civilian notion come into our doctrine of precedent, especially in constitutional common law. I believe that the doctrine which says that a course of decisions is necessary for a precedent, is probably a better one than ours is with its every decision a precedent. I know it is a better doctrine than the English one, as Sir John Salmond states it, "We don't look to a decision as an evidence of law, it is the law." Well, a good many decisions I have written, I have been not so pleased with later as binding precedents, and I am a good, average scrub judge, and if that is the situation with me it is perhaps the situation with a good many others.

Erie v. Tompkins doesn't bother me much, both because I know the true doctrine of precedent and because legislation has touched and changed most of the common law. Nearly everything coming up to us has had some legislation affecting it. Our court has always been trained and well disposed to follow the state courts, if we can find them. Just after Erie came down, I had some fun with my colleagues on the Texas Supreme Court. I said to them: "I don't mind following you, but my trouble is that half the time I don't know where to find you, and how in the hell can I follow you if I can't find you."

ROYAL A. STONE, THE WANING JUSTIFICATION FOR
CONSIDERATION AS THE SOLE TEST OF
CONTRACTUAL OBLIGATION

Delivered before Hennepin County Bar Ass'n, (Minu.) Oct. 10, 1933.

. . . . It is not for the people to deny their needs or retard their development to keep within traditional concepts of law. It is rather for the law to keep abreast of the ever growing needs and the ever widening concepts of the people. If it does not, so much the worse for both law and people. In proportion as law is wanting in adaptability to the accomplished facts of healthful evolution, both it and its practitioners will deserve to, and will, lose caste.

Now for an issue of every day occurrence, and of very practical present importance, the conventional legal solution of which is nothing less than nonsensical from the lay viewpoint or any other. B owes A \$1,000. It is economically wise and important for both that the debt be discharged for \$500 in cash. The parties so agree and so attempt to proceed. B sells securities, for which some banker friend got him to pay \$1,000 or even more, for \$500 in money. He pays that sum to A who gives him a written release. Both consider the matter settled, the whole debt discharged. But A happens to tell a lawyer about it. The latter volunteers the information that he can collect the balance because there was no consideration for his release on the unpaid moiety. A is sufficiently hard pressed and sufficiently dishonest to sue B for the remaining \$500. Under our present law, he must recover. Dunnell, Sec. 39.

The result is absurd. Its utter injustice thwarts the dominant, lawful and plainly expressed purpose of the parties. The result comes from an impractical attenuation of the doctrine of consideration. A could have made B an executed gift of any corporeal chattel. Why not also a gift of half B's debt to him? But that evasive means of escape aside, does not the transaction and its absurd result suggest strongly that we are carrying too far the traditional notion that consideration must remain the exclusive test of contractual obligation?

A's intent to be bound appearing clearly from the written memorial of the transaction, why should we inquire further? Neither a seal,

nor any additional flourish that could be called consideration, could make plainer the actual intention of the parties.

The utter nonsense of the whole thing becomes still more glaring when we consider that if, instead of cash, B had given his promissory note for the \$500, with one or more worthless sureties, taking the same release as before, there would have been an enforceable compromise, because, whereas B was bound to pay the whole \$1,000, he was not bound to give a negotiable note, with sureties, for any sum. *Mason v. Campbell*, 27 Minn. 54, 6 N.W. 405. Hence the note, even though valueless in fact, is considered by the law a valuable consideration, sufficient to uphold the contract of release, although the payment of \$500 in good cash could have had no such effect.

RYE v. PHILLIPS

Supreme Court of Minnesota, 1938. 203 Minn. 567, 282 N.W. 459, 119 A.L.R. 1120.

ROYAL A. STONE, JUSTICE. Action by indorsee, not a holder in due course, upon a promissory note. The complaint avers certain indorsements of payment which indicate that the statute of limitations had not run. The answer tendered judgment for an admitted balance, but interposed a defense as to the amount over and above that sum. The defense was wiped out as matter of law by the direction of a verdict for plaintiff for the full amount claimed. Defendant appeals from an order denying his motion for a new trial.

1. There has been some argument for defendant about the statute of limitations. That defense is out of the case on the pleadings. From the complaint it did not appear that the statute had run. If defendant wished any advantage of the affirmative defense of the statute, he should have said so by demurrer or answer. *Schmitt v. Hager*, 88 Minn. 413, 93 N.W. 110; see *Board of County Commissioners v. Miller*, 101 Minn. 294, 112 N.W. 276; *Dunnell*, Minn.Dig. (2 Ed. & Supp.) § 5661. On top of all that is defendant's formal admission by answer of liability for a concededly unpaid balance of the debt.

2. We come now to the important point. The answer sets up a defense in the nature of a release or an accord and satisfaction (executed in part at least) in these words:

"That in the early part of the year 1930, one Kooima, referred to in the complaint herein, held and owned the note described in the said complaint; at that time the plaintiff was the owner of a Chevrolet car, . . . and the defendant then was hopelessly insolvent and unable to pay his debts or obligations, all of which the plaintiff and Kooima then well knew. The plaintiff at that time approached the defendant and Kooima and offered to purchase said note from Kooima by turning over said car, valued at \$250 and no more. As a part of said transaction and as consideration for same defendant agreed to turn over to plaintiff livestock or produce of the value of \$250, or some livestock and the balance in cash, and to pay the car license on said plaintiff's car that he was then and there trading to Kooima. In

pursuance of said agreements, carried out, defendant turned over to plaintiff livestock and cash aggregating the amount admitted as paid in the complaint, and additionally paid the said car license fee to the plaintiff; all of which was a compromise and settlement of all liability on the part of the defendant on said note referred to in the complaint herein."

On the ground that the answer failed to plead a defense, plaintiff objected to the introduction of any evidence. The objection was sustained, and plaintiff's motion for directed verdict granted upon the ground that "a mere promise of a creditor to receive, and of the debtor to pay, a sum less than the debt in full satisfaction of it, is without consideration, and binds neither party." *Dunnell*, Minn.Dig. (2 Ed. & Supp.) § 39; *Trunkey v. Crosby*, 33 Minn. 464, 23 N.W. 846.

The doctrine thus invoked is one of the relics of antique law which should have been discarded long ago. It is evidence of the former capacity of lawyers and judges to make the requirement of consideration an overworked shibboleth rather than a logical and just standard of actionability.

In *Oien v. St. Paul City Ry. Co.*, 198 Minn. 363, 373, 270 N.W. 1, we made such observations concerning it that the bar should have been advised thereby that we were ready to label the proposition as a museum piece of the law and shelve it accordingly. As Mr. Dunnell suggests, Minn.Dig. (2 Ed.) 1932 Supp. § 39, the doctrine may have sprouted from "a mistake in reporting," in *Pinnel's Case*, 5 Co.Rep. 117, in 1602. It is characterized as "an artificial and groundless rule which has been consistently condemned." Allen, *Law in the Making* (Oxford, 1930) 189. Its true status is accurately stated in *Selected Readings on the Law of Contracts* (MacMillan, 1931) 325, as follows: "And the rule is commonly thought to be a corollary of the doctrine of consideration. But this is a total misconception. The rule is older than the doctrine of consideration and is simply the survival of a bit of formal logic of the mediaeval lawyers." The law has been changed by statute in at least ten of our states. *Id.* 328. But, being a judge made rule, no vested rights depending on it, judges are just as competent to get rid of it as the legislature.

There is more than one ground of logic and good law upon which this old and indefensible rule may be discarded. There is no reason why a person should be prevented from making an executed gift of incorporeal as well as corporeal property. Why should a receipt in full for the entire debt not be taken in a proper case as sufficient evidence of an executed gift of the unpaid portion of the debt? Again, where there is proof, or on adequate evidence a finding, that a completed legal act such as a waiver has set a matter at rest, why is it necessary to search for any consideration?

The modern view is that a new promise to pay a debt barred by the statute of limitations or discharged in bankruptcy is binding without consideration. I Restatement, Contracts, §§ 86, 87. In that field at least, judges have recognized the futility of their former efforts to

create a synthetic consideration where there was no actual consideration.

What has just been said may appear mere dictum, but judicial frankness justifies it to the end that both bar and public may be advised of our attitude.

3. We have no hesitation in saying that, while perhaps it might have been pleaded more clearly, the paragraph of the answer above quoted pleads a defense. It avers a new contract, not alone between plaintiff and defendant, but between both of them and Kooima, the payee of the note. Furthermore, it shows that the agreement was executed. The new tripartite contract pleaded had plenty of consideration. Kooima got an automobile instead of cash for his note. Plaintiff got the note. Insofar as defendant agreed to turn over livestock and pay the license tax he assumed new obligations which were not his as maker of the note. Hence, it is immaterial whether the obligation substituted by the new contract for the old one under the note would or would not be the latter's equivalent in money value.

For these reasons it was reversible error to exclude defendant's offered evidence in support of his defense and to direct a verdict for plaintiff.

Order reversed.

PATTRIDGE v. PALMER

Supreme Court of Minnesota, 1937. 201 Minn. 387, 277 N.W. 18.

ROYAL A. STONE, JUSTICE. Plaintiff appeals from a judgment, adverse to him in so far as it denies him recovery for two-thirds of his claim.

Plaintiff sued on a \$2,000 note dated December 1, 1924, executed in Los Angeles, Cal., and payable to the estate of Otis L. Pattridge, one year after date at Tracy, Minn. When the note was given, the estate of Otis L. Pattridge was in the probate court of Lyon county, in which Tracy is located. Plaintiff, the son, and his mother, the widow, were the heirs of Otis L. Pattridge, deceased. They were citizens and residents of Minnesota at the date of the note. Plaintiff ever since has continued resident in this state. His mother so continued until her death. During the same period, defendant has been a resident of California. October 5, 1925, before the note matured, the probate court assigned a one-third interest in the note to plaintiff and two-thirds to his mother, who died December 24, 1929. Her estate was probated, and, August 8, 1930, the probate court assigned her two-thirds interest in the note to plaintiff, who thereby became its sole owner.

Defendant claims that the cause of action on the note arose in California and that, as to the two-thirds interest which plaintiff acquired from his mother, his action is barred by the statute of limitations of California (section 337, Code of Civil Procedure of California), and

cannot be maintained because of Mason's Minn.St.1927, § 9201, which provides: "When a cause of action has arisen outside of this state, and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued."

The cited California statute provides that an action upon an obligation in writing must be commenced within 4 years. In the stipulated facts it is agreed that, if the cause of action here involved arose and accrued in California, the same arose and accrued on December 2, 1925, and by the law of California the statute of limitations of that state commenced to run on that date.

Plaintiff contends that the cause of action did not arise in California but in Minnesota, and therefore does not come within the provisions of Mason's Minn.St.1927, § 9201. The court below gave judgment in favor of plaintiff for one-third of the face of the note, together with interest, costs, and disbursements, amounting in all to \$868.10. Plaintiff appeals from the judgment.

The decision below is correct under the rule of *Luce v. Clarke*, 49 Minn. 356, 361, 51 N.W. 1162, 1163. See, also, *Powers Mercantile Co. v. Blethen*, 91 Minn. 339, 97 N.W. 1056; *Drake v. Bigelow*, 93 Minn. 112, 100 N.W. 664. That rule resulted from a construction of our statute (section 9201) as intending "to recognize the effect of the limitation laws of any other state whenever a cause of action has come under the operation of such laws, and been barred by them." The reasoning in support of that conclusion is this: "All statutes of limitation, in prescribing the periods, have reference for the beginning of such periods to the time when the opportunity to commence the action arises. And so there never was a statute of limitations for the purpose of which, in the case we have supposed, the cause of action would be deemed to have arisen as the debt fell due in the state where the debt was made payable, there being then in that state neither creditor to sue nor debtor to be sued; nor for the purpose of which it would be deemed then to have arisen in the state of the creditor's residence, there being no debtor there to be sued."

If the question were now to be decided by logic alone and the inquiry confined to an abstract consideration of the nature and essentials of a cause of action, a contrary result might well be reached. But for now over 50 years the statute, section 9201, as construed in *Luce v. Clarke*, *supra*, has been our law and we prefer not to change it.

Putting aside pure theory in the interest of realism, there is much to be said for the reasoning of Mr. Justice Gilfillan in *Luce v. Clarke*, *supra*. While no cause of action arises until the necessary breach or default of the obligor, it is not true that when that default occurs the result in respect to remedy is confined in territorial operation to the jurisdiction where it occurs. The result there may remain in the realm of theory, for no opportunity may ever come for enforcement there of the cause of action by suit thereon.

In this case defendant's default occurred December 1, 1925, in Minnesota, and the cause of action accrued or originated here. But did it also not arise (even though it did not originate) simultaneously in California? Certainly so, for defendant could have been sued instantly and successfully in that state. So a cause of action against defendant had "arisen" in California for the purpose of action and limitation of action. If, then, because of defendant's continuous residence there during the necessary period, that cause of action is barred in California, we are not prepared to say that the reasoning of our earlier decisions; that under section 9201 the action is also barred here, is so bad after all.

It is one of those numerous problems concerning which there is, and long has been, a division of judicial opinion. On which side the weight lies, we do not determine. See notes, 4 L.R.A.,N.S., 1029; 14 L.R.A., N.S., 776; 17 R.C.L. 691. But, inasmuch as so long ago this court had to and did take a position on one side of the fence, we simply decline now to jump over to the other side.

Another thought which occurs to us is that the statute of limitations is a measure of repose. We lessen substantially its intended effect if, upon the ground indicated, we overrule our earlier decisions. That idea has special application to this case where defendant, maker of the note, was a resident of California at the time it was signed and has remained such ever since, at all times being within reach of the process of the courts of that state.

"A judicial construction of a statute becomes a part of it, and as to rights which accrue afterwards it should be adhered to for the protection of those rights. To divest them by a change of the construction is to legislate retroactively." 2 Lewis' Sutherland, Statutory Construction (2d Ed.) § 485, following, *inter alia*, *Fairfield v. County of Gallatin*, 100 U.S. 47, 25 L.Ed. 544.

That rule has its ordinary application where a change of the judicial construction of a statute would operate adversely on vested rights. There are none such here, but the fact remains that, were we to overrule *Luce v. Clarke*, *supra*, and adopt the rule which the court there refused to adopt, we would as a practical matter be amending a statute which has stood with its present effect for over 50 years, with no thought on the part of the Legislature that it should be changed. We would be removing the bar and reinstating the remedy as to causes of action, the number and character of which nobody can now estimate. That observation shows that, whatever the criticism of *Luce v. Clarke*, *supra*, its error, if any, is on the side of enhancing the repose intended by a statute of repose. It did not have the injurious import of *Fitzgerald v. St. Paul, M. & M. R. Co.*, 29 Minn. 336, 13 N.W. 168, 43 Am. Rep. 212, overruled by *Rosse v. St. Paul & D. Ry. Co.*, 68 Minn. 216, 71 N.W. 20, 37 L.R.A. 591, 64 Am.St.Rep. 472.

It follows that the judgment should be affirmed.

PETERSON, JUSTICE (dissenting). . . . A cause of action cannot be said to arise, under the statute (section 9201), at more than one

place. The distinction between the place where a cause of action arises and the debtor's domicile is erased, as it must be, to reach the decision in this case. Both statute and decision law recognize the distinction. Thus in the Restatement, Conflict of Laws, § 604, comment b, it is said: "Statutes frequently provide that an action may not be maintained if it has been barred by the statute of limitations at the place where the action accrued, or, in some cases, at the domicile of the defendant."

Riser v. Snoddy, 7 Ind. 442, 65 Am.Dec. 740, considers a statute which provided that the bar should be that of the state of the debtor's domicile. Under our statute, the bar is that of the place where the cause of action arises. By holding that the cause of action arises at the debtor's domicile instead of at the place where it arises as a matter of law, the statute has been amended by judicially legislating to substitute the court's notion of what the law is or should be for the Legislature's express provision. We should not forget that we are construing a statute which by its implications restrains the process of construction. It is plain that the statute contemplates that the cause of action arises in one place. Therefore it is useless to talk about the possibility of a cause of action arising in more than one place because the statute allows to be asserted here the bar "of the place where it [the cause of action] arose." It does not provide for admitting the bar of the places where the debtor might have been or resided. See 3 Beale, Conflict of Laws, § 604.2, p. 1622.

3. The doctrine of stare decisis does not compel adherence to *Luce v. Clarke*, supra, and other cases which have followed it. The rule of that case is not only erroneous as a legal proposition, as the court admits, but it is unjust to our citizens in that they are deprived, by our decision law, of the right to assert their claims as against citizens of California under section 9201, while citizens of California are accorded the privilege by the decision law of that state of asserting their claims against the citizens of our and other states. See *McKee v. Dodd*, 152 Cal. 637, 93 P. 854, 14 L.R.A.,N.S., 780, 125 Am.St.Rep. 82. Of course no one will deny that the rule of stare decisis is a wholesome one and should not be minimized. In *State v. Great Northern Ry. Co.*, 106 Minn. 303, at page 335, 119 N.W. 202, 210, we held that hasty and crude decisions "ought to be examined without fear, and revised without reluctance," and that even a series of decisions is not always conclusive of what is the law. In 7 R.C.L. 1008, § 35, the rule is thus stated: "But the strong respect for precedent which is ingrained in our legal system is a reasonable respect which balks at the perpetuation of error, and it is the manifest policy of our courts to hold the doctrine of stare decisis subordinate to legal reason and justice, and to depart therefrom when such departure is necessary to avoid the perpetuation of pernicious error."

Nor do I think we should be frightened by our apprehensions. Mr. Justice Cardozo minimizes them. He says that the "picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the deci-

sion overruled, is for the most part a figment of excited brains," and that "the only rules there is ever any thought of changing are those that are invoked by injustice after the event to shelter and intrench itself." He observes that only "in the rarest instances, if ever, would conduct have been different if the rule had been known and the change foreseen." Cardozo, *The Growth of the Law*, p. 122. . . .

The decision below should be reversed.

EPSTEIN v. GLUCKIN

Court of Appeals of New York, 1922. 233 N.Y. 400, 135 N.E. 861.

CARDOZO, J. One Rose Gluckin made a contract to sell a house and lot in Brooklyn to Weinstein and Joblin. The price, \$12,550, was to be paid partly in cash and partly by the execution of a purchase-money bond and mortgage, payable in semiannual installments within a period of three years. The vendees assigned to the plaintiff their interest in the contract and in the land therein described. A suit for specific performance followed the vendor's refusal to convey. The Special Term gave judgment in favor of the plaintiff. The Appellate Division reversed on the ground that specific performance will not be granted at the suit of an assignee, unless the assignment of the contract is coupled with an assumption of its burdens. The result has been thought to be a deduction from cases which have conditioned relief in equity upon mutuality of remedy. We think the deduction must be rejected as unsound.

The assignee of such a contract succeeds by force of the assignment to the position of the original vendee as "the equitable owner" of the subject of the sale. *Lenman v. Jones*, 222 U.S. 51, 54, 32 S.Ct. 18, 56 L.Ed. 89; cf. *Elterman v. Hyman*, 192 N.Y. 113, 119, 120, 84 N.E. 937, 127 Am.St.Rep. 862, 15 Ann.Cas. 819. Equity, while recognizing his right, will not leave him powerless to vindicate it, by withholding the equitable remedies without which the right is ineffective. The anomaly is not presented of a trust which equity establishes, but refuses to enforce. Assignee and assignor alike, upon fulfillment of the agreed conditions, may have the aid of the court in converting the equitable right into a legal estate. For this, the precedents are ample. [Citing cases.] In such an exercise of jurisdiction, there is no risk of hardship or injustice to the vendor. The assignee, by the very act of invoking the aid of equity, assumes the duty of performance, and subjects himself to any conditions of the judgment appropriate thereto. [Citing cases.] At first the vendor had the obligation of the vendees, and of no one else. The obligation thus imposed has not been lost, but another has been added. Some one has at all times been charged with the duty of performance. The continuity of remedy is unbroken from contract to decree.

We hold, then, that specific performance was available to assignee as to assignor. Nothing to the contrary was intended by our decisions in *Wadick v. Mace*, 191 N.Y. 1, 83 N.E. 571, and *Levin v. Dietz*, 194

N.Y. 376, 87 N.E. 454, 20 L.R.A.,N.S., 251. Later cases have made it clear that the decisions there made will be closely confined, and not extended by analogy. If there ever was a rule that mutuality of remedy existing, not merely at the time of the decree, but at the time of the formation of the contract, is a condition of equitable relief, it has been so qualified by exceptions that, viewed as a precept of general validity, it has ceased to be a rule to-day. [Citing cases.] Stone, *The Mutuality Rule in New York*, 16 *Columbia Law Review*, 443; 3 Williston, *Contracts*, §§ 1433, 1436, 1440, and cases there cited. What equity exacts to-day as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or to defendant. Williston, *supra*; Stone, *supra*; Ames, *Lectures on Legal History*, p. 370; Lewis, *Want of Mutuality in Specific Performance*, 40 *Am.Law Reg. (N.S.)* 270, 382, 447, 507, 559; 42 *Am.Law Reg. (N.S.)* 591. Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end. The formula had its origin in an attempt to fit the equitable remedy to the needs of equal justice. We may not suffer it to petrify at the cost of its animating principle.

. . .

The order of the Appellate Division should be reversed.

HERBERT R. BAER AND GEORGE T. WASHINGTON, LAWYERS, TAXES AND THE SUPREME COURT

25 *Cornell L.Q.* 537-541, 546-547, 549-555 (1940).

RICHEY: . . . If I find a decision of the United States Supreme Court saying that white is white, and I tell my client to act accordingly, I get mighty sore when the Supreme Court turns around and says that white is black,² and my client is liable. It may be progress, but it looks like bad law to me.

MASON: Give me a concrete example. From where I sit, it looks as if the new Court has been handing down some pretty good law.

RICHEY: All right. I'm a tax man: I make my living telling people what the tax law is. I've got to know the law. I've got to set up trusts, advise about tax-free reorganizations, and so on. But nowadays I look up the cases—and I just can't rely on them. I don't know what to tell my clients.³

[Footnote 1 is omitted. Ed.]

² "In this Court dissents have gradually become majority opinions . . .," said Mr. Justice Frankfurter in his concurring opinion in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491, 59 S.Ct. 595, 83 L.Ed. 927, 120 A.L.R. 1406 (1939). This process has been referred to as the ". . . judicial miracle of the loaves and fishes, four becoming five," by Judge William Clark of the Third Circuit in *Rothensies v. Cassell*, 103 F.2d 834, 837 (C.C.A.Pa.1939).

³ Mr. Richey would undoubtedly obtain the friendly ear of Mr. Justice Roberts who said in his dissent in *Higgins v. Smith*, 308 U.S. 473, 487, 60 S.Ct. 355, 84 L.Ed. 406 (1940): "I am of the opinion that the courts should not disappoint the well-

MASON: You mean you can't tell whether a certain deal is taxable or not?

RICHEY: That's the trouble. I'm pretty sure most of them are going to be taxable. A client tells me he's about to put through a deal—says he doesn't want to pay a tax. I look up the law, I find a Supreme Court case in 1930 telling me that if the deal is put through in a certain way it will be nontaxable. And then I have a terrible feeling that that case isn't going to be followed any more. I tell my client I can't be sure the deal is tax-free. Then he goes to some other tax man, or he drops the deal. I don't get much of a fee when that happens. It's terrible for business—my business and the client's business. And that's not the worst of it. I'm worried about some of the things I set up in the good old days. I used to feel like the Rock of Gibraltar—I'd look up the law, and find a set-up that was tax-free. Then I'd put it through, and everybody was happy. But now they're coming along and taxing the very deals that the United States Supreme Court once said were not taxable—getting the very people that paid me good money for sound advice!

MASON: I'm afraid I don't know much tax law. You mean that a trust set up in 1930, and tax-free in 1930, is being taxed in 1940?

RICHEY: Let me explain. Take a simple case. It used to be the law that a man could set up a trust for his children or for his wife, transferring all his interest in the property to the trustee, but creating a possibility of reverter, so that he could get the property back in case they died before he did. In the old days before the Court Fight that was considered a complete gift at the time it was made, and if he died before his wife or children the property was not subject to a tax.⁴

MASON: You're speaking of the federal estate tax, I suppose?

RICHEY: Yes. The Court was saying that the death of the old man passed nothing to the children, and hence there was no transfer that could be taxed. His death simply extinguished a possibility of reverter. But I should explain that there *would* be a tax if the father gave the property to the children for their life, retaining a remainder interest in case the children predeceased him, but on the understand-

founded expectation of citizens that, until Congress speaks to the contrary, they may, with confidence, rely upon the uniform judicial interpretation of a statute. The action taken in this case seems to me to make it impossible for a citizen safely to conduct his affairs in reliance upon any settled body of court decisions." . . .

⁴ Richey undoubtedly has reference to *Helvering v. St. Louis Union Trust Co.*, 296 U.S. 30, 56 S.Ct. 74, 80 L.Ed. 29, 100 A.L.R. 1239 (1935), noted with disapproval in (1936) 40 Harv.L.Rev. 661, and *Becker v. St. Louis Union Trust Co.*, 296 U.S. 48, 56 S.Ct. 78 (1935). See on these cases Lowndes, *A Day in the Supreme Court with the Federal Estate Tax* (1936) 22 Va.L.Rev. 261, 279 et seq.; and Comment (1936) 45 Yale L.J. 684, 690. For articles on this subject, see Leaphart, *The Use of the Trust to Escape the Imposition of Federal Income and Estate Taxes* (1930) 15 Cornell L.Q. 587; Payne, *Inter Vivos Transfers and the Federal Estate Tax* (1933) 81 U. of Pa.L.Rev. 937; Rottschaefer, *Taxation of Transfers Intended to Take Effect in Possession or Enjoyment at Grantor's Death* (1930) 14 Minn.L.Rev. 453. See also note (1930) 5 St. John's L.Rev. 147.

ing that if he died before they did, it was all theirs. Of course, I never advised keeping a remainder interest.⁵

MASON: I'm a bit rusty on my property law, but if I understood you, a man could keep a possibility of reverter and avoid the tax, whereas if he kept a remainder there would be a tax.

RICHEY: Correct.

MASON: Is there really any difference in the two situations? Why should one man's estate be taxed and not the other's? Both of them are doing exactly the same thing.⁶

RICHEY: Not at all. The man who didn't get good tax advice kept a remainder and got nicked—my clients got good advice and kept a possibility of reverter, and weren't taxed. But the Supreme Court has changed its mind. Now they say that the tax must be paid in both cases!⁷

MASON: Well, I can see that if your clients have to pay a tax, when you've told them they wouldn't have to, they're going to be pretty sore. But they can't blame you, can they?

RICHEY: Maybe not, but what's to bring them back to me for more advice if my first advice doesn't hold up? I relied on the Supreme Court, my clients relied, and what good did it do? It's downright discouraging to people who look up the law and try to act accordingly. Justice Roberts dissented—more power to him—he had some pretty sound things to say on the subject.⁸

⁵ Apparently, Richey at all times avoided creating a vested remainder in the settlor and thus his clients found themselves beyond the reach of *Klein v. United States*, 283 U.S. 231, 51 S.Ct. 398, 75 L.Ed. 996 (1931). For a discussion of this case, see Surrey and Aronson, *Inter Vivos Transfers and the Federal Estate Tax* (1932) 32 Col.L.Rev. 1332, 1335 et seq. See note (1934) 43 Yale L.J. 491.

⁶ A similar view expressed by Mr. Justice Stone in his dissent in *Helvering v. St. Louis Union Trust Co.*, supra note 4, where he said (296 U.S. at 47, 56 S.Ct. 74): "Instead, by using a different form of words, he [the settlor] attained the same end and has escaped the tax. Having in mind the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers' device—what particular string—the decedent selected to hold in suspense the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not to form."

⁷ Richey unquestionably has in mind *Helvering v. Hallock*, 309 U.S. 106, 60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368 (1940), noted (1940) 53 Harv.L.Rev. 884, 34 Ill.L.Rev. 867, (1940) 26 Va.L.Rev. 830, and followed in *Bradlee v. White*, 31 F.Supp. 569 (D.Mass.1940). The decision covers three cases, *Hallock*, *Rothensies*, and *Bryant*, each involving a different type of agreement, with variations in the language used to preserve an interest for the settlor in case the beneficiary predeceased him. Mr. Justice Frankfurter, speaking for the majority, discarded the suggestion that the Court study the technical form of the grant in each instance and endeavor to catalogue each grant as coming under either the *Klein* or *St. Louis Union Trust Co.* doctrine. To do so, he said, would be to "multiply gossamer distinctions." (60 S. Ct. at 451). He twists the dagger by questioning the accuracy of Mr. Justice Sutherland's use of the term "possibility of reverter" in *Helvering v. St. Louis Union Trust Co.*, supra note 4.

⁸ "If there ever was an instance in which the doctrine of *stare decisis* should govern, this is it. Aside from the obvious hardship involved in treating the taxpayers in the present cases differently from many others whose cases have been decided or closed in accordance with the settled rule, there are the weightier con-

MASON: So you think the Supreme Court used to be right and now is wrong?

RICHEY: Let's not get into the question of whether the old decision was "right" or "wrong." It's enough to say that it was the law, that my clients relied on it, and that it looks mighty like legislation when the Court changes the law overnight and makes people pay a tax who weren't supposed to!

MASON: Legislation? One swallow doesn't make a summer.

RICHEY: Well, if you want more examples, there are plenty of them.

MASON: But suppose the Supreme Court—or, rather, the new judges—honestly think that the old rules are bad and should be changed. Are you going to tell them the old rules have to be followed whether they like them or not?

RICHEY: Yes, sir. Where people have relied, it seems to me to be just plain unconstitutional to change the law from what it was when they took action.²⁶ If Congress wants to change the law so as to catch future transactions, well and good. But as to past transactions, it's wrong—it's devilish—to go back and collect a tax. It's like the gold clause. Our government broke its sacred word of honor—a sin and a crime that will haunt us forevermore. You mark my words—it's just as McReynolds said, "The Constitution is gone."²⁷ . . .

siderations that the judgments now rendered disappoint the just expectations of those who have acted in reliance upon the uniform construction of the statute by this and all other federal tribunals; and that, to upset these precedents now, must necessarily shake the confidence of the bar and the public in the stability of the rulings of the courts and make it impossible for inferior tribunals to adjudicate controversies in reliance on the decisions of this court." Mr. Justice Roberts, dissenting in *Helvering v. Hallock*, supra note 7, 60 S.Ct. at 456.

See also the remarks of Mr. Hugh M. Bennett before the Cincinnati Conference on the Status of the Rule of Stare Decisis: "These cases [recent tax decisions of the Supreme Court] indicate more than a mere trend, in fact, they indicate to me a tornado in progress, wiping out what most of us thought were stout and sturdy foundations upon which our legal precepts have been built." (1940) 14 U. of Cin. L.Rev. at 232.

[Footnotes 9 to 25 are omitted. Ed.]

²⁶ Does Richey mean to imply that the court should be estopped? If so, he might well consider the language of Mr. Justice Frankfurter, speaking for the majority in *Helvering v. Hallock*, supra note 7. After stating that the court recognized in *stare decisis* "an important social policy" rooted in the "psychological need to satisfy reasonable expectations," he pointed out that none of the settlers had in fact relied on the St. Louis Union Trust decisions since their grants were made and their deaths took place before those cases. He added, however (60 S.Ct. at 451): "We do not mean to imply that the inevitably empiric process of construing tax legislation should give rise to an *estoppel* against the responsible exercise of the judicial process." (Italics supplied.)

²⁷ "In an extemporaneous speech bristling with scorn and indignation, Justice McReynolds, delivering the opinion of the minority in the gold clause cases, startled spectators in the Supreme Court chamber today with a blistering attack on New Deal currency policies. There were gasps as the 73-year old Tennessean, scarcely glancing at his manuscript, declared that Nero undertook to use a debased currency, asserted that the Constitution had 'gone' and expressed the 'shame and humiliation' of the minority consisting of himself and Justices Van Devanter, Sutherland and Butler." N. Y. Times, Feb. 19, 1935, p. 1, col. 7. In his reported

At this point, a man who has been sitting some distance away comes over and pulls up a chair. He is Professor Garvey Stiles, of the faculty of a well-known law school located near-by.

STILES: Good afternoon, Mr. Richey! Mr. Mason! May I join you?

MASON AND RICHEY: Certainly! Certainly!

STILES: I couldn't help overhearing part of your discussion. Your voices were raised somewhat above the usual level. I am deeply interested in some of the questions you have been discussing. As a matter of fact, I am preparing an article on the subject for one of the reviews. It seems to me that the solution of some, at least, of the problems raised lies in the adoption of a more frankly legislative technique on the part of the judiciary.

RICHEY: Good God!

STILES: Wait. Let me finish. Suppose that the Supreme Court does not wish to follow a previous holding, but still wishes to protect a litigant who has relied on the former statement of the law. Why should it not adopt the policy of following the old law in the instant case, but announcing a new rule for the future?

RICHEY: Is there any precedent for such a proceeding?

STILES: Yes. There is excellent authority for it. Judge Cardozo³¹ and Professor Kocourek³² both advocated it, and in fact the Supreme Court itself once considered it. Judge Cardozo wrote the opinion, as it happened. The Montana Supreme Court had held a defendant liable, but had announced a new rule for the future under which no li-

opinion in the same cases, Mr. Justice McReynolds said: "Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling." *Norman v. Baltimore & Ohio R. R.*, 294 U.S. 240, 381, 55 S.Ct. 407, 79 L.Ed. 885, 95 A.L.R. 1352 (1935).

[Footnotes 28 to 30 are omitted. Ed.]

³¹ Reference here is probably made to the address given by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals, before the New York State Bar Association on January 22, 1932. See Report of the New York State Bar Association (1932) vol. LV, pp. 263 et seq. He cited an instance in which the majority of the New York Court of Appeals, in order that injustice might not be done in the instant case, felt obliged to follow precedent with which it no longer agreed; the minority wished to overrule this precedent, with retroactive effect. He then added (p. 296): "But was there not a third thing that might better have been done, better than what the majority or the dissenting judge approved? Would it not have been the sensible thing to say, this judgment will be affirmed because injustice would otherwise be done to the seller of the ranges who relied upon a declaration of the law now believed to have been wrong, but as to all who propose to have like transactions in the future, we give notice here and now that they are not to trust to the mistaken declaration to guide their course hereafter?"

³² Professor Kocourek in a short article, *Retrospective Decisions and Stare Decisis* and a Proposal (1931) 17 A.B.A.J. 180, suggested the adoption of a statute which would expressly authorize the Supreme Court to announce a newer rule and yet apply the old rule in order to avoid injustice in the instant case. Mr. Justice Cardozo referred to Kocourek's proposed statute in his address to the New York State Bar Association, *supra* note 31, but said (p. 297): "I am not persuaded altogether that competence to proceed along these lines does not belong to the Judges even now without the aid of statute. If the competence does not exist, it should be conferred by legislation reinforced, if need be, by constitutional amendment."

ability would be imposed.³³ The defendant claimed that this was a denial of due process, and went to the United States Supreme Court. The Court said that there was no denial of due process.

MASON: What sort of case was it? A tax case?

STILES: No, it was a suit to recover an overcharge from a railroad.

MASON: You mean that the court let the plaintiff recover in this case, but then said, "Never again"?

STILES: That is correct.

MASON: So the Montana court said, "We're sorry. We have misled the bar."³⁴ There is no overcharge, and the railroad should not be liable. But since we've misled the bar, and let the plaintiff spend a little money on counsel fees, we'll give the plaintiff a big, fat judgment against the railroad. But we give notice that in the future we're going to enforce the correct rule and let the railroad off." Is that right, Professor?

STILES: Substantially so.

MASON: Sounds like rotten law to me. The court says to the defendant, "You really aren't liable under the law, but you've got to pay, because we can't have it said that the court misled the legal profession."

STILES: That's putting it rather harshly, Mr. Mason. After all, the law *did* impose liability,³⁵ as far as anyone knew, going by the old decisions. And the United States Supreme Court said that since it wouldn't have been a denial of due process to follow the old decisions, it wasn't a denial to follow the old decisions and then tag on the announcement that from now on the rule would be different.³⁶

³³ The professor is undoubtedly referring to *Montana Horse Products Co. v. Great Northern Ry.*, 91 Mont. 194, 7 P.2d 919 (1932). In an earlier decision, *Doney v. Northern Pac. Ry.*, 60 Mont. 209, 199 P. 432 (1921), the same court, in construing the identical statutory provision involved, had declared the carrier liable in a like situation. See the comment of Shartel, *Stare Decisis—A Practical View* (1933) 17 J.Am.Jud.Soc. 6.

³⁴ "Having written that opinion for the court [i.e., in *Doney v. Northern Pac. Ry.*, supra note 33], the author hereof expresses apology for having misled the profession, and welcomes this opportunity to correct the error made in interpreting our statutes. . . . We were then apparently satisfied with the correctness of the holding, and *thenceforth the profession and others were entitled to place reliance thereon*." (italics supplied.) Such were the humble words of Judge Galen in *Montana Horse Products Co. v. Great Northern Ry.*, supra note 33, at 205, 211.

³⁵ The professor here deprives us of what would undoubtedly be a very learned discourse on the nature of law. Apparently, he is of that school of thought which believes that judges create as well as discover law, for otherwise he would tell us in true Blackstonian style that the former decision never was the law. For a very recent discussion of this age-old problem, see Spruill, *The Effect of an Overruling Decision* (1940) 18 N.C.L.Rev. 199. See also Carpenter, *Court Decisions and the Common Law* (1917) 17 Col.L.Rev. 503.

³⁶ *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360, 85 A.L.R. 254 (1932), noted, (1933) 28 Ill.L.Rev. 277, (1933) 17 Minn.L.Rev. 811, (1933) 11 N.C.L.Rev. 323, (1933) 42 Yale L.J. 779. See also (1934) 47 Harv. L.Rev. 1402, 1412; (1939) 23 J.Am.Jud.Soc. 32. Professor Llewellyn in his article, *The Constitution as an Institution* (1934) 34 Col.L.Rev. 1, 37, referred to the decision as to one which "may yet become . . . epoch making." More recently, in

RICHEY: I admit that Montana case seems pretty raw to me, Professor, but I think your idea has some real possibilities in the tax field—providing always that we apply it for the protection of the taxpayer and not of the tax gatherer. In fact, come to think of it, I think it would be unconstitutional to apply such an idea in favor of the government. You couldn't have the court saying that a man would have to pay a tax just because the court had formerly announced a mistaken rule that a tax was due in such a situation, and then go on and say that in the future there would be a new rule of no tax liability. That would be ridiculous—in fact, I guess we'd all agree that that would be un-American. But the other way round—a rule for the protection of the taxpayer—I think you've got something there, Professor.

MASON: Is that your idea, Professor Stiles—a one-way street leading out of taxation?

STILES: Well, Mr. Mason, I had not thought of it in exactly that light. In tort cases, where a man has been non-negligent under older judicial decisions, but is considered negligent by a modern court, I have no great sympathy for him. He probably was not relying on a court decision when he did the act which is now held to be negligent.³⁷ But in contract cases and property cases, my sympathies are very much on the side of the man who has relied on court decisions.³⁸ It seems to me that he should be protected—that the court should in his case follow the decision on which he relied, even though it may at the

On Reading and Using the New Jurisprudence (1940) 40 Col.L.Rev. 581, 26 A.B.A.J. 300, he refers to the decision as one "fraught with destiny" and comments on the glacial slowness of the state courts in adopting its doctrine.

Mr. Justice Cardozo, in delivering the opinion in the *Sunburst* case, said (287 U.S. at 364): "A state in defining the limits of adherence to precedent may make a choice for itself between the principal of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions." Professor Kocourek, who had advocated the statute mentioned supra note 32, was extremely heartened by this decision. In his joint article with Mr. Koven, *Renovation of the Common Law through Stare Decisis* (1935) 29 Ill.L.Rev. 971, he no longer finds need for the suggested statute, but says p. 999:) "The courts already inherently have the power to accomplish this program. No statute is needed. No change in any constitution is required." For a comment on Kocourek's and Koven's article, see *Stare Decisis Freed from Baneful Effect*, (1935) 19 J.Am.Jud.Soc. 37.

³⁷ The professor probably has in mind such a case as *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 690, Ann.Cas.1916C, 440 (1916), or perhaps even *Wrie R. R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938). See in this connection, Cardozo, *The Nature of the Judicial Process* (1921) 146; Carpenter, *Stare Decisis and Law Reform* (1927) 1 So.Calif. L.Rev. 53, 61.

³⁸ Professor Stiles might well have quoted Professor Wigmore's *The Judicial Function*, a preface to Volume 9 of the *Modern Legal Philosophy Series* (1917), where it is said: "In so far as the faith of contracts is involved, and the security of property, there must be adherence to prior declarations of law *in so far as such faith and such security have been rested upon them*, but so far only." (P. xxxvii).

For an able article reviewing the situations in which overruling decisions are not given retroactive effect, see Freeman, *The Protection Afforded against the Retroactive Operation of an Overruling Decision* (1918) 18 Col.L.Rev. 230. Mr. Freeman concluded that courts generally were making every effort to avoid injustice by refusing to give retroactive effect to overruling decisions.

same time announce a new rule for the future. So the question is, are the tax cases like the contract cases?

RICHEY: Yes—emphatically, yes. The price paid for stock, for example, will often depend on whether the transaction can be put in the form of a tax-free reorganization. If it can, and there is no tax, a contract is made to reflect that situation. If later a tax is imposed, the expectations of the parties are upset.

MASON: But look at it from the other side. The government has to go on—somebody has to pay the taxes. If you let one man out of paying a tax, it means somebody else is going to have to pay a bigger tax. It seems to me that if the court concludes that a certain transaction is taxable, it should hold that the tax must be paid, even though the court has held the opposite in some previous case.³⁹ Otherwise, you will be putting an undeserved burden on the rest of the public.

RICHEY: Everybody's bearing an undeserved burden, if you should ask me.

STILES: Your thought is an interesting one, Mr. Mason. But is there not much to be said for a policy of encouraging reliance on past decisions, while at the same time permitting free expression of the court's opinion as to the rule to be followed in the future?⁴⁰

³⁹ Mason would heartily approve of the language of Justice Heffernan in *People ex rel. Rice v. Graves*, supra note 30 (242 App.Div. 123 at 136, 273 N.Y.S. 582): "We have not overlooked the relator's contention that a retrospective application of the decision in the Fox Film case works an apparent hardship as to him. We concede as much. The answer to that argument, however, is that the hardship in question is no greater on the relator than was that suffered by the State by the erroneous decision in *Long v. Rockwood*. *The ruling in that case deprived the State of revenue to which it was justly entitled.*" (italics supplied.) Similarly the Wisconsin court in *Laabs v. Wisconsin Tax Commission*, supra note 30 (218 Wis. 414 at 422, 261 N.W. 404), said: "To compel him to pay a tax which, by the doctrine of the Fox Film Corp. Case, the state was entitled to collect, does not seem to us to produce injustice or undue hardship. To deprive the state of revenue to which it was justly entitled upon a correct view of the law would produce injustice."

See also Professor Llewellyn's letter reviewing the proceedings of the Cincinnati Conference, supra note 8, in which he says: "Indeed, as to the tax cases in particular, it has seemed to me that one who has followed the current of opinion, judicial and other, over the past ten years, and has observed the pressure all over the country to open sources of revenue, must have been aware that *some* important shifts of ground have been impending." (1940) 14 U. of Cin.L.Rev. at 345.

⁴⁰ While much has been said for the policy advocated by the professor (see Kocourek and Koven, loc. cit. supra note 36), there has likewise been able criticism of the theory. Chief Justice von Moschzisker, in *Stare Decisis in Courts of Last Resort* (1924) 37 Harv.L.Rev. 400, points out that if an overruling decision is given only prospective effect legislation by the court is the result; the declaration of the rule to be followed in the future is mere dictum; and as a practical matter a litigant would not attempt to induce a court to overrule its former decision, for he would realize that the battle as to him is already lost, even should he succeed in obtaining a correct declaration of the law for the future. Kocourek and Koven counter by saying that if overruling a prior precedent is not judicial legislation, it is difficult to see how postponing the effect of the overruling decision is any more a matter of legislation. As to the argument that the rule announced for the future is mere dictum, it is said the court would feel morally bound to follow such a dictum and could be relied upon to adhere to it in the future. In regard to the practical effect on the individual litigant, it is conceded that the man with but a single case will not be inclined to appeal, but it is suggested that those business interests which are repeatedly involved in the operation of certain rules of law, as railroads, utilities.

MASON: How is this thing going to work? I take it that we have decision on a tax matter in 1930, holding a certain type of transaction is not taxable. Then many people, relying on the decision, enter into such transactions.

STILES: Correct.

MASON: Right. Now, in 1940, the Supreme Court wants to change the rule. What does it do? Wait for a case which brings up the exact point, or issue a decree?

STILES: Of course, it has to wait till a case comes up. It couldn't act in the absence of an actual case before it.

MASON: Well, we know that the taxpayers won't be anxious to bring the point up. They're hanging on to the old cases for dear life. So it will be the government which drags the taxpayer through the courts, knowing that the particular taxpayer will win, but hoping for a decision which will impose a tax in future cases.

STILES: Is that so different from present practice? Except, of course, that the government now hopes to win in the instant case as well as to obtain a new rule for the future.

MASON: Well, let's finish painting our picture. The Court's decision comes down, say, on November 1, 1940, at 10:30 A. M. So the public is now warned that while all transactions of a certain type occurring between the old decision date in 1930 and November 1, 1940, at 10:30 A. M. are tax-free, all similar transactions occurring after November 1, 1940, at 10:30 A. M. are taxable. Is that right?

STILES: Yes. It would be exactly like a statute—effective when officially promulgated.

MASON: I don't like your proposition, Professor, because it locks the barn door after the horse is stolen—or, rather, after it has died of old age. What good does it do to announce a new tax rule, effective after November 1, 1940? Everybody will run to friend Richey and be steered into other ways of getting out of taxes. And the government would lose its revenue on a big crop of transactions that took place between 1930 and 1940. No, sir, what's good law for the future is good law right here and now. In my opinion, a judge isn't living up to his oath of office if he doesn't decide each case according to the best that's in him—no matter if some other judge made a mistake ten years ago.⁴¹

and insurance companies, would find it to their interest to establish the new and correct rule for the future.

The Kentucky Supreme Court has on several occasions followed the Kocourek suggestion, citing *Great Northern Ry. v. Sunburst Oil & Refining Co.*, supra note 36, in support of its position. *Payne v. City of Covington*, 276 Ky. 380, 123 S.W.2d 1045, 122 A.L.R. 321 (1938); *World Fire & Marine Ins. Co. v. Tapp*, 279 Ky. 423, 130 S.W.2d 848 (1939).

⁴¹ Mason would undoubtedly agree with Mr. Justice Frankfurter who in *Helvering v. Hallock*, supra note 7 (60 S.Ct. at 453), said: ". . . we cannot evade our own responsibility for reconsidering in the light of further experience, the validity of distinctions which this Court has itself created."

Compare the remarks of Honorable Murray Seasongood before the Cincinnati

RICHEY: My feelings are a bit mixed on this idea, Professor. In the first place, I don't like to hear you say that the Court's decision is going to be exactly like a statute. It's un-American. The courts are there to decide cases according to the law—not to put through new legislation. I like to hear a court say that such and such was the law in 1930, is the law in 1940, and will be the law in 1950, unless Congress changes it by vote of the people's elected representatives. The law's the law—and it should stay put!⁴² But—and here's where I start to agree with you—if we're going to have judges who insist on changing the law, anything you can do to ease up the effects is O. K. with me. Just so my clients get the kind of treatment I told them they'd get—and the courts told them they'd get—that's all I ask. . . .

NOTE

See "Stare Decisis, Quo Vadis: the Orphaned Doctrines of the Supreme Court", by Judge Emmet H. Wilson, 33 Geo.L.J. 251 (1945), for a discussion of various subjects on which the Supreme Court has overruled itself in recent years.

WARRING v. COLPOYS

United States Court of Appeals for the District of Columbia, 1941.
74 App.D.C. 303, 122 F.2d 642, 136 A.L.R. 1025.

VINSON, ASSOCIATE JUSTICE. This is an appeal from the District Court's discharge of a writ of habeas corpus. The litigation grows out of the same earlier proceedings as did the case of *Warring v. Huff*,¹ also decided today.

Conference, supra note 8: "So I conclude, whether we like it or not, in constitutional cases, the doctrine of *stare decisis* nowadays is practically non-existent. When it is established in the United States Supreme Court that about everything is constitutional, taxable and, for administrative tribunals, permissible, the present majority of the Court may be expected to give greater effect in constitutional cases, to the doctrine of *stare decisis*. (Applause.)" (1940) 14 U. of Cin.L.Rev. at 243.

⁴² A man after Richey's heart was that Pennsylvania jurist, Judge Black, who in *Hole v. Rittenhouse*, 2 Phila. 411, 418 (Pa. 1856), voiced the following dissenting views: "The majority of this Court changes on the average once every nine years, without counting the chances of death and resignation. If each new set of Judges shall consider themselves at liberty to overthrow the doctrines of their predecessors, our system of jurisprudence (if system it can be called) would be the most fickle, uncertain and vicious that the civilized world ever saw. A French constitution, or a South American republic, or a Mexican administration would be an immortal thing in comparison to the short-lived principles of Pennsylvania law. The rules of property which ought to be as steadfast as the hills, will become as unstable as the waves. To avoid this great calamity, I know of no resource but that of *stare decisis*. I claim nothing for the great men who have gone before us on the score of their marked and manifest superiority. But I would stand by their decisions, because they have passed into the law and become a part of it—have been relied and acted on—and rights have grown up under them which it is unjust and cruel to take away." In this connection, see Freeman, loc. cit. supra note 38; Goodhart, *Case Law in England and America* (1930) 15 Cornell L.Q. 173; Radin, *Case Law and Stare Decisis: Concerning Präjudizienrecht in Amerika* (1933) 33 Col.L.Rev. 199.

¹ 74 App.D.C. 302, 122 F.2d 641, decided July 29, 1941.

Appellant was sentenced on February 24, 1939, upon pleas of guilty, to four criminal contempt charges. The first charge stated that appellant had used money to influence a prospective juror. The second charge stated that appellant had investigated the possibility of influencing another prospective juror. Admittedly, and as shown by the rule to show cause, these acts occurred some days before the trial commenced, and some distance from the court house, although within the District of Columbia.

Appellant contends that the court had no power to convict him in a criminal contempt proceeding on these charges, for the statute delineating the court's contempt power provides, *inter alia*, "Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their [courts'] presence, or so near thereto as to obstruct the administration of justice," (Ital. supplied.) Appellant then concludes that since he has served the valid sentences imposed upon him (the other two contempt sentences and a criminal conspiracy one), he should be discharged from custody on this writ of habeas corpus.

The "so near thereto" is old law as far as Congressional enactment goes. It was passed in 1831.³ It succeeded the Act of 1789 which provided simply that courts had power to punish contempts of their authority.⁴ The contempt provision of the Act of 1831 was Section 1. Section 2 of that Act listed certain acts which obstruct justice as offenses which were liable to punishment after indictment.⁵ Thus reading Section 2 with Section 1 and considering the background⁶ which brought about the Act of 1831, it is reasonable to believe that Congress meant that the courts should have a contempt power less broad than they possessed under the Act of 1789.

² 28 U.S.C.A. § 385.

³ "That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts." 4 Stat. 487-S, § 1.

⁴ "That all the said courts of the United States * * * shall have power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." 1 Stat. 83, § 17.

⁵ "That if any person or persons shall, corruptly, or by threats of force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence." 4 Stat. 488. Compare 18 U.S.C.A. § 241.

⁶ Particularly the impeachment and acquittal of Judge James H. Peck. This incident is often discussed in the contempt cases. For a recent discussion, see *Nye v. United States*, 61 S.Ct. 810, 85 L.Ed. 1172, decided April 14, 1941.

To learn how much less, it is natural to turn to the cases. We find that Section 1 of the Act of 1831 has had varying constructions and varying interpretations of those constructions.⁷ It is probably correct to say that throughout the remainder of the nineteenth century the provision received a continually broadening construction. In 1905 this court clearly held that the attempt to influence a juror no matter where fell within the Section.⁸ In 1911 this court reaffirmed that conclusion.⁹ There can be no doubt that the Supreme Court's "reasonable tendency" (to obstruct the administration of justice) test enunciated in the Toledo Newspaper¹⁰ case (1918) included all attempts to influence jurors wherever they were. And to our minds, at least twice¹¹ since then, the Supreme Court construed the Section in such manner as would make the acts of the present appellant subject to contempt proceedings.

Under this state of the law,¹² appellant, after pleading guilty, was convicted of criminal contempt. On April 14th of this year the Supreme Court, in the Nye¹³ case, said that the words "so near thereto" must be given a geographical not a causal construction. In reaching this conclusion the Court expressly overruled its Toledo decision. We believe that appellee has properly conceded that if appellant's wrongful acts had occurred on April 15, 1941, the court should conclude that it had no power to punish him in criminal contempt proceedings. This is particularly true in light of the emphasis in the Nye opinion placed on Section 2 of the Act of 1831 in construing Section 1. Section 2 makes the endeavor to influence jurors, the wrongful acts here, liable to punishment after indictment.¹⁴

Is one entitled to a discharge under a writ of habeas corpus where the court had power under the statutory construction to punish his acts in a criminal contempt proceeding at the time the acts were done and the sentence imposed, the court not having such power under a new statutory construction at the time the writ of habeas corpus was filed? That is the question in this case. And so far as we have been able to ascertain it is a question of first impression.

This is a habeas corpus proceeding, a collateral attack upon a previous judgment of the District Court, accepted at the time as final.

⁷ See cases cited and discussed in the majority and dissenting opinions of Nye v. United States, 61 S.Ct. 810, 85 L.Ed. 1172, decided April 14, 1941.

⁸ McCauley v. United States, 25 App.D.C. 404.

⁹ Pierce v. United States, 37 App.D.C. 582.

¹⁰ Toledo Newspaper Co. v. United States, 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186.

¹¹ Craig v. Hecht, 263 U.S. 255, 44 S.Ct. 103, 68 L.Ed. 293; Sinclair v. United States, 279 U.S. 749, 49 S.Ct. 471, 73 L.Ed. 938, 63 A.L.R. 1258. "The reasonable tendency of the acts done is the proper criterion," 279 U.S. at page 764, 49 S.Ct. at page 476, 73 L.Ed. 938, 63 A.L.R. 1258.

¹² "It is universally recognized that any act by which jurors are tampered with, whether by bribery, association, or other methods, constitutes a contempt, punishable by the court in summary proceedings." 63 A.L.R. 1269, 1270.

¹³ Nye v. United States, 61 S.Ct. 810, 85 L.Ed. 1172, decided April 14, 1941.

¹⁴ See Footnote 5, compare footnote 3.

It is increasingly evident that "jurisdiction" in the normal case is not subject to collateral attack.¹⁵ While habeas corpus is regarded more liberally than most forms of collateral attack, it is not to be used as an appeal or a writ of error.¹⁶ We believe that appellant would be entitled to discharge under the writ, if the District Court clearly did not have power to act.¹⁷ If there was doubt about the Court's power, a direct appeal would usually be the proper means of questioning the conclusion; extraordinary circumstances might justify the issuance of the writ.¹⁸ If the court had the power, appellant is not entitled to discharge.¹⁹

Thus the question in this case becomes whether the Nye case (1941) with its geographical construction of the statutory words took away the District Court's power to adjudge one guilty of contempt for these acts as of 1939, when in that year the Court had the power under the "reasonable tendency" construction.

When a case is decided it is expected that people will make their behavior conform to the rule it lays down and also to the principle expressed in so far as it can be determined. This is true whether the decision is regarded as "the law", "the best evidence of the law", or "a prediction of what the court will do next time". When hard cases arise under the principle, counter principles are emphasized, distinctions pointed out, and the determination of what is significant may become easier or more difficult. If, at last, the first decision is overruled, then there is new law, better evidence, or an enlightened basis for prediction. Those transactions which occurred between the two decisions, are, for the most part, accepted history. This is true even though a person had presented, in proper fashion, his case to the courts. His rights being finally determined, an attempt to reopen the question, in view of the new enlightenment, would be greeted with the powerful answer of *res judicata*. In one respect the new law is applied to an old set of facts. Traditionally, he who questioned the law or the best evidence of it is given the benefit of the new law or the better evidence of it. This is not always the case. There has

¹⁵ *American Surety Co. v. Baldwin*, 287 U.S. 150, 53 S.Ct. 98, 77 L.Ed. 231, 86 A.L.R. 298; *Stoll v. Gotlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104; *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263; *Jackson v. Irving Trust Co.*, 311 U.S. 494, 61 S.Ct. 326, 85 L.Ed. 297; *Boskey and Braucher, Jurisdiction and Collateral Attack*; October Term, 1939 (1940) 40 Col.L.Rev. 1006; (1940) 49 Yale L.J. 959; (1940) 53 Harv.L.Rev. 652. But see *Kalb v. Feuerstein*, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370, and *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894.

¹⁶ *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; *United States v. Jaeger*, 2 Cir., 117 F.2d 483. Compare *Hunter v. United States*, 48 App.D.C. 19.

¹⁷ *In re Snow*, 120 U.S. 274, 7 S.Ct. 556, 30 L.Ed. 658; *Ex parte Fisk*, 113 U.S. 713, 5 S.Ct. 724, 28 L.Ed. 1117; *Elliott v. United States*, 23 App.D.C. 456. Compare *Ex parte Cuddy*, 131 U.S. 280, 9 S.Ct. 703, 33 L.Ed. 154. Contrast *United States v. Jaeger*, 2 Cir., 117 F.2d 483.

¹⁸ *Bowen v. Johnston*, 306 U.S. 19, 59 S.Ct. 442, 83 L.Ed. 455; *Boskey and Braucher, Jurisdiction and Collateral Attack*; October Term, 1939 (1940) 40 Col.L.Rev. 1006, 1028-9.

¹⁹ *Sanford v. Robbins*, 5 Cir., 115 F.2d 435.

arisen, for example, when contract rights or property rights growing out of contracts are involved, the exception that the one who argued against the established law is not given the benefit of the change he helped bring about inasmuch as his adversary relied upon the previous law.²⁰ Such decisions apply the old law to the case at hand while establishing new law for the future. The Supreme Court has found no constitutional limitation on state courts proceeding in this manner.²¹ Federal courts have proceeded similarly.²² Obviously courts are free to follow the more traditional method.²³

Now if a legislature makes some law, again it is expected that people will conform to its provisions. If a court later construes the Act, it is expected, likewise, that behavior will be adjusted compatibly with the decision even though the court says that the statute means something other than what most people thought that it meant. There would be uncertainty and criticism if each person proceeded to conduct himself according to his own notion of what the statute meant in face of what the court had said. If later the court reverses its construction, a new angle of thought is often injected. There are those who reason that this is different from overruling a common law case.²⁴ After all, the statute always was the law. It is on a higher plane than the judicial construction of it. Since the two constructions are inconsistent, to be practical, the latter must be chosen as right and the former never was the law. That means that just about everybody was fooled. This reasoning would seem to be more in accordance with the traditional thought habit of the civil law than of the common law although both always tend to modify themselves toward each other. But courts have often concluded that to apply the new construction to a previous transaction would be unjust.²⁵

²⁰ 14 Am Jur., Courts, § 180. Snyder, *Retrospective Operation of Overruling Decisions* (1940) 35 Ill.L.Rev. 121, 130 et seq.

²¹ *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 77 L.Ed. 360, 85 A.L.R. 254.

²² *Gelpcke v. City of Dubuque*, 68 U.S. 175, 17 L.Ed. 520; *Taylor v. Ypsilanti*, 105 U.S. 60, 26 L.Ed. 1008. Compare *Montana Nat. Bank v. Yellowstone County*, 276 U.S. 499, 48 S.Ct. 331, 72 L.Ed. 673.

²³ *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 365, 53 S.Ct. 145, 77 L.Ed. 360, 85 A.L.R. 254.

²⁴ Snyder, *Retrospective Operation of Overruling Decisions* (1940) 35 Ill.L.Rev. 121, 134. Contrast *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 365, 53 S.Ct. 145, 77 L.Ed. 360, 85 A.L.R. 254.

²⁵ *State v. O'Neil*, 147 Iowa 513, 126 N.W. 454, 33 L.R.A., N.S., 788, Ann.Cas. 1912B, 691. See the case in which the Iowa Court changed its view, *McCullum v. McConaughy*, 141 Iowa 172, 119 N.W. 539. The new view was applied to the case at hand inasmuch as the defendant had acquired no property rights; the action was in equity to enjoin.

State v. Longino, 109 Miss. 125, 67 So. 902, Ann.Cas. 1916E, 371. See the case that changed the law, *State v. Rawles*, 103 Miss. 806, 60 So. 782.

State v. Bell, 136 N.C. 674, 49 S.E. 163. Compare change in construction of constitutional provision, *Payne v. City of Covington*, 276 Ky. 380, 123 S.W.2d 1045, 122 A.L.R. 321.

These cases apply the principle that all the law, the statute plus the judicial construction, in effect at the time of the transaction is critical. Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision* (1918) 18 Col.L.Rev. 230.

Compare, *United States v. Moser*, 266 U.S. 236, 45 S.Ct. 86 69 L.Ed. 282

If instead of a court changing the construction of a statute, the legislature passes a new act which in effect repeals the old one, there would be little doubt that the old act was the law until the new one was enacted. For example if the contempt statute of 1789 had still been in effect in 1939 when appellant was sentenced, and then on April 14, 1941, a new act of Congress had become effective which limited the court's power to breaches committed within the court house, probably no one upon second thought would have decided that appellant was entitled to discharge upon a writ of habeas corpus.

We have mentioned three types of alterations in the law: a court's overruling decision in the realm of common law, a court changing its construction of a statute, and the enacting of a new statute which partially or totally repeals an old act. In an attempt to complete the picture we point out a fourth situation and compare it with the instant problem.

It has been commonly thought that if an act is declared unconstitutional, it never had any force or effect. Yet a realistic approach is eroding this doctrine. In the instant case the reason why it is considered that appellant may be entitled to discharge is because the statute never gave the court contempt "jurisdiction" over his type of offense. Yet the courts had said there was jurisdiction. It is now said that there is no jurisdiction. But to say that there never was jurisdiction is to place the Nye case on a higher plane than, for example, the Toledo decision. True the Nye case is the law now and will be followed until changed. But the Supreme Court's construction had been otherwise. Those decisions that made it otherwise were on the same plane as the Nye case. All of the decisions were construing the statute. When a statute is declared unconstitutional it falls because it must yield to the basic, superior law. There is much more reason to argue that the unconstitutional statute never was the law. Yet today even such a statute is an operative fact and decisions made under its color have the blessing of *res judicata*.²⁶

All of the loose ends presented in this discussion on the effect of altering the law can be pretty well tied together when it is realized that law is not a pure science, that law loses its vital meaning if it is not correlated to the organic society in which it lives, that law is a present and prospective force, that law needs some stability of administration, that the law is all the law there is, that law is more for the parties than for the courts, that people will rely upon and adjust their behavior in accordance with all the law be it legislative or judicial or both.

These considerations should guide the lawmakers and the law-apppliers in making their determinations in respect of whether a change in the law is to be effective only for the future or also for the past,

²⁶ *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329.

and if the latter, to what extent.²⁷ And these considerations should be applicable to both sides of a potential litigation, civil or criminal, so that we may have our rules of the game as we go. The Supreme Court in the Nye case applied its new law to the litigation then before it. Inasmuch as personal liberty was involved and the courts usually apply law this much after the fact, such a result was meritorious. But the Court did not indicate whether its new law was to be applied to cases decided under the old law previous to its decision. That question is now for us, another court.

We believe that appellant is not entitled to discharge upon the habeas corpus writ. The District Court had the power to sentence him in a criminal contempt proceeding in 1939. The Nye case of 1941 should not be applied so as to sweep away that power as of 1939. This collateral attack, then, is unavailing. We reject the idea that if a court was considered to have the power in 1939 to do a certain thing under existing statutory construction, and in 1941 that construction is changed so that it no longer has the power to do that thing, it should be concluded that it never had the power in 1939. It has often been said that the living should not be governed by the dead, for that would be to close our eyes to the changing conditions which time imposes. It seems even sounder to say that the living should not be governed by their posterity, for that, in turn, would be downright chaotic.

Affirmed.

NOTE

For commentary on the principal case, see 26 Minn.L.Rev. 658 (1942).

BURADUS v. GENERAL CEMENT PRODUCTS CO.

Superior Court of Pennsylvania, 1946. 159 Pa.Super. 501, 48 A.2d 883.

Proceeding under the Workmen's Compensation Act by Mrs. Fannie Buradus, claimant, to recover compensation for the death of Edward Buradus, employee, opposed by the General Cement Products Company, employer, and the Maryland Casualty Company, insurance carrier. From a judgment for claimant on appeal from the Workmen's Compensation Board's order denying compensation, the employer and insurance carrier appeal.

HIRT, JUDGE. It was admitted that Edward Buradus died on April 5, 1943, from injury in the course of his employment with General Cement Products Company. Claimant in this case asserted that she

²⁷ Snyder, Retrospective Operation of Overruling Decisions (1940) 35 Ill.L.Rev. 121; Freeman, The Protection Afforded Against the Retroactive Operation of an Overruling Decision (1918) 18 Col.L.Rev. 230; (1933) 42 Yale L.J. 779; (1938) 25 Va.L.Rev. 210. Compare 89 A.L.R. 1514 et seq.; but see, United States v. Hill, 3 Cir., 70 F.2d 1006, certiorari denied 292 U.S. 634, 54 S.Ct. 719, 78 L.Ed. 1487; Compare Hosier v. Aderhold, 5 Cir., 71 F.2d 422 and Rives v. O'Hearne, 64 App.D.C. 48, 73 F.2d 984; Ellerbee v. Aderhold, D.C.N.D.Ga., 5 F.Supp. 1022.

was his common-law wife, and as such, was entitled to compensation. Her testimony was to this effect: After an acquaintance of three weeks, she agreed to marry Buradus. On November 16, 1941, she went to the house of John Powell, where Buradus roomed, and there in the presence of Powell and his wife, in words of the present, took him for her lawful husband and he, her, as his wife. Both Powell and his wife, as witnesses for claimant, recounted what was said by the parties on entering into the marriage contract. In formal respects the testimony of claimant and these witnesses met legal requirements in almost the exact language of our decisions. Claimant testified that she then went with Buradus to his room and that she continued to live with him there and was supported by him, up to the time of his death. Both the referee and the board accepted this testimony and found that claimant had met the burden of establishing a common-law marriage with Buradus. The board, however, considered itself bound by our dicta in *Fisher v. Sweet & McClain*, 154 Pa.Super.Ct. 216, 35 A.2d 756, 760, and on that ground alone refused an award. Following our order, affirming the judgment in that case, we, on January 27, 1944, gave notice of a prospective change in our construction of the Act of May 17, 1939, P.L. 148, in this language: ". . . that a valid common-law marriage cannot *hereafter* be entered into in this Commonwealth without first complying with the Act of 1939 and securing a marriage license pursuant to its provisions." There was no license to marry in the present case. But since the marriage contract, found by the board, was entered into *before* the date of our opinion in the *Fisher* case, the lower court held that the marriage was not invalidated thereby and entered judgment for claimant as on an award.

There has been a growing judicial impatience of the invitation to perjury in cases depending for recovery on marriage at common law and a progressive change in judicial view requiring higher degrees of proof where such marriages are asserted. In the Orphans' Court the proofs of a common-law marriage must be sufficient in substance and credibility to convince the mind and satisfy the conscience of a chancellor, whose findings become final when approved by a court en banc. In *re Krystkiewicz's Estate*, 310 Pa. 298, 165 A. 230. In workmen's compensation cases there must be substantial credible and competent testimony sufficient to satisfy a reasonable mind as adequate proof of a marriage at common law. *Wilbert v. Commonwealth Second Injury Reserve Account*, 143 Pa.Super.Ct. 37, 17 A. 2d 732. But it is still not difficult for unprincipled claimants to convert illicit relationships into honest marriages, to their advantage, on spurious claims for workmen's compensation or against the estate of a decedent. In the present case however, with the question of credibility of the witnesses resolved in favor of claimant, there is evidence sufficient to support the finding of a common-law marriage and we may not interfere with that finding, judicially, *Kiska v. C. H. Ziegenfuss Co., Inc.*, 154 Pa.Super.Ct. 100, 35 A.2d 532. But this claim is not atypical and is not above suspicion. Claimant at the

time of the alleged marriage was but little more than sixteen years old, although she said that her father consented to the marriage. She had an illegitimate child by a former alliance. In defendant's testimony, Buradus was described as a police character; he was frequently in conflict with the law, and, after the marriage, admittedly served him in the Allegheny County Work House on a conviction of larceny. He had left claimant in Pittsburgh, on another occasion after the marriage, and spent six months in Cleveland and Detroit. There is credible evidence also that he lived with two other women, in succession in meretricious relationship after the marriage with claimant and that he was not living with her at the time of his death.

Marriage without civil or religious ceremony (perhaps mistakenly accepted here, as the then common law of England, Cf. Bishop on Marriage, Divorce and Separation, § 390 et seq.; In re Roberts' Estate, 58 Wyo. 438, 133 P.2d 492) is still valid, under the common law of Pennsylvania. And although, with the ready means of transportation everywhere available, common-law marriage may be an anachronism in the present day—born as it was of the exigencies of pioneer life—we have not presumed to question it as an institution sanctioned by our law. The question here is whether we may give effect to our dicta in the Fisher case and declare claimant's marriage void for want of a license in accordance with the Act of 1939.

It well may be questioned that we, on a change of view in the construction of an act of assembly, have the power to limit the application of the revised construction to conduct occurring thereafter. In general, the construction placed upon a statute by the courts becomes a part of the act, *from the very beginning*. And when former decisions are overruled, the reconsidered pronouncement becomes the law of the statute from the date of its enactment. People ex rel. Rice v. Graves, 242 App.Div. 128, 273 N.Y.S. 582, affirmed in 270 N.Y. 498, 200 N.E. 288, certiorari denied, 298 U.S. 683, 56 S.Ct. 953, 80 L.Ed. 1403; City of Philadelphia v. Schaller, 148 Pa.Super.Ct. 276, 25 A. 2d 406, allocatur refused, certiorari denied 317 U.S. 649, 63 S.Ct. 43, 87 L.Ed. 522. Cf. Crawford Statutory Construction, § 184.

On any view, this is not a proper case in which to give effect to our dicta in the Fisher case since the parties were married before the date of the decision. What we there said was but notice of a prospective change in the law. By our language, limiting its intended application to common-law marriages contracted after the date of our opinion, claimant would have been justified in the belief that any contemplated change in legal construction would not affect her marital status nor require a subsequent marriage, duly licensed, to make it valid. We are not justified in now saying that her position of security, whether or not she did in fact rely on our language, was false. Although we well might direct the entry of an award on that ground, as did the lower court, frankness compels us to say that we, on re-examination of the question, have found our declaration in the Fisher case, untenable.

Our addendum to the Fisher case was pure dicta; the question of the general application of the 1939 act as a health measure was not involved and was not raised nor argued in that appeal. Because not necessary to the determination of that case our contemplated change in construction of the 1939 act did not become presently effective and did not work a change in the law, under the doctrine of *stare decisis*.

The incidents of a common-law marriage always have been, marriage, contracted without civil or religious ceremony, and without prior license (Freedman on Marriage and Divorce, §§ 48, 49) and until the Fisher case, our appellate courts have tacitly held that no statutes affect either the method of contracting a common-law marriage or its validity. The provision of the Act of June 23, 1885, P.L. 146, 48 P.S. § 2, that "no person within this commonwealth shall be joined in marriage, until a license shall have been obtained for that purpose," relates solely to civil and religious ceremonial marriages and marriages solemnized in writing by the parties themselves under § 4 of the act. 48 P.S. § 7. Common-law marriage was not affected by that act or its amendments. The 1939 act, requiring a serological test for syphilis, was also a marriage license regulation, though in the interest of public health. It is significant that the act does not refer to common-law marriages specifically. It therefore may not be presumed to make any change in the common law. Even though the expression of an act is in general terms, only such modification will be recognized as the statute clearly and definitely prescribes. In the absence of express declaration, the law presumes that the act did not intend to make any change in the common law, for if the legislature had that design they would have expressed it.¹ *Pettit v. Fretz's Ex'r*, 33 Pa. 118. *Bishop on Marriage, Divorce and Separation*, § 424, is authority for the statement that a common-law marriage is valid notwithstanding a statute, unless the statute contains express words of nullity. Cf. L.R.A.1915E 19; 39 A.L.R. 538.

Moreover the history of the act indicates that the legislature did not actually intend to include common-law marriage within its purview. Earlier in the session of 1939, an act, identical in material respects, was passed by both houses. Governor James vetoed the measure on the ground that it made no reference to common-law marriage, as well as because of defects in the prescribed procedure on summary conviction for violation of the act. In a redraft, the suggested changes of procedure were made but the language of the prior bill was not modified in other respects, in the act which became the law on May 17, 1939. There was no discussion on the floor of either the Senate or the House during its passage. By ignoring the suggestion of the governor, no inference is possible other than that the legislature deliberately refused to make any change in the

¹This rule of statutory interpretation has been widely adopted, 3 *Sutherland Statutory Construction*, 3rd Ed., § 6201. It has been applied without exception in Pennsylvania.

law of common-law marriage in that act. In 1943 the legislature had before it a suggested revised marriage code which proposed specifically to abolish common-law marriage. The provisions of the 1939 act were incorporated in it. Though passed by the House, it never reached the floor of the Senate. That proposed act is of no significance except to demonstrate that the legislature again had the question of common law marriage before it for consideration and did not see fit to make any change in the existing law. On March 9, 1945, P.L. 41, the legislature reenacted the 1939 act without material changes in language. Later in the same session it incorporated the same provisions, almost verbatim, in an "Act for the prevention . . . of venereal diseases". This Act of May 16, 1945, P.L. 577, 35 P.S. § 587.6 repealed the 1939 act as well as the prior 1945 act. There is no presumption, in the absence of a change in language, of a legislative change of intent in the Act of May 16, 1945, to require license as a prerequisite to a valid common-law marriage. The inference is inescapable that the legislature with our suggested change before it, chose to leave the law as it was.

Because of our high respect for the wisdom of our late President Judge, in his development of the law and its practical application, we have stated these conclusions with much reluctance. Our experience with cases such as this has been unsatisfactory and we are in agreement that some badge of integrity should be required by law to identify the rarely actual common-law marriage and distinguish it from the spurious; thus, removing the temptation from finders of facts of rewarding "imposture by fiction". But whether the suggestion of the Fisher case is to be given effect will be exclusively for the legislature to determine.

On amendment, by substituting General Cement Products Company as defendant employer (in accordance with agreement of counsel) the judgment is affirmed.

ROBERT HILL FREEMAN, THE PROTECTION AFFORDED AGAINST THE RETROACTIVE OPERATION OF AN OVERRULING DECISION

18 Colum.L.Rev. 230, 250-251 (1918).

Summary.

Our review of the cases discloses that the doctrine of *stare decisis*, generally accepted as it is by our courts, forms a strong, if only moral, force to prevent the capricious change of decisions by a Court. Further, that where a change is made, protection is afforded in various ways against the retroactive operation of the overruling decision. We may tabulate the results as follows:

1. In cases originating in the federal courts, the last decision of a state court, overruling former decisions, will not be followed where to do so would interfere with rights acquired in reliance upon the first decisions.

2. The state courts, on one theory or another, almost universally protect property rights acquired in reliance upon a statute or constitutional provision as then interpreted by the courts.

3. Men are not punished as criminals for acts which were done when the highest court of the state had declared them lawful.

4. The tendency is to extend the same protection to rights acquired in reliance upon decisions interpreting the common or unwritten law.

From the above results it is not too much to say that ultimately, where the courts feel impelled to abandon a position formerly taken, all rights will be protected against the retroactive effect of the overruling decision, and the people may rely upon the court decisions as announcing the law by which they are to be governed. True, it may like a statute, be repealed; but the repealing decision will, like the repealing statute, operate prospectively only.

The doctrine of *stare decisis* will not cover all cases. There will be cases where a change of ruling is desirable or necessary; and where legislative action to work the change will be impracticable. In such cases, the courts should be free and feel free to make the change. A doctrine which would permit the saving of rights based upon the first decision would make them the less reluctant to do so.

There are, of course, serious objections to be overcome. Constitutional difficulties have been suggested. A whole hearted repudiation of the theory that the courts only declare law—a theory which, as we have seen has already been abrogated and eaten into by exceptions—may be necessary. The suggestion that the courts have power to announce a new and better rule for regulating future transactions, while applying the old rule to the case in hand, may be accepted. Or, as suggested above, the courts may take the view that an overruling decision may operate so as to deprive a person of his liberty or property without due process of law. Certainly the tendency of the courts as reflected in the cases, some of which we have discussed, is to the view that the advantages of the result outweigh the objections to the basis.

VAN VRANKEN v. HELVERING

Circuit Court of Appeals of the United States, 1940. 115 F.2d 709.

L. HAND, CIRCUIT JUDGE. This appeal brings up a deficiency in income taxes assessed against the taxpayer for the year 1935, and depends upon what shall be taken as the "basis" in calculating her gain or loss upon the sale in that year of certain shares of stock, inherited from her father as part of a remainder, limited to her in a testamentary trust. He died on August 16, 1915, having devised and bequeathed the residue of his estate to his executors in trust for the life of his wife, the taxpayer's mother; then upon her death "to transfer, deliver and pay over to my daughter, Elsie Van Vranken" (the taxpayer) "if she shall outlive my wife, the remaining equal one-half part of

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the remainder of my estate. . . . If my daughter, Elsie Van Vranken, should die during her mother's lifetime, leaving lawful issue her surviving, then upon the death of my wife, I order and direct my said Executor and Trustees to transfer, deliver and pay over the remaining one-half part to the issue of my daughter, Elsie Van Vranken, in equal shares." The testator's wife out-lived him and died on April 26, 1930; shortly thereafter the trustees delivered to the taxpayer the shares now in question, which, as we have said, she sold in 1935. The only question is whether the "basis" for computing her gain or loss is the value of the shares at the time of the testator's death or at the time of his wife's. In the first event there would be a gain; in the second, a loss. The Commission held that the date of the testator's death fixed the "basis," and so the Board found, basing its decision, however, upon the law of New York under which it held that the remainder was vested. We do not find it necessary to consider that question because we think that the testator's death is the proper date, even if the remainder was contingent.

Section 202(a) (3) of the Revenue Act of 1921, 42 Stat. 229, defined the "basis" for the sale of property "acquired" by will or descent as its value "at the time of . . . acquisition"; and the Acts of 1924 and 1926 (§ 204(a) (5)) 26 U.S.C.A.Int.Rev.Acts, pages 8, 152, were the same. In 1928 this was changed; specific bequests and all real property, whether passing by devise or descent, were valued as of the death of the decedent, and so was all property passing from him to his "state"; but all else was valued as of "the time of the distribution to the taxpayer." § 113(a) (5), 26 U.S.C.A.Int.Rev.Acts, p. 380. The Act of 1932 was in the same form, 26 U.S.C.A.Int.Rev.Acts, page 515, but in 1934 Congress went back to the original, 26 U.S.C.A.Int.Rev.Acts, page 697, which it has repeated in the Acts of 1936 and 1938, 26 U.S.C.A.Int.Rev.Acts, pages 860, 1048. The phrase, "at the time of acquisition," seems to have been borrowed from the regulations promulgated under the Revenue Act of 1918 (Art. 56 of Regulations 45) where it first appeared. Very shortly thereafter the Commissioner construed this regulation as meaning the death of the testator, when the remainder was vested, and the occurrence of the limiting condition, when it was contingent. The first intimation to the contrary was in the regulations of 1934, which provided that the date of the decedent's death should be that of "acquisition" whether the remainder was vested or contingent (Article 113(a) (5), Regulations 86) and this all later regulations have repeated.

There had, meanwhile, grown up a large body of judicial construction of the acts before 1934 which uniformly accepted the administrative ruling. . . . Under the well-recognized canon of statutory construction that the reenactment of a statute incorporates preceding judicial interpretations, a strong case can therefore be made against the regulation of 1934, which Judge Soper put most persuasively in *Reynolds v. Commissioner*, 4 Cir., 114 F.2d 804. Moreover, although an argument the other way might have been based upon the change in 1934 from "distribution" back to "acquisition," the Senate Committee

Report shows that Congress was then concerned only to end the option which "distribution" had given to executors to choose the most profitable time for setting up testamentary trusts. *Brewster v. Gage*, 280 U.S. 327, 50 S.Ct. 115, 74 L.Ed. 457, had decided that under the statute before 1928 a legatee "acquired" his bequest at the death of the testator, and Congress wished to make this the date for trustees in all cases. Were it not for the change in the attitude of the Supreme Court towards the common-law distinction between contingent and vested remainders (*Helvering v. Hallock*, 309 U.S. 106, 60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368) we should therefore find it difficult to escape the force of the reasoning in *Reynolds v. Commissioner*, *supra* (114 F.2d 804).

It is true that the question before the Supreme Court was very different from that at bar; it did not even concern income taxes at all; it was whether a remainder limited upon a life estate could be said to have passed by a transfer "intended to take effect in possession or enjoyment" at the settlor's death, when that event, by determining that the remainderman was the survivor, ended the possibility that the settlor might take the property. But in deciding that question the court declared that the whole distinction of the common law between vested and contingent remainders was irrelevant; it was enough that the remainder, which had before been subject to defeat, became indefeasible by the settlor's death; that alone was a "transfer." The supposititious difference between an existing interest, subject to a condition, and an interest, non-existent before condition fulfilled, was said to preclude "a fair and workable tax system"; the "elusive and subtle casuistries" which it involved might "have historic justification," but were of no moment "for tax purposes" (309 U.S. page 118, 60 S.Ct. page 450, 84 L.Ed. 604, 125 A.L.R. 1368). In the case at bar we have substantially the same question though in a different form; we are to say whether a remainderman "acquires" any interest before it becomes certain that he will ever enjoy it. Whether one is forced to regard conditional existence as non-existence is after all a question in ontology which judges are ill fitted to answer. Practically a conditional interest "exists" in the sense that the holder can sell it and—if the condition is not his own survivorship—can bequeath it; and, as a new matter divorced from history, we should say that its "acquisition" dates from the time when he achieves that much control over it, like an unconditional interest whose enjoyment is merely postponed. But the problem is not that, for nobody disputes that under the rulings on which the taxpayer relies a "vested" remainder, "subject to be divested," is "acquired" when it "vests." We may start with that as datum and have only to say whether there is any difference for the purposes of taxation between such a remainder and one which the common law would have regarded as "contingent" *ab initio*; the choice is not between a conditional and an unconditional interest *simpliciter*, but between conditional remainders as they were differently classified by the phantom casuistry of the common law. That distinction we under-

stand the Supreme Court to have repudiated as a determinant of tax liabilities.

It may indeed be reasonable *à priori* to say that our fiscal system was meant to fit upon the old mould as a whole; convenience in administration might make up for the lame correspondence between concept and polity. If *Helvering v. Hallock*, *supra* (309 U.S. 106, 60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368), had merely decided that the later cases were erroneously decided under the ancient rubrics, its decision would not be helpful here. But that was not the measure of the holding; it meant to jettison the distinction as an archaism no longer appropriate to existing needs; and it is as little appropriate to § 113(a) (5) as to § 202(c) of the Estate Tax. Moreover, quite aside from the asymmetry which its survival would create, it would be particularly unsuitable for salvage here. Any increase in value between the testator's death and the death of the life holder—or whatever other event may put an end to the condition upon the remainder—is certainly a “gain” if it is “realized.” One may debate the propriety of taxing it to the remainderman rather than to the estate; but one cannot dispute that it is properly taxable to some one under the system as it stands. Nor is this conclusion shaken by the fact that the doctrine will permit the deductions of losses as well as the addition of gains, for *prima facie* all “realized” changes in value are factors in computing income.

The canon which the taxpayer invokes is sometimes a help, but we must never ignore the more important, though impalpable, factors. Indeed, nothing is so likely to lead us astray as an abject reliance upon canons of any sort; so much the whole history of verbal interpretation teaches, if it teaches anything. At times one is more likely to reach the truth by an unanalyzed and intuitive conclusion from the text as a whole, than by following, step by step, the accredited guides. Therefore, while without *Helvering v. Hallock*, *supra* (309 U.S. 106, 60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368), we should probably have felt obliged to hold that the statute incorporated the earlier rulings of the lower courts, it appears to us that, with that decision before us, we should not preserve what would now be no more than an egregious exception in the fiscal scheme as a whole.

Order affirmed.

NOTES

1. Cf. the effect given to *Helvering v. Hallock* in the principal case to Dean Pound's remarks at p. 30, *supra*.

2. See discussion of *Helvering v. Hallock*, 309 U.S. 106, 60 S.Ct. 844, 84 L.Ed. 604 (1940), in 31 Minn.L.Rev. 278 (1947).

D. Some Cases of "Unprecedented" Law Making

OPPENHEIM v. KRIDEL

Court of Appeals of New York, 1923.
236 N.Y. 150, 140 N.E. 227, 28 A.L.R. 320.

Appeal from Supreme Court, Appellate Division, First Department.

CRANE, J. Can a wife maintain an action for criminal conversation as well as a husband? This is the question presented by this appeal.

The plaintiff and her husband were married in 1884 and had one child, who was married in 1909. They lived together in the same house or apartment until 1917. It can be gathered from the evidence that in 1913 the parties had ceased to live together as husband and wife. It is about this time that the defendant, a widow with children, entered into the lives of these two parties. From 1913 until a final separation in 1917, the husband seems to have lost his love and affection for his wife. During this time he was seeing the defendant with more or less frequency. Intimacy increased with the years until in January, 1919, he and the defendant were found in his apartment in New York City under such circumstances as to leave no doubt that they had committed adultery. The fact is conceded.

The plaintiff, Mrs. Jennie M. Oppenheim, thereupon brought this action against Mrs. Martha Kridel, the guilty party, alleging in her complaint:

"That the defendant, well knowing said Myron H. Oppenheim to be the plaintiff's husband, and maliciously and willfully intending to injure the plaintiff and deprive her of the comfort, society, aid, assistance, and support of her said husband, and to alienate and destroy his affection for her, heretofore, and on or about the 12th day of January, 1919, and on divers other days and times during the last four years last past, and before the commencement of this action, at the premises No. 207 West Fifty-Sixth street, borough of Manhattan, city of New York, and at divers other premises and places, wrongfully and wickedly, and without the privity or connivance of plaintiff, debauched and carnally knew the said Myron H. Oppenheim, by means whereof the affection of the said Myron H. Oppenheim for the said plaintiff was wholly alienated and destroyed, and by reason of the premises the plaintiff has wholly lost the affection, comfort, society, aid, assistance, and support of her said husband."

On the trial the justice refused to consider the case as one for alienation of affections and submitted it to the jury solely as an action for criminal conversation. He charged:

"You are not to concern yourselves with any question as to whether or not the defendant alienated the affections of plaintiff's husband. There is now no such question in this case."

He further said:

"It is only necessary for the plaintiff to prove her marriage and the criminal intercourse between her husband and the defendant, and that such criminal intercourse was without her consent."

The jury, however, were permitted to consider the loss of the husband's affections and his society and the mental anguish and disgrace sustained by the plaintiff, if any, on the question of damages.

On appeal the judgment for the plaintiff, entered upon the verdict of a jury in her favor, was reversed by a divided court, and the complaint dismissed under a ruling that an action for criminal conversation could not be maintained in this state by a wife. We have arrived at the conclusion, after a full review of the authorities, that, whatever may have been the rights of the wife in this particular under ancient law, there is no reason or law against her maintaining such an action to-day so long as the husband may do so.

At common law the wife had no cause of action against a woman for alienating the affections of her husband or for the act of adultery committed with him known by the technical name of an action for criminal conversation. The husband could bring such action against a man for enticing away the affections of his wife or for committing adultery with her. Some of the reasons assigned as the basis of the action by the husband for criminal conversation sound somewhat strange in our ears to-day. The gist of the action was the possibility that by the infidelity of a wife the husband might be called upon to support illegitimate children, or the legitimacy of his own offspring be cast into doubt. The husband, so it was said, had a property in the body, and a right to the personal enjoyment, of his wife, for the invasion of which right the law permitted him to sue as husband. The wrongful act was treated as an actual trespass upon the marital rights of the husband, although the consequent injury to him was on account of the corruption of the body and mind of the wife. *Tinker v. Colwell*, 193 U.S. 473-483, 24 S.Ct. 505, 48 L.Ed. 754. These old authorities and reasons have carried the respondent to the logical conclusion which he states in his brief as follows:

"The husband's cause of action is based upon his proprietary right in the person of his wife. . . . The assertion that husband and wife are now equal in the eyes of the law has no bearing on the cause of action for criminal conversation, which was predicated upon the possessory right of the superior being in the body of the inferior."

The basis for some of these apparently harsh reasons mentioned in the early common law arose out of forms of action and difficulties in procedure. They were written into the law at a time when forms of action were rigid and limited, and fictitious reasons were sought to justify relief under existing, but inappropriate, forms. The adultery was treated as an assault upon the person of the husband. This search for a remedy was referred to as follows:

"The assault *vi et armis* is a fiction of the law, assumed at first, in early times, to give jurisdiction of the cause of action as a trespass,

to the courts, which then proceeded to permit the recovery of damages by the husband for his wounded feelings and honor, the defilement of the marriage bed, and for the doubt thrown upon the legitimacy of children." *Tinker v. Colwell*, 193 U.S. 473, 481, 24 S.Ct. 505, 506 (48 L.Ed. 754).

Barring the fictions which apply only to procedure, whatever reasons there were for giving the husband at common law the right to maintain an action for adultery committed with his wife exist to-day in behalf of the woman for a like illegal act committed with her husband. If he had feelings and honor which were hurt by such improper conduct, who will say to-day that she has not the same, perhaps a keener, sense of the wrong done to her and to the home? If he considered it a defilement of the marriage bed, why should not she view it in the same light? The statement that he had a property interest in her body and a right to the personal enjoyment of his wife are archaic, unless used in a refined sense worthy of the times, and which give to the wife the same interest in her husband. The fiction of assault, whereby courts were given jurisdiction, has long since vanished, except for historical interest. The danger of doubt being thrown upon the legitimacy of the children, which seems to be the principal reason assigned in all the authorities for the protection of the husband and the maintenance of the action by him, may be offset by the interest which the wife has in the bodily and mental health of her children when they are legitimate. Science to-day teaches us the dire consequences which sometimes follow promiscuous intercourse by a man. It is common knowledge that the sins of the father are sometimes visited, not only upon the children, but upon the wife, in the resultant diseases contracted through breaches of the marriage contract. The husband must not have discredit thrown upon the legitimacy of his children. The wife should have no doubt about the health and cleanliness of her husband or of her offspring. Legitimacy is important. Children of sound mind and body are equally as important.

It is said in this case that the affections of the husband and wife had already been alienated, and that the defendant could cause the wife no harm by her illegal relations with the husband, as the husband had ceased to live with the wife and his love for her had already vanished. Such a proposition loses sight of the fact that the parties were still husband and wife, the marriage bonds had not been dissolved, and that there was always the possibility of reconciliation rendered perhaps too remote by the defendant's illicit relationship.

So far as I can see, there is no sound and legitimate reason for denying a cause of action for criminal conversation to the wife while giving it to the husband. Surely she is as much interested as the husband in maintaining the home and wholesome, clean, and affectionate relationships. Her feelings must be as sensitive as his toward the intruder, and it would be mere willful blindness on the part of the courts to ignore these facts. Both the courts of this state and the statutes have recognized this change in the status, rights, and privileges of a married woman. As stated before, the common law gave a married

woman no action either for alienation of affections or for criminal conversation. Yet this court has recognized that under the statutes giving her the power to maintain actions in her own name she may now sue another woman for alienating the affections of her husband. *Bennett v. Bennett*, 116 N.Y. 584, 23 N.E. 17, 6 L.R.A. 553. It is true that this case was not decided upon the theory that the Married Women's Acts of 1860 (Laws 1860, c. 90) and of 1862 (Laws 1862, c. 162), permitting her to sue in her own name, gave her a cause of action which she did not previously possess. The question put and answered by that case was the following:

"Can it be sustained upon the theory that the right of action belongs to the wife according to the general principles of the common law and that she may now maintain it, being permitted to sue in her own name?" 116 N.Y. 584, 589, 23 N.E. 17, 18 (6 L.R.A. 553).

In answering this question in the affirmative, this court proceeded upon a theory that the right always existed in the woman at common law, but that she could not enforce it by reason of the rules of practice which prohibited her from maintaining actions, and which also gave to the husband her property. This was pure theory, as it is difficult to understand how any substantial right could exist at common law for which there was no remedy afforded. The fact is the *Bennett Case* established the rule that, as the husband could sue for the alienation of his wife's affections, there was no reason why the wife should not also maintain such an action under our forms of procedure, when the results were as injurious to her from the alienation of her husband's affections as they would be to the husband by the alienation of her affections. The question was again asked in the opinion in that case:

"Has she such a legal right to the conjugal society of her husband as to enable her to recover against one who wrongfully deprives her of that right?"

And the court again answered by these general reflections upon the facts as they existed and were known by everybody to exist:

"The actual injury to the wife from the loss of consortium, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship, and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation not only of a natural right, but also of a legal right arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy, not provided by statute, but springing from the flexibility of the common law and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of

the husband. As the wrongs of the wife are the same in principle and are caused by acts of the same nature as those of the husband, the remedy should be the same. What reason is there for any distinction? Is there not the same concurrence of loss and injury in the one case as in the other? Why should he have a right of action for the loss of her society unless she also has a right of action for the loss of his society? Does not the principle that 'the law will never suffer an injury and a damage without a remedy' apply with equal force to either case? Since her society has a value to him capable of admeasurement in damages, why is his society of no legal value to her? Does not she need the protection of the law in this respect at least as much as he does? Will the law give its aid to him and withhold it from her?" 116 N.Y. 584, 590, 23 N.E. 17 (6 L.R.A. 553).

What is here said about "natural right" and the "flexibility of the common law" is equally applicable to an action for criminal conversation. If the husband has such an action, why should not the wife? The reasons for giving the action to the one are as potent for giving the action to the other, as I have above demonstrated. The common law is not rigid and inflexible, a thing dead to all surrounding and changing conditions, it does expand with reason. The common law is not a compendium of mechanical rules, written in fixed and indelible characters, but a living organism which grows and moves in response to the larger and fuller development of the nation. In *Colwell v. Tinker*, 169 N.Y. 531, 62 N.E. 668, 58 L.R.A. 765, 98 Am.St.Rep. 587, this court said regarding an action for criminal conversation brought by a husband:

"While loss of service is usually pleaded in this form of action, yet its real foundation is the personal injury inflicted upon the husband. The offense charged is a most grievous wrong against social order and society; it strikes at the foundations of the home and the legitimacy of offspring. The husband, who is entitled to live with his wife and enjoy her society in the marriage relation, finds himself humiliated and to a certain extent disgraced by a public scandal; the marriage bed is dishonored; his domestic peace and comfort are destroyed, and he is subjected to great mental suffering." 169 N.Y. 531, 536, 62 N.E. 668, 670 (58 L.R.A. 765, 98 Am.St.Rep. 587).

Are we prepared to say that humiliation, disgrace, dishonor and mental suffering afflict a husband but do not afflict a wife? The law is not so foolish. The United States Supreme Court in this same case (193 U.S. 473, 24 S.Ct. 505, 48 L.Ed. 754) said:

"Many of the cases hold that the essential injury to the husband consists in the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife and to beget his own children. This is a right of the highest kind, upon the thorough maintenance of which the whole social order rests, and in order to the maintenance of the action it may properly be described as a property right." 196 U.S. 484, 24 S.Ct. 507 (48 L.Ed. 754).

With the exception of the begetting of children, all these reasons apply equally to the wife. As I have above stated, his interest in the begetting of his own children is equalized by the wife's interest in having a clean man and healthy children. In fact, there has been no objection raised anywhere to the right of the wife to maintain the action for criminal conversation, except the plea that the ancient law did not give it to her. Reverence for antiquity demands no such denial. Courts exist for the purpose of ameliorating the harshness of ancient laws inconsistent with modern progress, when it can be done without interfering with vested rights. . . .

For the reasons here stated, the judgment of the Appellate Division must be modified, by granting a new trial, and, as so modified, affirmed, with costs in this court and Appellate Division to abide the event.

HISCOCK, C. J., and HOGAN, CARDOZO, and POUND, JJ., concur.

MCLAUGHLIN, J., dissents, on ground that decision about to be made changes the law of the state in a manner which should be effected by legislation.

DAILY v. PARKER.

Circuit Court of Appeals of the United States, 1945.
152 F.2d 174, 162 A.L.R. 819.

EVANS, CIRCUIT JUDGE. The instant appeal raises this question: Have children, living in Pennsylvania, a cause of action for damages against a woman living in Illinois who caused their father to leave them, their mother, and their home and go to Chicago and live with her and to refuse to further contribute to their maintenance and support? The District Court answered the question in the negative and dismissed the complaint.

An answer to the question necessitates its being broken into several narrower inquiries: (a) Will the Federal Court recognize and enforce such a cause of action in the absence of any direct holding by the state court upholding such cause of action? (b) Should a State or Federal Court recognize such a cause of action in the absence of legislation by the state granting such a cause of action to the minor children? (c) Is there anything in the Illinois or Pennsylvania constitutions or statutes which prevents this court from recognizing such a cause of action in the plaintiffs?

After study and reflection, we answer all three questions in plaintiffs' favor.

Plaintiffs are the four minor children of Mrs. Olive Means Daily and Wilfred J. Daily. They bring this action through their mother as next Friend, against the defendant, Mrs. Marian Parker, who they allege, enticed their father from his and their home and to go to Chicago where he lives with defendant, a married woman, and they further allege that their father fails and refuses to maintain or support

them or their home. All of this conduct or misconduct on their father's part is allegedly due to defendant's successful efforts in using her feminine charms, to entice and lure said father from his home that he might live and cohabit with defendant in Chicago.

Our approach to the question must be based on a study of the rights and obligations of *all* who are parties to a *family*. The father, the mother, and the children ordinarily constitute the family. Each is entitled to the society and the companionship of the others. Within the limits of the others' abilities, each is entitled to the financial aid and support of the others, although generally speaking, the children in their tender years can contribute nothing, and the wife, in view of her place in the home, may make but small financial contribution to the family exchequer. The children are entitled to shelter, food, clothing, and schooling and to the social, the moral support, guidance, and protection of their father, though in turn they can contribute only companionship and the inspiration which comes from their association in the family circle.

Is the family relationship and the rights of the different members therein, arising therefrom, sufficient to support a cause of action in each, the father, mother, or children, against one who breaks it up and destroys rights of the said individual members?

Appellee concedes that such a cause of action exists in favor of the father and within certain limits and certain jurisdictions, also in favor of the wife. She denies that such a cause of action, however, exists in favor of the children.

The history of the development of the family and the family relations and the duties and obligations of the members of the family is a long one, covering centuries. Its development was slow, due to society's acceptance of the relative positions of the parties in the family and its reluctance to change such status. The husband was lord and master, and the rights of all of the members of the family were merged in him. He ruled. He spoke in the first person singular in all matters. He spoke authoritatively for all. Through the centuries, however, there came slowly a change. The father is still the master, it may be said, but the duties of the master have changed. Where it was said to be his duty to rule, he now serves. He recognizes rights of the others and his obligation to meet them.

Perhaps he is still the titular head of the family. If so, his position merely carries with it greater duties and obligations. The duties of each member of the family are measured (at least in theory and in legal conception) by the position, the role, each takes in the family. Thus we see the wife, the breadwinner, and speaking for the family when the husband becomes incapacitated through sickness or invalidism. And children of tender years take on the family financial burdens when father is incapacitated and mother must attend him or for other reasons is unable to contribute to the financial support of the family. Relativity of rights and duties marks the rights and the obligations of the group and relativity is determined in each case by the situation of

the family. But relativity does not eliminate or destroy the rights of any member.

It is this conception of the family which must constitute our approach to the question at hand.

Another factor deserving consideration is the division which we must make of the rights of children. For the purpose of considering redress of such rights, we divide them into two groups. (a) The right to recover for injuries which arise from their right to support and maintenance from their parent. These rights are financial in character. (b) The right to recover for injuries to feelings and damages which arise from their rights to the comfort, the protection and the society of the father.

Defendant argues that such rights as here asserted have never been, and should not now be, recognized by any court until and unless legislation has been enacted creating such right. She argues that in the past, children's rights have not been judicially recognized, save after legislative enactment and she points to various specific acts¹ which the Illinois Legislature enacted to give rights which were not previously recognized. Particularly does she contend that the Federal Court should not exercise its power to grant redress in such cases where the state courts have not seen fit to recognize it.

Plaintiffs, on the other hand, rely upon the maxim, *Ubi Jus Ibi Remedium*. Also they refer to the bill of rights of the Illinois Constitution (sec. 19, Art. 2, Smith-Hurd Stats.) where it is provided "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation." They contend that the absence of precedent affords no justification for denial of a common law remedy where the right of an individual has been invaded by the wrongful act of another. *Kujok v. Goldman*, 150 N.Y. 176, 44 N.E. 773, 34 L.R.A. 156, 55 Am.St.Rep. 670; *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101, 106 Am.St.Rep. 104, 2 Ann.Cas. 561; *Kine v. Zuckerman*, 4 Pa. Dist. & Co. R. 227; *Bennett v. Bennett*, 116 N.Y. 584, 23 N.E. 17, 6 L.R.A. 553.

Instead of holding that there is no remedy, because there is no precedent, they argue for what they assert to be the better rule, and what Dean Pound calls judicial empiricism. In other words, the common law has been and is sufficiently elastic to meet changing conditions. We quote from Dean Pound's book, "The Spirit of the Common Law," page 183:

"Anglo-American law is fortunate indeed in entering upon a new period of growth with a well-established doctrine of law-making by judicial decision. . . . Undoubtedly . . . judicial empiricism was proceeding over-cautiously at the end of the last century.

¹The Dram Shop Act, Smith-Hurd Ill. Ann. Stat., ch. 43, § 135; Lord Campbell's Act; *Patelski v. Snyder*, 179 Ill. App. 24.

. . . If the last century insisted over-much upon predetermined premises, and a fixed technique, it did not lose to our law the method of applying the judicial experience of the past to the judicial questions of the present."

Also quoted and relied upon are Pollock in his 1939 edition of "Torts," and Cooley in his Third Edition of "Torts," page 464, dealing with the subject of Family Rights.

Our conclusion, without going further into the matter, is that a child today has a right enforceable in a court of law, against one who has invaded and taken from said child the support and maintenance of its father, as well as damages for the destruction of other rights which arise out of the family relationship and which have been destroyed or defeated by a wrongdoing third party. Likewise, we are persuaded that because such rights have not heretofore been recognized, is not a conclusive reason for denying them. They will be denied if it appears that the state court has spoken and denied them. If said rights have not been denied in the state court, we see no reason why the Federal Courts should be more prone to deny them or to grant them than a state court. If the state courts have not acted, we are free to take the course which sound judgment demands. In the absence of a state court ruling our duty is tolerably clear. It is to decide, not avoid, the question.

We have considered the other contentions of the defendant and conclude that they need not be given separate treatment. They all seem to grow out of the age-old philosophy—"whatever is, is right." Probably no institution has given life and breath to this thought as freely as the judiciary. They are ever looking for precedents, as they should be. If none be found, however, they may not give up,—lost in darkness. The situation is not hopeless. In a society as complex as ours, rare is the situation where precedents cannot be found. And even in the common law, in 1945, if no precedents be found, courts can hardly be advisedly called radical if they indulge in lawmaking by decisions, or in a word, engage in judicial empiricism.

On this subject of the family and the rights and obligations of its members there has been a change in the accepted view of the status of the wife and the children. The courts have been rather slow to follow this accepted change. But they have belatedly accepted it and when once they accepted the change they have made law by their decisions.²

In announcing this law, they have applied recognized principles to new or newly accepted views of the political and social conditions revolving about the family and the status of each member thereof. After the first decisions are announced, there has usually been prompt acceptance of the view by other courts.

² . . . Milliken v. Long, 188 Pa. 411, 41 A. 540; Kine v. Zuckerman, 4 Pa. Dist. & Co. R. 227; Graham v. Wallace, 50 App.Div. 101, 63 N.Y.S. 372; Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17, 6 L.R.A. 553; Waldron v. Waldron, O.C., 45 F. 315.

It might, and probably will be argued, in this case, if it is ever submitted to a jury, that plaintiffs were not and could not be damaged by the loss of their father's society. This, however, would be a factual argument, not an application of the maxim, *damnum absque injuria*.

There is, we must confess, weight to the argument that no loss was suffered when the children were deprived of the society of a father who deserted them to run away with a married woman and who left his wife and children to struggle as best they could with the task of making a livelihood. In other words, before there can be a loss measured in damages, there must be something to lose. And a father should have at least a shadow of character before his loss can be said to create a claim for damages in his children. This question of the amount of damages is, however, for the jury and the loss of financial support conceding there was nothing lost in the way of society when the father left his family, is still present.

The judgment is reversed with directions to proceed in accordance with the views expressed in this opinion.

NOTE

See also *Johson v. Luhman*, 330 Ill.App. 598, 71 N.E.2d 810 (1947).

SECTION 3. THREE EARLY LAW REFORMING STATUTES

STATUTE OF WESTMINSTER II (In consimili casu)

13 Edw. I, Ch. 24 (1285).

... whensoever from henceforth it shall happen in the Chancery that there is to be found a writ in one case, but not in another case although involving the same law and requiring the same remedy, the clerks of the Chancery shall agree in farming a writ, or else they shall adjourn the plaintiffs to the next Parliament, or else they shall write down the points upon which they cannot agree and refer them to the next Parliament, and so a writ shall be framed by the consent of the learned in the law; to the end that the court from henceforth shall no longer fail those who seek justice.

(As translated in Plucknett, "A Concise History of the Common Law," 3rd Ed. 1940, 28.)

NOTE

Hanbury, "Modern Equity", 3rd Ed., (1943), p. 2, f.n. 3, states:

"The relation of the development of the action on the case to the statute (in consimili casu) has recently formed the battleground of interesting controversy. The traditional view is that though the action on the case existed before the statute, it was the statute that facilitated its crystallization as trespass on the case. A more modern view is that the action owed its origin to the statute, and existed in no form prior to 1285. This view, as is pointed out by P. A. Landon, in 52 L.Q.R. 68, ignores the implications of the Provisions of Oxford, which were purposeless if they were not enacted to check the attempted expansion by the Chancellor of the

older writs. Professor T. Plucknett has gone to the opposite extreme, in maintaining in 31 Col.L.R. 778, that the action on the case is quite unconnected with the statute. He defends his view in 52 L.Q.R. 220, in reply to Mr. Landon's article in the same volume. Sir William Holdsworth describes it in 47 L.Q.R. 334 as 'a startling thesis'. Professor Plucknett has promised, but not yet provided, a constructive theory to replace that which he seeks to destroy. Miss Dix, in a very learned article in 46 Yale L.J. 1142, takes a middle path. She holds that the statute was interpreted in a very conservative spirit, and ascribes the origin and development of the action on the case to the ever-widening horizon of mediaeval judges."

THE STATUTE OF USES

27 Hen. VIII c. 10 (1535).

Where by the common laws of this realm, lands, tenements and hereditaments be not devisable by testament, (2) nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made *bona fide*, without covin or fraud; (3) yet nevertheless divers and sundry imaginations, subtle inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries and other assurances craftily made to secret uses, intents and trusts; (4) and also by wills and testaments, sometime made by nude parolx and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as we visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance; (5) at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; (6) by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries and other like assurances to uses, confidences and trusts, divers and many heirs have been unjustly at sundry times disherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids *pur fair fils chivalier & pur file marier*, (7) and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles and duties; (8) also men married have lost their tenancies by the curtesy, (9) women their dowers, (10) manifest perjuries by trial of such secret wills and uses have been committed; (11) the King's highness hath lost the profits and advantages of the lands of persons attainted, (12) and of the lands craftily put in feoffments to the uses of aliens born, (13) and also the profits of waste for a year and a day of lands of felons attainted, (14) and the lords their escheats thereof; (15) and many other inconveniences have happened, and daily do increase among the King's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm; (16) for the extirping and extinguishment of all such subtle practiced feoffments, fines, recoveries, abuses and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws for the same, and to the intent that the King's highness, or any other

his subjects of this realm, shall not in any wise hereafter by any means or inventions be deceived, damaged or hurt, by reason of such trusts, uses or confidences: (17) it may please the King's most royal majesty, That it may be enacted by his Highness, by the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, in manner and form following, that is to say,

That where any person or persons stand or be seized, or at any time hereafter shall happen to be seized, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politick, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner means whatsoever it be; that in every such case, all and every such person and persons, the bodies politick, that have or hereafter shall have any such use, confidence or trust, in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence or trust, in remainder or reverter, shall from henceforth stand and be seized, deemed and adjudged in lawful seisin, estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders and hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in use, trust or confidence of or in the same; (19) and that the estate, title, right and possession that was in such person or persons that were, or hereafter shall be seized of any lands, tenements or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politick, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence or trust, after such quality, manner, form and condition as they had before, in or to the use, confidence or trust that was in them. . . .

NOTE

See Holdsworth, "The Political Causes Which shaped the Statute of Uses," 26 *Harv.L.Rev.* 108. (1912):

On the question how far the Statute of Uses is in force in the United States, see Perry, "Trusts," sec. 299n; 16 *L.R.A.,N.S.*, 1148.

WIMBISH v. TAILBOIS

Common Bench, 1550. 1 Plowden 38, 75 E.R. 63.

Cook, Serjeant, recited the case briefly in this manner. You, my Lords, have well understood how that Thomas Wimbish and Elizabeth his wife have sued an action of trespass against Elizabeth Tailbois for a trespass done in land; and the defendant saith, that long before the trespass supposed, one George Tailbois, Knight, grandfather of the wife of the plaintiff, whose heir she is, was seized of the place where, &c. in his demesne as of fee, and being so seized, he, by his deed shewn

forth thereof infeoffed the Bishop of Winchester and others in fee, to the use of the said George Tailbois and of the said Elizabeth Tailbois, then being his wife, and the heirs of their two bodies begotten, and for default of such issue, to the use of the said George Tailbois in general tail, by force whereof the said bishop and others his co-feoffees were seized in fee to the uses aforesaid; and she shews in particular that some of the feoffees died, and the others survived them and were seized in fee to the uses aforesaid until the Statute of 27 Hen. 8. of Uses was made, by force of which the said George Tailbois and Elizabeth his wife were seized of the said land in their demesne as of fee tail, and being so seized, the said George Tailbois died, and the said Elizabeth his wife, now defendant, survived him, and was thereof sole seized in her demesne as of fee tail by right of survivorship; and she gives colour to the plaintiffs, and so justifies. And the plaintiffs by their replication say, that well and true it is, that the aforesaid George Tailbois, grandfather of the said Elizabeth, the plaintiff was seized of the said land in fee, and thereof infeoffed the said bishop and the others to the uses aforesaid in manner and form aforesaid, and that some of the said feoffees died, and that the survivors were seized to the uses aforesaid until the statute of 27 Hen. 8. was made, in manner and form as is alleged. And further they say, that after the death of the said George Tailbois, one William Tailbois brought a *formedon* in descender for the said land against the said Elizabeth, now defendant, and recovered at the first day by *ment dedire*, and that the feme tenant was not amerced because she came the first day: and the said plaintiffs by protestation say, that the said William Tailbois was not cousin and heir in tail to the aforesaid donees, supposed by his *formedon*, and for plea further say, that the said recovery was by covin had between the said William Tailbois and the said Elizabeth Tailbois, now defendant, without the assent or consent of the said plaintiffs, or either of them. And further they say, that the wife of the plaintiff, at the time of the said *formedon* purchased, and of the judgment given, was the same person to whom the interest and title of the said land belongs after the decease of the said Elizabeth Tailbois; by reason of which premisses the said plaintiffs, as in right of the said wife of the plaintiff, by virtue of a certain Act of Parliament made in the eleventh year of the reign of King Henry the Seventh, entered into the said land, and thereof were seized in their demesne as of fee tail in right of the said wife of the plaintiff, viz. to them and to the heirs of the body of the said wife of the plaintiff begotten, until the defendant entered, and did the trespass; and upon this the defendant has demurred in judgment. And it seems to me that the plaintiffs shall be barred, for the replication is not good for divers causes. One cause is, because the plaintiffs in the replication have not shewn certainly how the wife of the plaintiff is heir to the tail, but have averred generally that the wife of the plaintiff is the same person, to whom the interest and title, after the death of the defendant, belongs; and this is not good. For the statute of 11 H. 7. cap. 20. saith, that upon a recovery by covin, *it shall be lawful for the person, to whom the interest, title, or inheritance, after the death of*

such women, belongs, to enter into the same tenements. And then such person as will enter for such cause, ought to shew certainly how the title or inheritance, after the death of the woman, belongs to him, and so ought the wife of the plaintiff here, as to say, that she was the daughter of A., son and heir of the aforesaid George Tailbois and Elizabeth his wife, begotten of their bodies, and upon this issue might arise, as that A. was a bastard, or upon such like matter; but here it altogether wants certainty. . . .

MOUNTAGUE, CHIEF JUSTICE. It seems to me, that for one defect only in the replication the plaintiffs shall not have judgment. First it seems to me, that covin is well averred without special cause shewn. For covin (according to the true definition of it) is a secret agreement determined in the hearts of two or more men, to the prejudice of another. As if tenant for life will secretly conspire with another, that the other shall recover to the prejudice of the reversioner, for by this his reversion should be taken away; and this conspiracy is and may be termed covin, for all the parts of the definition of covin are there fully performed, for there is an union of their two hearts, and it is done secretly, and it is to the prejudice of a third person, and so it is a perfect covin without defect or blemish. And, sir, this covin to have a recovery may be as well where the title of the recovery is good, as where it is feint or bad. . . .

And as to the . . . exception taken, because it was not shewn certainly how the wife of the plaintiff was heir, it seems to me, that for this cause only the replication is bad. For it is a learning in our law, that replications, titles, pleas in abatement of writs, and estoppels ought to comprehend certainty. . . .

And with regard to the words, sir, the first part of the statute 11 H. 7 (which is in the disjunctive) saith, that *if any woman who hath had, or afterwards shall have, any estate in dower, for term of life, or in tail, jointly with her husband, or solely to herself, or to her own use, in any tenements, &c. of the inheritance or purchase of the husband, &c.* so that the estate in dower may not be referred to in these words, *jointly with her husband*, for a woman cannot have an estate in dower jointly with her husband, but these words, *jointly with her husband*, shall be referred to the two other estates, viz. for life, or in tail, and here the estate is in tail, and so within the words. But then the estate is referred to the things following, viz. in manors, lands, tenements, or other hereditaments; and, sir, here it cannot be denied but that the estate is an hereditament, that is to say, in the use, for a use is an hereditament. . . . And then all the words of the statute are satisfied, for here the woman has an estate, what estate? an estate tail; in what? in an hereditament? what hereditament? a use; in what manner? jointly with her husband; how? to her own use; of whose inheritance? of the inheritance of the husband; and so all the words of the first disjunctive sentence are fully performed in the case here. And if the case was not within the words of the first disjunctive sentence, yet should it be within the words of the second disjunctive sen-

tence, which is, *or given to the husband and wife in tail by any person seized to the use of the husband, &c.* For it cannot be here denied but that the feoffees were seized to the use of the husband until the statute of 27 H. 8, was made, for if they were seized to the use of the husband and wife, *ergo* they were seized to the use of the husband. And the husband had the entire use, and the wife the entire use, for there are no moieties between husband and wife. And when the statute of 27 H. 8, was made, it gave the land to them that had the use. It is to be seen then, who shall be adjudged in law the donor after the execution of the possession to the use. And, sir, the Parliament, (which is nothing but a Court) may not be adjudged the donor. For what the Parliament did was only a conveyance of the land from one to another, and a conveyance by Parliament does not make the Parliament donor; but it seems to me that the feoffees to use shall be the donors, for when a gift is made by Parliament, every person in the realm is privy to it, and assents to it, but yet the thing shall pass from him that has the most right and authority to give it. As if *cestuy que use*, and his feoffees join in a feoffment, it shall be said the feoffment of the feoffees, for they have the greatest authority to give it. And if tenant for life, and he in the reversion, join in a feoffment, it shall be adjudged the livery of the tenant for life, because he has the greatest authority to do it. And so if one who is seised in fee of land, and another who has nothing in it join in a feoffment, it shall be said the feoffment of him that hath right, and the confirmation of the other. So here it shall be said the gift of the feoffees by Parliament, and the assent and confirmation of all others. For if it should be adjudged the gift of any other, then the Parliament would do a wrong to the feoffees in taking a thing from them, and making another the donor of it. . . .

And here the land is by the Act of Parliament removed from the owners, that is to say, the feoffees, to the *cestuy que use*, and the statute would do wrong if it should not adjudge them the donors, for they have the greatest authority to give it, and the Parliament is only a conveyance, and therefore it shall be adjudged the gift of the feoffees by Parliament, and so the gift of the feoffees who were seized to the use of the husband, and then within the words of the second disjunctive sentence of the statute of 11 H. 7. And if the feoffees should not be adjudged the donors, then George Tailbois should, but this seems repugnant for him to be taken to be donor to himself, and therefore the feoffees shall be adjudged the donors *ut supra*, and so within the words of the statute. And if the case here was out of the words, yet it should be within the equity of the statute. For it is to be considered, that the statute was made for the redress of false covin, and to give a speedier remedy to right. And all such statutes are in advancement of justice, and beneficial to the public weal, and therefore shall be extended by equity. And although it restrains the liberty of tenant in tail, sir, every statute, which shall be extended by equity, restrains some body, and is penal to some body. But yet inasmuch as it is beneficial to the greater number, it shall be taken by equity, and so is this

statute, for it tends to the suppression of deceit, and to the advancement of truth. * * *

For which reasons it seems to me that the case here is within the words of the statute of 11 H. 7. And if it be not, yet it is within the equity of it, and so the entry of the plaintiffs is maintainable: but for the said single fault in the replication they shall not recover.

And so *note*, that all the justices held the case here within the words of the statute of 11 H. 7. and if it was not within the words, that yet it was within the equity of the statute. And they held also, that the heir might enter immediately, that is to say, in the life of the tenant in tail. But no judgment was given.

NOTE

Jenks, "Short History of English Law", at p. 100 says:

"The fate of the Statute of Uses is one of the most curious in legal history. Its secret and unavowed purpose, of securing the estates of the monasteries for the Crown, it accomplished. Its ostensible purpose, fortified by a wealth of hypocritical justification, it entirely failed to achieve. Not only were devises of lands, after a brief interval, put on a legal footing; but, as is well known, uses of lands, as distinguished from legal estates, soon re-appeared in full vigour. Whilst, in unforeseen directions, the statute worked havoc in the mediaeval system of conveyancing; and gradually modernized it out of existence".

Hanbury, "Modern Equity", 3rd Ed. (1943), at p. 20, after discussing the repeal of the Statute of Uses by the Law of Property Act, 1925, comments:

"The Statute of Uses had purposes that were purely ephemeral, and modern society has long outgrown them. It was in 1925, like an obstinate centenarian that would not die, but though of no use in the world, was determined before he quitted it, to be the cause of as much trouble and annoyance to his juniors as his foolish and capricious brain could invent. Lord Birkenhead never spoke a truer word than when he alluded to the Statute of Uses as having 'no contact of any kind with our modern life'".

STATUTE OF FRAUDS (1677)

29 Car. II, c. 3.

'An Act for prevention of Frauds and Perjuries.

For prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury Bee it enacted by the King's most excellent Majestie by and with the advice and consent of the Lords Spirituall and Temporall and the Commons in this present Parlyament assembled and by the authoritie of the same That from and after the fower and twentyeth day of June which shall be in the yeare of our Lord one thousand six hundred seaventy and seaven All Leases Estates Interests of Freehold or Termes of yeares or any undertaine Interest of in to or out of any Messuages Mannours Lands Tenements or Hereditaments made or created by Livery & Seisin onely or by Parole and not putt in Writeing and signed by the parties soe makeing or creating the same or their Agents thereunto lawfully authorized by Writeing,

shall have the force and effect of Leases or Estates at Will onely and shall not either in Law or Equity be deemed or taken to have any other or greater force or effect, Any consideration for makeing any such Parole Leases or Estates or any former Law or usage to the contrary notwithstanding. . . .

IV. And bee it further enacted by the authoritie aforesaid That from and after the said fower and twentyeth day of June noe Action shall be brought whereby to charge any Executor or Administrator upon any speciall promise to answere damages out of his owne Estate or whereby to charge the Defendant upon any speciall promise to answere for the debt default or miscarriages of another person or to charge any person upon any agreement made upon consideration of Marriage or upon any Contract or Sale of Lands Tenements or Hereditaments or any Interest in or concerning them or upon any Agreement that is not to be performed within the space of one yeare from the makeing thereof unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized.

IX. And bee it further enacted That all Grants and Assignments of any Trust or Confidence shall likewise bee in Writeing signed by the party granting or assigning the same [or ¹] by such last Will or Devise or else shall likewise be utterly void and of none effect.

XVII. And bee it further enacted by the authority aforesaid That from and after the said fower and twentyeth day of June noe Contract for the Sale of any Goods Wares or Merchandises for the price of ten pounds Sterling or upwards shall be allowed to be good except the Buyer shall accept part of the Goods soe sold and actually receive the same or give something in earnest to bind the bargaine or in part of payment, or that some Note or Memorandum in writeing of the said Bargaine be made and signed thereunto lawfully authorized.

ASH v. ABDY

Chancery, 1678. 3 Swans App 661, 36 E.R. 1014.

LORD NOTTINGHAM. The bill was to execute a parol agreement before the late act for prevention of frauds and perjuries (29 Car. 2, c. 3), but the bill itself was exhibited since the act; for which cause the Defendant demurred, supposing the new act had barred this suit; but I overruled the demurrer; for the act was not to be construed with a retrospection and to bar agreements precedent, but did only look forward and provide for the future (4 H. 7, 10, pl. 6; 10 H. 7, 22; Jenk, 233, pl. 6.; Jaques v. Withy, 1 H.Bl. 65); the rather because all acts which restrain the common law ought themselves

¹ Interlined on the Roll.

to be restrained by exposition. And I said that I had some reason to know the meaning of this law; for it had its first rise from me, who brought it in the bill into the Lord's House, though it afterwards received some additions and improvements from the Judges and the civilians. And the counsellors at the bar cited another case in the King's Bench this very term, where the same point being specially found, was so likewise adjudged upon argument; which I was glad to hear of; but said, if they had adjudged it otherwise, I should not have altered my opinion. . . .

BROWNE, STATUTE OF FRAUDS

Boston: 1895. Little, Brown, and Co., 5 ed., vii-viii.

. . . The real object and scope of the statute would seem to extend far beyond all questions of the integrity of witnesses, and to comprehend the exclusion of merely oral testimony in certain classes of transactions, as at best of an uncertain and deceptive character. In estimating the value of this enactment, therefore, the important question is not whether the statute has in its practical working let in as much perjury as it has excluded, for no strictness of legislation can bar out from a court of justice the man who deliberately purposes to commit perjury; but it is whether, in the average of large experience since the statute was enacted, the requisition of written testimony in certain cases has not materially served to secure the property of men against illegal and groundless claims. That it has done so will scarcely be disputed, and to the profound practical wisdom with which it was conceived to this end the most enlightened judges and jurists have at all times borne emphatic testimony.

Nevertheless it cannot be said to have been judicially administered with a firm hand and in a consistent spirit. Within a few years after its enactment, and before the generation of its framers had passed away, we find the courts admitting exceptions and distinctions as to its application, and forcing upon it constructions tending to restrict its beneficial operation. In later days there has been evinced, on the whole, a disposition to return to a closer interpretation of its provisions; but even now there are doctrines, too firmly settled by precedent to be overthrown, which, from their very inconsistency with the spirit of the statute, lead continually to great embarrassment in its administration. . . .

NOTES

1. Street, "Foundations of Legal Liability" (1906), Vol. II, 168:

"Absence of legislative interference is a feature which characterizes in a striking way the account thus far given of the development of English Contract law. We come now to a notable instance of such interference. We refer to the Statute of Frauds (1677), an enactment by which certain simple contracts are required to be in writing." Cf. Rabel, "The Statute of Frauds and Comparative Legal History", 63 L.Q.Rev. 174 (1947).

2. See Hening, "The Original Drafts of the Statute of Frauds (29 Car. II, c. 3), and their Authors", 61 U.Pa.L.Rev. 283 (1913), and Costigan, "The Date and Authorship of the Statute of Frauds", 26 Harv.L.Rev. 329 (1913), both discussing what today would be called the "legislative history" of the statute.

3. Perhaps the great significance of the Statute of Frauds to the student of legal method is the huge gloss of case law that has grown around Section 4, particularly on the following points:

- (1) what constitutes a sufficient memorandum;
 - (2) the doctrine of part performance (wholly judge-made in so far as Section 4 is concerned);
 - (3) whether the statute is substantive or procedural;
 - (4) the rule that the statute cannot be used as an instrument of fraud, that it is "not a sword but a shield" etc.
4. See comment of Ordronaux, *infra*, p. 909.

STEFAN A. RIESENFELD AND WILLIAM E. MUSSMAN, SURETYSHIP AND THE STATUTE OF FRAUDS

31 Minn.L.Rev. 1-3, 678-679 (1947).*

The year 1677 marks a very important although probably not altogether propitious event in the history of Anglo-American law. In that year the celebrated Statute of Frauds was enacted, mainly through the joint efforts of Lord Nottingham and Chief Justice North together with other famous contemporary jurists including, in all likelihood, Sir Matthew Hale. Hardly any lawyer will disagree that this act and its American counterparts have been among the most controversial and most frequently litigated pieces of legislation in English speaking countries.

The first treatise on the Statute known to the writers appeared a little more than 125 years after its enactment, and in the preface the author informs us that from the days of Lord Mansfield ". . . a diversity of sentiment has prevailed with respect to the utility of the great Statute of Frauds and Perjuries." Surveying the pronouncements for and against the act he concluded that they were fairly balanced. But in recent days the current of opinion seems to have swung to a condemnation of both the wisdom and beneficial effect of the statute, although voices of praise have not been silenced entirely.

While in fact most of the provisions of this once very comprehensive act have been either repealed or incorporated into other statutes by the British Parliament in the course of time, the famous section 4 requiring a writing for certain types of agreements, among them contracts of guarantee, and section 23 are still in force in the original version. And it is the very section 4, which was inserted in the original draft only at a later stage, that has come to be regarded as the very heart of the statute of frauds.

It is certainly significant that in the country of its origin the English Law Revision Committee recommended in 1937 the repeal of section 4

* Footnotes are omitted. Ed.

which contains, in addition to provisions relating to other types of contracts, the famous reference to "any special promise to answer for the debt, default or miscarriage of another person." With negligible differences in phraseology, it is reiterated in all American statutes of frauds. The most interesting point for our purpose is the fact that while the Law Revision Committee in general was in agreement upon the advisability of the repeal of the section there was a split with reference to contracts of guarantee. The majority stated explicitly that they had considered the question ". . . whether we ought to recommend that the contract of guarantee should be treated separately . . . by providing that a signed writing should be made essential for this type of promise," but that they had reached a negative conclusion. The minority conversely requested ". . . that it should be provided that a guarantee is to be invalid unless the terms thereof (other than consideration, if any) have been embodied in a written instrument and signed by the guarantor."

The majority of the committee based its position on the ground that first and foremost the Act was a product of conditions in the law of evidence which have long since passed away, that it promoted frauds rather than prevented them, that the selection of promises to be in writing was arbitrary and haphazard, that it was out of step normal business practice, that it was partial and lopsided in its operation and ambiguous and ill drawn. The minority took its stand with respect to guarantees not because the writing would prevent "frauds and perjuries" but for the reason that it would give ". . . the proposed surety an opportunity of pausing and considering, not only the nature of the obligation he is undertaking but also its terms."

In the United States as in England the courts have struggled with the provisions of the statutes of frauds of the various states and a formidable body of case law has developed. And just as in the country of its origin, so the American courts have whittled away much of the literal meaning of the provisions of the statute. While the basic purpose of the act—to secure defendants against unfounded and fraudulent claims—has never been obscure, the courts have had almost insurmountable difficulties in devising a simple and workable scheme of promises without and within the statute. . . .

It is true that the origins of the statute place it in line with a general European trend during the seventeenth century which considered the requirement of a written memorandum as a cure-all for a multitude of evils—particularly the danger of perjury; and it is also true that its various drafts show that the framers of the statute pursued no consistent theory of their own. Nevertheless, the section which we have discussed has become a corrective to certain expansions of the doctrine of consideration. Apparently the courts have felt that promises of guaranty, while binding (although the benefit might enure only to the principal), should not be enforceable unless their formality demonstrates that they *were* made and not made *rashly*. The exclusion of situations which fall under the scope of the entire credit test and the inde-

pendent economic advantage rule in fact takes account of the well-acknowledged informality of commercial contracts.

Underlying the whole problem of the abolition of the statute is a question of fundamental policy. If the section discussed performs the function of correcting certain dangers flowing from the liberalization of the doctrine of consideration, it certainly will not be kindly treated by anyone who believes that modern conditions require that any oral promise which is not directed to an illegal object should be binding under all circumstances. If, on the other hand, it is considered to be a principle of sound legal policy that the promisee must have been *justified* in relying on the promise, the requirement of certain formalities for promises made where the promisee *knows* that only himself or a relative or friend of the promisor received an advantage is not so shocking as some critics like to insist.

SECTION 4. LEGISLATION IN AID OF THE COURTS

CROWLEY v. LEWIS

Court of Appeals of New York, 1925. 239 N.Y. 264, 146 N.E. 374.

ANDREWS, J. The question involved on this appeal is whether a contract under seal may be enforced against persons not parties to the instrument on the theory that they are undisclosed principals in whose behalf the contract was executed.

"We find no authority for the proposition that a contract under seal may be turned into the simple contract of a person not in any way appearing on its face to be a party to or interested in it, on proof dehors the instrument, that the nominal party was acting as the agent of another, and especially in the absence of any proof that the alleged principal has received any benefit from it, or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal so as to embrace this case." *Briggs v. Partridge*, 64 N.Y. 357, 365, 21 Am.Rep. 617.

Neither do we find any authority since 1876 in this court for the proposition. *Briggs v. Partridge* has been cited by us many times, with no hint of disapproval. *Kiersted v. Orange & A. R. R. Co.*, 69 N.Y. 343, 25 Am.Rep. 199; *Beardsley v. Duntley*, 69 N.Y. 577; *Williams v. Gillies*, 75 N.Y. 197; *Schaefer v. Henkel*, 75 N.Y. 378; *Tut-hill v. Wilson*, 90 N.Y. 423; *Whitford v. Laidler*, 94 N.Y. 145, 46 Am. Rep. 131; *Henricus v. Englert*, 137 N.Y. 488, 33 N.E. 550; *Elliott v. Brady*, 192 N.Y. 221, 85 N.E. 69, 18 L.R.A., N.S., 600, 127 Am.St.Rep. 898; *Case v. Case*, 203 N.Y. 263, 96 N.E. 440, Ann.Cas.1913B, 311. We repeat that we do not feel at liberty to change a rule so well understood and so often enforced. If such a change is to be made it must be by legislative fiat.

Certainly nothing was said in *Harris v. Shorall* (230 N.Y. 343, 130 N.E. 572), which indicated any such disposition upon our part, even

had the language there used been necessary for the decision. As there pointed out, the importance of the seal in this state has been much diminished, and we referred to certain cases bearing upon the question as to whether a contract under seal might be varied or discharged by a parol agreement and to some conflict upon this point, and we gave some intimation that we might be ready to follow the suggestion made by us upon this subject in *Thomson v. Poor*, 147 N.Y. 402, 42 N.E. 13. We had no thought, however, that all distinctions between sealed and unsealed instruments were swept aside. Such an idea would have been impossible if for nothing else because of the rules contained in our statutes with regard to the limitations of actions. Equally impossible is such an idea with regard to the subject now before us. Thousands of sealed instruments must have been executed in reliance upon the authority of *Briggs v. Partridge*. Many times the seal must have been used for the express purpose of relieving the undisclosed principal from personal liability. It may not be unwise to preserve the distinction for this especial purpose. But whether wise or unwise the distinction now exists.

The complaint asks for the specific performance of a contract under seal whereby the plaintiff agreed to exchange a deed conveying certain premises for a \$35,000 mortgage upon other lands. The contract is annexed to the complaint, and it does not mention the respondents by name. It is signed by the plaintiff and the defendant Joseph H. Lewis, and all the covenants therein contained are the covenants of the parties thereto. The respondents are sought to be held simply upon the allegation that they were undisclosed principals of their agent Lewis. This may not be done.

The order appealed from should be affirmed, with costs, and the question certified to us should be answered in the negative.

NOTE

Walter E. Treador, at Cincinnati Conference on the Status of the Rule of Judicial Precedent, 14 U. of Cinc.L.Rev. 220, 227, said:

"Another case in the New York Court of Appeals is significant for our discussion, illustrating, after all, what the courts are really doing. It was a case back about 1925, in which the question before the New York Court of Appeals was whether or not a contract under seal made by an agent with a third party could be the basis of liability of an undisclosed principal.

"Of course, by that time, courts and legislatures had limited greatly the legal significance of seals; the doctrine of undisclosed principal and agent was well developed, and there was no question but that on an ordinary contract by an agent the third party could sue an undisclosed principal. So it looked very much as if the New York Court of Appeals would surely recognize that seals no longer should be given effect except where it was required by statute, and recognize, for the sake of symmetry in the doctrine of agency, that an undisclosed principal could be sued on a sealed instrument executed by his agent. I was teaching Agency in those days and I watched that case as it went up in the New York courts, because I thought the New York Court of Appeals would take advantage of such a fine opportunity to remove an anomaly from the law of agency. But the Court of Appeals said that it would not reverse the doctrine of *Briggs v. Partridge*, that such doctrine was well established." [Crowley v. Lewis, 239 N.Y. 264, 146 N.E. 374.]

"Superficially it appeared to be a case of sticking to the doctrine of *stare decisis* with a vengeance; but that was not the real reason why the New York Court did not overrule the former decision. The New York Court of Appeals said that ever since that earlier decision, contracts under seal had been made between agents of undisclosed principals, and third parties, for the purpose of relieving the principal from liability to a third party. It had become a common device. The parties understood it. And the court concluded, in view of the fact that undoubtedly there were thousands of such contracts outstanding, that it was the wiser, sounder thing to leave the question of change to the Legislature of New York, whose action would be prospective, and not retrospective.

"The New York Court of Appeals recognized that the ancient historical justification for the rule had ceased; and it seemed to be a case for application of the old maxim that, Where the reason for a rule ends, with it should end the rule. But in the meantime, as the result of current practice, a new content had been put into the rule, so the New York Court of Appeals reached its decision, not because of blind adherence to the doctrine of *stare decisis*, but because there was a real, substantial situation of the present moment which that rule took care of, and for which the rule should be left. The court did not say that it was a wise rule, or an unwise rule, except to the extent that it was sound and just to protect those interests which definitely had arisen in reliance thereon."

Cf., however, Radin, "The Trail of the Calf," 32 Cornell L.Q. 137, 144-45, 151-152 (1946), who contends that it is only a "speculative assumption" to say that parties have relied on decisions of the courts, and that the legislature, in refraining from changing the law, must have known those decisions. See also Cardozo, "The Growth of the Law", quoted in *Patridge v. Palmer*, supra, at p. 60.

COCHRAN v. TAYLOR

Court of Appeals of New York, 1937. 273 N.Y. 172, 7 N.E.2d 89.

RIPPEY, JUDGE. On October 20, 1934, an agreement in writing and under seal was executed in duplicate, duly acknowledged and delivered by and between defendant and one William B. Chenault, whereby the former gave to Chenault an option to buy certain real and personal property located in Allegany county, N. Y., for \$115,000 at any time within 120 days thereafter upon terms and conditions therein specified, and agreed to sell and convey the same to Chenault on condition that Chenault should, within such period of time, give her written notice of his intention to buy. On November 13, 1934, defendant notified Chenault that she revoked, rescinded, and withdrew the offer to sell on the ground, as she asserted, that the contract was without consideration and was obtained from her through duress, fraud, and undue influence. Chenault assigned all of his interest in the agreement to plaintiff on December 21, 1934, and on January 11, 1935, the latter served the required notice of his election to buy. Complying with the provisions of the agreement, plaintiff demanded delivery within thirty days of abstracts of title and of a suitable instrument of conveyance. Upon refusal of defendant to perform, this action for specific performance was brought.

The answer put in issue the material allegations of the complaint. Additionally, defendant set up, as defenses, (1) that the agreement was only an offer to sell, was without consideration, and was revoked

and withdrawn before acceptance and prior to the time of assignment to plaintiff who took the assignment with knowledge of the withdrawal and revocation; (2) that the option was not assignable and plaintiff acquired no interest by the assignment; and (3) that defendant's signature to the instrument and its delivery by her were obtained through imposition, fraud, and undue influence. A counterclaim was interposed for damages arising out of the recording of the instruments which, it was asserted, prevented defendant from disposing of her property and from enjoying the full use and benefit thereof, all of which was put in issue by the reply.

The trial court found that there was no valid acceptance or tender of performance by plaintiff or by Chenault and sustained the first two defenses mentioned. No finding or decision was made on the material question of fact as to whether the execution and delivery of the instrument were procured, as defendant asserts, by plaintiff or by Chenault or by both through imposition, undue influence, or fraud. The trial court specifically stated in his opinion that he limited his decision to holding that the option was nudum pactum, that defendant had a right to withdraw, revoke and cancel it, and that, since the option by its terms involved the extension of credit to Chenault, it was not assignable to plaintiff or, in any event, enforceable by plaintiff without a tender of a bond executed by Chenault. Judgment was entered dismissing the complaint, with costs. The Appellate Division in the Fourth Department affirmed by a divided court upon the findings of fact as made by the trial court. The judgment appealed from cannot be sustained unless it can be held, as matter of law, that the option was without consideration, was not assignable, and was not accepted according to its terms.

It is the rule that an offer or an option, not under seal or given for a consideration, may be revoked at any time before acceptance. 1 Williston on Contracts (Rev.Ed.1936) § 55; *Petterson v. Pattberg*, 248 N.Y. 86, 88, 161 N.E. 428; *Boston & M. R. v. Bartlett*, 3 Cush. (Mass.) 224. That rule has no application here. In the instant case the agreement was under seal and the receipt of a consideration was acknowledged and confessed. In the body of the instrument the parties recited that they attached their seals, thereby establishing their intention concerning the sealing of the instrument, and, at the end, added the seal in the form required by section 44 of the General Construction Law (Consol.Laws, c. 22). It cannot be successfully argued that the agreement was not a sealed instrument carrying with it all the force and implications attributable to an instrument so executed. The cases of *Matter of Pirie*, 198 N.Y. 209, 91 N.E. 587, 19 Ann.Cas. 672, and *Empire Trust Co. v. Heinze*, 242 N.Y. 475, 152 N.E. 266, hold nothing to the contrary. In the *Pirie* Case the seal was present but an expression of intent to make the instrument one under seal was lacking. In the *Heinze* Case the intention was expressed but the seal was lacking. . . .

The first statute in this state in any manner affecting the common-law rule as to the conclusive character of the seal was the act of 1828

(2 R.S. [1st Ed.] 406, pt. 3, ch. 7, tit. 3, § 77), which provided that the seal should be only "presumptive evidence of a sufficient consideration which may be rebutted in the same manner, and to the same extent, as if such instrument were not sealed." That act remained in effect until amended by chapter 448 of the Laws of 1876 (Code of Remedial Justice, § 840) to read: "A seal upon an executory instrument is only presumptive evidence of a sufficient consideration, which may be rebutted, as if the instrument was not sealed." In chapter 416 of the Laws of 1877 (Code Civ.Proc. § 840) the words "hereafter executed" were inserted after the first word "instrument." In that form the statute remained until 1920 (Civil Practice Act, § 342, enacted by Laws 1920, c. 925), when the words "hereafter executed" were stricken out and the statute, thus amended, continued to September 1, 1935. These statutory changes in the common-law rule refer only to the question of "sufficient consideration," and, as to the sufficiency of the consideration, the seal, it is declared, shall be only presumptive evidence. The memorandum opinion in *Baird v. Baird*, 145 N.Y. 659, 665, 40 N.E. 222, 224, 28 L.R.A. 375, where it was said, among other things that under section 840 of the Code of Civil Procedure "it is now open to the maker of such an instrument to allege and prove the absence of any consideration in fact as a defense," did not receive the approval of a majority of this court. The question of sufficiency of consideration has always been open to inquiry, and the statute is merely declaratory of the common law, but the "consideration implied by the seal cannot be impeached for the purpose of invalidating the instrument or destroying its character as a specialty." *McMillan v. Ames*, *supra*; *Fuller v. Artman*, *supra*. Whether the intent and effect of chapter 708 of the Laws of 1935 (in effect September 1, 1935) was to destroy the conclusive effect of the seal on a written instrument, we are not here called upon to determine. The instrument in suit was executed and delivered prior to the time that act went into effect. . . .

The written option, being under seal and founded upon a valid consideration, could not be withdrawn, revoked, or rescinded at will by defendant within the time within which she agreed that Chenault and his assigns might accept. *Fuller v. Artman*, *supra*; *Thomason v. Bescher*, 176 N.C. 622, 97 S.E. 654, 2 A.L.R. 631, note; 6 R.C.L. (contracts) § 26. It was a unilateral contract to convey, subject only to one express condition. *Heller v. Pope*, 250 N.Y. 132, 164 N.E. 881. When Chenault's assignee gave written notice within the time specified that he elected to buy, the condition was fulfilled and the unilateral option was thereby converted into a bilateral contract. *Heller v. Pope*, *supra*; *Thomason v. Bescher*, *supra*. The contract was reasonably certain in its terms, its subject matter, its purposes, and its parties. By acceptance, it became mutual in its obligations and its remedies. Upon the defendant's refusal to perform, the contract was enforceable by the assignee in an action for specific performance, in the absence of any available and satisfactorily established defense or counterclaim of an equitable character existing against the assignee or against Chenault before notice to defendant

of the assignment. *Trustees of Hamilton College v. Roberts*, 223 N. Y. 56, 119 N.E. 97; 4 *Pomeroy's Equity Jurisprudence* (4th Ed.), § 1405; 1 *Williston on Contracts* (Rev. Ed. 1936), § 415. Cf. *State Bank v. Central Mercantile Bank of New York*, 248 N.Y. 428, 434-436, 162 N.E. 475, 59 A.L.R. 1473.

The judgment of the Appellate Division and that of the Trial Term should be reversed and a new trial granted, with costs to the appellant to abide the event.

NOTE

New York Statutes dealing with the effect of the seal on a contract up to *Cochrane v. Taylor* were:

The Civil Practice Act, § 342 (Laws 1920, c. 925): "A seal upon an executory instrument is only presumptive evidence of a sufficient consideration, which may be rebutted, as if the instrument was not sealed." This section is little different from the original provision in the Act of 1828 (2 R.S. 1st ed. 406 Pt. 3, Ch. 7, tit. 3, §. 77).

(The history of Section 342 is set out in *Cochrane v. Taylor*.)

Laws of 1935, c. 708:

"s. 342. Seal on written instrument as evidence of consideration. A seal upon a written instrument hereafter executed shall not be received as conclusive or presumptive evidence of a sufficient consideration. A written instrument, hereafter executed which modifies, varies or cancels a sealed instrument, executed prior to the effective date of this section shall not be deemed invalid or ineffectual because of the absence of a seal thereon.

"This act shall take effect September 1, 1935."

Laws of 1936, c. 353:

"Sec. 342. Common Law effect of seal abolished. The common law effect heretofore given to a seal upon a written instrument is hereby abolished as to all instruments executed after this section takes effect. If a sealed instrument is modified, varied or cancelled after this section takes effect, such modification, variation or cancellation shall not be deemed invalid to any extent for want of a seal upon the instrument constituting the same.

"This act shall take effect September 1, 1936." (Became law April 9, 1936.)

Laws of 1936, c. 685:

"s. 342. Seal on written instrument; evidence of consideration; modification of sealed instrument; undisclosed principal.

"1. A seal upon a written instrument hereafter executed shall not be received as conclusive or presumptive evidence of consideration. A written instrument, hereafter executed, which changes or modifies or which discharges in whole or in part a sealed instrument shall not be deemed invalid or ineffectual because of the absence of a seal thereon. A sealed instrument may not be changed, modified or discharged by an executory agreement unless such agreement is in writing and signed by the party against whom it is sought to enforce the change, modification or discharge. A sealed instrument so changed or modified shall continue to be construed as an instrument under seal.

"2. The rights and liabilities of an undisclosed principal under any sealed instrument hereafter executed shall be the same as if the instrument had not been sealed.

"(2) Chapter 353 of the laws of 1936 entitled 'An act to amend the civil practice act, in relation to abolishing the common law effect of seals upon written instru-

ments hereafter executed and repealing section 342 thereof, relating to the effect of such seals' is hereby repealed.

"(3) This act shall take effect September 1, 1936." (Became law May 23, 1936.)

RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE RELATING TO THE SEAL AND TO THE ENFORCEMENT OF CERTAIN WRITTEN CONTRACTS

(1941) N.Y. Legislative Document No. 65(M), 13-20.
1941 Report, Recommendations and Studies,
Law Revision Commission, 357-364.

In 1934 the Commission began a comprehensive study of the law concerning the seal with a view to ascertaining whether the then existing rules had outlived their usefulness. At the same time the Commission began a similar study of the law of consideration in the field of contracts. Because of the interrelation between the seal and consideration, the two studies were combined into one.

In 1936 the Commission published the results of its studies on both subjects (see Leg.Doc. (1936) Nos. 65 (C) and (D); Report, Recommendations and Studies (1936) pp. 65-80, 81-374), and made certain recommendations to the Legislature which resulted in the following important changes in the law with respect to the seal:

1. The old rule that a sealed instrument could be modified only by a sealed instrument was changed to permit a modification by a written although unsealed instrument.

2. The old rule that an undisclosed principal could neither sue nor be sued upon a sealed instrument was changed to permit such actions.

3. The old rule that a seal upon "an executory instrument" was "presumptive evidence of a sufficient consideration" had been changed in 1935 to read that a seal upon "a written instrument . . . shall not be received as conclusive or presumptive evidence of a sufficient consideration." In its 1936 recommendation, the Commission retained the substance of the 1935 amendment, with a single change in wording, which change was made by the Legislature in 1936. The rule, as amended, now provides that a seal upon "a written instrument . . . shall not be received as conclusive or presumptive evidence of consideration." Civil Practice Act, § 342. At the time of its recommendation in 1936, the Commission was of the opinion that the change in the rule made in 1935 manifested a clear desire by the Legislature to obliterate the distinction between sealed and unsealed instruments with respect to the requirement of consideration. However, in *Cochran v. Taylor*, 273 N.Y. 172, 7 N.E.2d 89 (1937), the Court of Appeals, after deciding that under the law prior to 1935 a seal upon an instrument dispensed with the necessity of consideration, raised but left unanswered the question whether the amendments to section 342 of the Civil Practice Act made in 1935 and 1936 had changed the rule. But the language and reasoning

of the opinion have raised doubts as to the effect of these amendments.

Whatever may be the final answer to this question, the following distinctions between sealed and unsealed instruments remained in the law after the amendments in 1936:

1. The modification of a sealed instrument could not be made by an oral executory agreement—a writing is required.
2. The 20-year statute of limitations applies to causes of action based upon a sealed instrument.
3. The presence of a seal on a document in certain cases is evidence of its authenticity.

Simultaneously with its recommendations in 1936 regarding the seal, the Commission also made recommendations dispensing with the requirement of consideration in certain cases. Pursuant to these recommendations the following changes in the law were made:

1. A release, in writing, was made binding regardless of a seal or consideration.
2. An agreement, in writing, to change, or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, was made binding regardless of consideration.

In line with these changes, the Legislature in 1937, upon the recommendation of the Commission, changed the law with respect to accord and satisfaction so as to make binding written executory accords.

It will thus be seen that the general policy of recent legislation respecting the law concerning the seal and consideration, has been to do away with the distinction between sealed and unsealed instruments, when the distinction appeared to serve no useful purpose, but to preserve them where it seemed desirable.

For example, the Commission could see no sound reason for the rule that a sealed instrument could be modified only by a sealed instrument. On the other hand the Commission recognized the desirability of a device whereby a party to a written agreement could protect himself against the danger of false claims of an oral modification. The old rule with respect to the modification of sealed instruments provided such a device, but it was the requirement that the modification be in *writing* rather than under *seal* that was important. Consequently, the requirement of a *writing* was preserved, but the requirement of a *seal* was abrogated.

Likewise, the requirement of consideration to make agreements binding seemed in general to serve a useful purpose, particularly in the inception of contractual relations, but there were cases where there appeared to be no sound reason for the requirement, provided there were proper safeguards against fraud, such as the requirement of a writing. Accordingly, the requirement of consideration was

dispensed with in the cases of a release in writing, or an agreement in writing modifying an existing agreement.

Whether there should be some method whereby a person could make any kind of promise binding without consideration is a debatable question. According to the opinion of the Court of Appeals in *Cochran v. Taylor*, *supra*, the seal, at common law, provided such a device. If this device has not been destroyed by the amendments to section 342 of the Civil Practice Act made in 1935 and 1936, the questions remain whether the seal is the best device, and whether it or some other device should be limited in scope. On the other hand, if the amendments to section 342 of the Civil Practice Act made in 1935 and 1936 have destroyed the seal as a device for making promises binding without consideration, the question arises whether some such device should not be created and, if so, what limitations should be placed upon its use.

There are several objections to the use of the seal as such a device. The seal has degenerated into an L. S. or other scrawl which, in modern practice, is frequently a printed L. S. upon a printed form. To the average man it conveys no meaning, and frequently the parties to instruments upon which it appears have no idea of its legal effects.¹ Moreover, under the present law, the character of an instrument which bears the magic letters, but which contains no recital of sealing, is left uncertain as to whether it is sealed, depending upon parol evidence of intent to be later adduced (*Transbel Investment Co. v. Venetos*, 279 N.Y. 207, 18 N.E.2d 129 (1938)). It would seem, therefore, that if a method of making promises binding without consideration is desirable, some method should be devised which more clearly than the seal brings to the attention of the promisor what he is doing, and which fixes the character of the instrument as of the time of its execution.

Likewise, assuming the desirability of a device whereby a party to a written agreement can protect himself against the danger of false claims of an oral modification, a function which the seal now performs, it would seem that a more appropriate method of accomplishing this end would be one which more clearly than the seal brings to the attention of the parties that such is the effect of their acts, and definitely fixes the character of the instrument as of the time of its execution.

The Commission believes a method more appropriate than the use of the seal for permitting a party to a written agreement to protect himself against the danger of false claims of an oral modification,

¹ "In our day, when the perfunctory initials 'L. S.' have replaced the heraldic devices, the law is conscious of its own absurdity when it preserves the rubric of a vanished era. Judges have made worthy, if shamfaced, efforts, while giving lip service to the rule, to riddle it with exceptions and by distinctions reduce it to a shadow. A recent case suggests that timidity, and not reverence, has postponed the hour of dissolution. The law will have cause for gratitude to the deliverer who will strike the fatal blow." Cardozo, *The Nature of the Judicial Process* (1921), p. 155.

would be to make binding a stipulation to this effect contained in the original written agreement.

Concerning the broader question whether, and to what extent, a person should be able to bind himself by a promise without consideration, the Commission doubts the wisdom of any device that is applicable to all kinds of promises under all circumstances. Certainly the seal is not the best device, assuming some such device is desirable. The Uniform Obligations Act, proposed by the Commissioners on Uniform State Laws, is a more appropriate device than the seal for accomplishing this end, but it is subject to the same objection that it applies to all kinds of promises. Moreover, in the two states which have adopted it, many difficulties have been encountered in its application. The Commission believes that a sounder policy would be to make the requirement of consideration applicable to promises generally, making no distinction between sealed and unsealed promises, with express statutory provision that in specified cases a promise, in writing, shall not be unenforceable because of the absence of consideration. This method of dealing with the problem is the one already employed by the Legislature in the cases of releases and modification agreements.

The Commission is now prepared to recommend that the requirement of consideration be dispensed with in the case of promises, in writing, expressly based upon a past consideration; in the case of assignments, in writing, of a chose in action; and in the case of an offer, in writing, which expressly states that it shall be irrevocable for a specified time. As experience demonstrates the desirability of further additions to the list of exceptions, they may be made without the necessity of revising the entire law of consideration. In this way the dangers of a sudden and revolutionary change in the law of contracts are avoided, but specific and well recognized defects are removed. Also, it makes feasible the complete abolition of the magical effects of the seal, by providing a better way for accomplishing those desirable ends for which it is now used. As an authenticating device, the seal of a public official or of a corporation performs a useful function and should be preserved. But the use of the seal to determine the character of rights and obligations under a written contract or other written instruments is archaic, is frequently productive of unexpected and unjust results, and should be ended.

Apart from the effect of the seal as an authenticating device, and its effect upon the ability of the parties to modify the instrument, and its possible, but by no means certain, effect upon the requirement of consideration, the only other effect of the seal upon an instrument is to give to the parties thereto the benefit of a 20-year statute of limitations upon a cause of action arising under the instrument. There appears no sound basis for this distinction between sealed and unsealed instruments, especially since the Legislature has already reduced the limitation on actions upon real property mortgages and bonds secured thereby, although sealed, from 20 to 6 years, the period applicable to unsealed contracts (Civil Practice Act, § 47-a). If

the effects of the seal in other respects are to be abolished, certainly the 20-year statute of limitations should not be applicable to sealed instruments after such changes in the law are made.

Submitted herewith is a study made under the direction of the Commission.

The Commission therefore recommends:

I.* *

The repeal of present section 342 of the Civil Practice Act; the enactment of a new section 342 of the Civil Practice Act; the amendment of section 14 of the General Corporation Law; the enactment of new section 282 of the Real Property Law and new section 33-c of the Personal Property Law; and the amendment of sections 11, 47, 47-a and 48 of the Civil Practice Act, as follows:

§ 342. Seal on written instrument. Except as otherwise expressly provided by statute, the presence or absence of a seal upon a written instrument hereafter executed shall be without legal effect.

§ 14. Grant of general powers. Every corporation as such has power, though not specified in the law under which it is incorporated: . . .

2. To have a common seal and to alter the same at pleasure. *The presence of the seal of a corporation on a written instrument purporting to be executed by authority of the corporation shall constitute a rebuttable presumption that the instrument was so executed.* . . .

Real Property Law, § 282, and Personal Property Law, § 33-c:

An executory agreement hereafter made shall be ineffective to change or modify, or to discharge in whole or in part, a written agreement or other written instrument hereafter executed which contains a provision to the effect that it cannot be changed orally, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought.

§ 47. *Actions on sealed instruments* to be commenced within [twenty] *six* years. 1. Except as otherwise provided by section forty-seven-a, an action upon a sealed instrument must be commenced within [twenty] *six* years after the cause of action has accrued.

[Where the action is brought for breach of a covenant of seizin or against incumbrances, the cause of action, for the purposes of this action only, is deemed to have accrued upon an eviction, and not before.]

2. *This section shall apply to all causes of action enumerated in subdivision one, whether heretofore or hereafter accruing, except that in the case of such a cause of action heretofore accrued, if, on September first, nineteen hundred forty-one, there remains of the*

* Became law April 13, 1941, effective Sept. 1, 1941: Laws 1941, c. 329.

time heretofore limited for the commencement of an action thereon a period longer than six years, such period shall be shortened to six years from September first, nineteen hundred forty-one, and except further that if, on September first, nineteen hundred forty-one, there remains of the time heretofore limited for the commencement of an action thereon a period shorter than six years, such period shall not be enlarged.

§ 47-a. Actions on bonds and/or mortgages secured by real property to be commenced within six years. 1. An action upon a bond, the payment of which is secured by a mortgage upon real property, or upon a bond and mortgage so secured, or upon a mortgage of real property, or any interest therein, must be commenced within six years after the cause of action has accrued. [Where the action is brought for breach of a covenant of seizin or against incumbrances, the cause of action, for the purposes of this section only, is deemed to have accrued upon an eviction, and not before.]

2. This section shall apply to all causes of action enumerated in subdivision one, whether heretofore or hereafter accruing except that in the case of such a cause of action heretofore accrued, if, at the time this section takes effect, there remains of the time heretofore limited for the commencement of an action thereon a period longer than six years, such period shall be shortened to six years from the effective date of this section and except further that if, at the time this section takes effect, there remains of the time heretofore limited for the commencement of an action thereon a period shorter than six years, such period shall not be enlarged by the enactment of this section.

§ 48. Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:

1. An action upon a contract obligation or liability express or implied, except a judgment [or sealed instrument] *and except as provided by section forty-seven and section forty-seven-a.*

2. An action to recover upon a liability created by statute, except a penalty or forfeiture.

3. An action to recover damages for a personal injury, except in a case where a different period is expressly prescribed in this article.

4. An action to recover a chattel.

5. An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

6. An action to establish a will. Where the will has been lost, concealed or destroyed, the cause of action is not deemed to have accrued until the discovery by the plaintiff or the person under whom he claims of the facts upon which its validity depends.

7. An action upon a judgment rendered in a court not of record, except where such judgment shall have been docketed in a county clerk's office of this state upon a transcript filed therein pursuant to law. The cause of action in such a case is deemed to have accrued when final judgment was rendered.

§ 11. Mode of computing periods of limitation. The periods of limitation prescribed by this article, except as otherwise specially prescribed therein, must be computed from the time of the accruing of the right to relief by action, special proceeding, defense or otherwise, as the case requires, to the time when the claim to the relief is actually interposed by the party as a plaintiff or a defendant in the particular action or special proceeding.

Where the action is brought for breach of a covenant of seizin or against incumbrances, the cause of action, for the purposes of this section only, is deemed to have accrued upon an eviction, and not before.

II.**

The enactment of the following new subdivision 2 of section 279 of the Real Property Law, and new subdivision 3 of section 33 of the Personal Property Law:

A promise hereafter made in writing and signed by the promisor shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.

III.***

The enactment of the following new subdivision 3 of section 279 of the Real Property Law, and new subdivision 4 of section 33 of the Personal Property Law:

An assignment hereafter made shall not be denied the effect of irrevocably transferring the assignor's rights because of the absence of consideration, if such assignment is in writing and signed by the assignor.

IV.****

The enactment of the following new subdivision 4 of section 279 of the Real Property Law, and new subdivision 5 of section 33 of the Personal Property Law:

When hereafter an offer to enter into a contract is made in a writing signed by the offeror, which states that the offer is irrevocable

** Became law Apr. 13, 1941, effective Sept. 1, 1941: Laws of 1941, c. 331.

*** Became law Apr. 13, 1941, effective Sept. 1, 1941: Laws of 1941, c. 330.

**** Became law Apr. 13, 1941, effective Sept. 1, 1941: Laws of 1941, c. 330.

during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability. When such a writing states that the offer is irrevocable but does not state any period or time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time.

Dated, *December 4, 1940.*

THE UNIFORM WRITTEN OBLIGATIONS ACT

An Act

To validate certain written transactions without consideration, and to make uniform the law relating thereto.

Section I. Be it enacted, &c., That a written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.

NOTE

The Uniform Written Obligations Act was approved by the National Conference of Commissioners on Uniform State Laws in 1925. See the complete Act in the Commission's Handbook for that year, p. 214.

In Reeve, "The Uniform Written Obligations Act", 76 U.Pa.L.Rev. 580 (1928), the author said: . . . "The Uniform Act has certain advantages over the common law formal contract, hence having adopted this act, a state could abolish sealed instruments should it so desire, and have a more realistic and better type of formal obligation. The obvious objection to doing this is that deeds have been the subject of judicial decision for centuries and there is always serious inconvenience in throwing overboard a definite body of law in favor of any statute, however clear it may be. There are bound to be doubts and difficulties until the statute has received considerable judicial construction."

In 1943 by action of the Commission this act ceased to be a recommended "uniform act" and was relegated to a noncommittal status of "model act": 1943 Proceedings at p. 153, "Although approved almost 20 years ago, this Act has been adopted in only two states, viz. Pa. in 1927 and Utah in 1929. It met strenuous opposition in the Conference at the time of its adoption . . . and it has found little favor in state legislative bodies". The 1946 Proceedings show the act passed only by the same two states.

RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE RELATING TO DISCHARGE OF SURETY OR GUARANTOR

New York Leg.Doc.1938 No. 65(C), 5-6. 1938 Report Recommendations
and Studies of the Law Revision Commission

Under the law of New York the liability of a surety, including a guarantor, is as a general rule discharged by any conduct of the obligee that alters the principal obligation in any respect, even though

such conduct may not prejudice the surety. For example, unless the surety consents, an extension, by even a day, of the time for the principal obligor's performance releases the surety from all liability. The fact that the principal was insolvent at the time of such extension, or that refusal to extend the time would have forced the principal into bankruptcy, will not prevent the application of this rule. In the case of *Katz v. Leblang* (243 App.Div. 421, 277 N.Y.S. 850 (1935)), a guarantor was held discharged by a change necessarily beneficial to him,—a reduction in rent payable by the principal obligor.

The rule permitting such a result represents a survival of the special favor traditionally shown the surety by the law. This favor may have served public policy in an earlier day, when all sureties were private persons, frequently acting without compensation. A different construction of the surety's liability might then have discouraged the assumption of a suretyship obligation. Today this reason has largely disappeared. In a number of states it has been held that a corporate surety is not discharged by an extension of time to the principal, except to the extent to which the surety is prejudiced.

The New York law is confused and unsatisfactory. Judge Cardozo in his article, *A Ministry of Justice*, cites it as an obvious example of an outworn rule to be corrected. (35 Harv.L.Rev. 113, 117.) In certain cases, especially those involving building contracts, the New York courts have made inroads upon the historic doctrine. In general, however, the doctrine stands.

The Commission believes that, except in the special classes of cases covered by the Uniform Negotiable Instruments Law and the Uniform Partnership Act, a surety should be discharged by a change in the principal obligation only when the change is prejudicial to him, and only to the extent of the prejudice.

In order to prevent evasion of the statute, inconsistent contractual stipulations should be invalidated.

In 1937 the Commission submitted to the Legislature a recommendation, study and accompanying bill upon the subject (Leg.Doc. (1937) No. 65(Q)). That bill was not enacted. In the meantime the Commission has received several suggestions from the New York bar. In the light of these suggestions, the Commission has made certain changes.

A new section has been added, placing the burden of proof upon the obligee on the question of prejudice, including the extent thereof.

The revised bill specifically names "guarantor" as well as "surety."

The Commission recommends the addition of the following new Article 8-C to the Debtor and Creditor Law:

ARTICLE 8-C *

LIABILITY OF SURETY OR GUARANTOR; CHANGE IN PRINCIPAL OBLIGATION

Section 246. Liability of surety or guarantor; change in principal obligation.

§ 246. Liability of surety or guarantor; change in principal obligation. 1. A surety or guarantor, upon an obligation of suretyship or guaranty hereafter entered into, shall not be discharged by reason of the fact that the obligee agrees to change or changes the principal obligation, except to the extent to which the surety or guarantor is thereby prejudiced.

2. The burden of proof on the question of prejudice including the extent thereof shall be upon the obligee.

3. Any stipulation, in a contract of suretyship or guaranty hereafter made, for the discharge of the surety or guarantor in contravention of this section shall be void.

4. Nothing contained in this section shall be construed as affecting any of the provisions of the partnership law or of the negotiable instruments law.

Dated, *December 8, 1937.*

BECKER v. FABER

Court of Appeals of New York, 1939.

280 N.Y. 146, 19 N.E.2d 997, 121 A.L.R. 1010.

LEHMAN, JUDGE. The plaintiff has brought this action to foreclose a mortgage upon real property in Nassau county. Payment of the principal and interest of the bond, secured by the mortgage, was guaranteed in October, 1923, by John A. Kollé. Asking a deficiency judgment against the executors of the last will and testament of John A. Kollé, deceased, the plaintiff made them parties to the foreclosure action. The complaint against them has been dismissed on the ground that the mortgagor and mortgagee modified the terms of the mortgage agreement without the knowledge or consent of the guarantor, and by force of such modification the guarantor was released.

The bond and mortgage were executed on or about June 1, 1923. The mortgagor bound himself to pay the sum of \$10,000 on or before June 1, 1926, with interest thereon to be computed from the 1st day of June, 1923, at the rate of six per cent per annum and to be paid on the first day of December next ensuing the date thereof, and semi-annually thereafter. The bond was not paid at maturity. No agreement to extend the time of payment was made. Interest was paid, as

* The bill for this proposed act was referred to the Judiciary Committees of the Legislature and not reported.

stipulated in the bond, every six months until December, 1932. In January, 1933, the mortgagee agreed that the mortgagor would be permitted to meet the installment of interest which had become due on December 1, 1932, by monthly payments of \$50 each and that similar monthly payments might be made upon subsequent installments after they became due semi-annually. In 1935 the mortgagee informed the mortgagor that when past due interest was paid up to June 1, 1934, she "is willing to charge you and accept 4%, but only on condition that you clean up the back taxes, and that interest rate to be effective for only one year, namely, June, 1935." Though the mortgagor did not comply with the stipulated condition, the mortgagee accepted, for more than two years, monthly checks for interest at the rate of four per cent. It is said that through the leniency thus shown to the mortgagor, the mortgagee has released the surety.

A contractual obligation may not be altered without the consent of the person who has assumed the obligation. The obligation of a surety or guarantor of due performance of a contract cannot be extended, without the surety's consent, to cover performance of a different contract. Alteration of the contractual obligation of the principal releases the surety, for the principal is no longer bound to perform the obligation guaranteed by the surety and the surety cannot be held responsible for the failure of the principal to perform any other obligation. The rule is based upon fundamental principles of contract which have not been seriously challenged in any jurisdiction, though there is difference of opinion in regard to the proper application of the rule. In this State the rule has been applied stringently. This court has said that the "defendant's [surety's] obligation is *strictissimi juris*, and he is discharged by any alteration of the contract to which his guaranty applied, whether material or not, and the courts will not inquire whether it is or is not to his injury." *Page v. Krekey*, 137 N.Y. 307, 314, 33 N.E. 311, 313, 21 L.R.A. 409, 33 Am.St.Rep. 731; *Paine v. Jones*, 76 N.Y. 274, 278; *Antisdel v. Williamson*, 165 N.Y. 372, 59 N.E. 207. The rule when strictly applied at times produces results which do not accord with our sense of what is fair or desirable and which are, perhaps, not consistent with the realities of business experience. When so applied, the rule has been subjected to searching and severe criticism. We have been urged to confine its application to cases where alterations in the obligation of the surety may increase the burden of the surety. Where the court can say with reasonable certainty that a surety gains benefit through an alteration, we are told it is unsound to hold that the surety is discharged. Before we consider whether we should abandon old precedents, reconsider an old-established rule or even redefine the field of its proper application, we should first determine whether a result which is challenged as unfair and unreasonable may not be due to an indiscriminating extension of established principles or old precedents rather than to infirmity in the principles or precedents.

By "alteration" in the obligation of the principal, the principal is discharged from performance of the obligation in its original form and, in effect, a new obligation is substituted for the old. In those

cases where we have held that alteration of any kind in the obligation of the principal discharges the surety, there has been a change in the nature of the obligation which might be required of the principal, performance of the old obligation might be more onerous but relief from the burden of the old was accompanied by the creation of rights and duties different from those which arose out of the original agreement. We have in such cases refused to balance the advantage of relief from the old burden against possible disadvantage imposed by the new. We have held that the surety is discharged by any modification of the contract of the principal which requires of him performance in any respect different from the performance guaranteed by the surety. We have not held that an act of leniency towards the principal by the assured through remission of a part of an obligation or waiver of full performance constitutes an alteration of the obligation of the principal which will discharge the surety completely. Reduction in the rate of interest is a remission of part of the obligation. Remission or waiver of part of the performance which might be exacted by the assured from the principal does not release the principal from performance of the part of the original obligation which remains unchanged and in full force; and if the principal fails in such performance the surety may be held for the default in accordance with the surety's agreement. Neither principal nor surety is held in such case for a new or altered obligation; both are held to performance of an obligation assumed in the original agreement.

Nothing said or decided by this court conflicts with the general rule that "A surety is none the less discharged by a change in the terms of the principal's contract for the performance of which the surety has bound himself when the change might not be disadvantageous to him. But an agreement merely to remit part of the performance due from the principal without changing its character as by lessening the amount of rent to be paid under a guaranteed lease, or by providing for a lower rate of interest on a debt than the contract provides for or by waiving a portion of the performance of a contract will not discharge the surety." (Williston on Contracts [Rev. ed.], § 1240.) It follows that remission of a part of the interest even if such remission had been made by valid contract would not discharge the surety. *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77, 41 Am.Rep. 193.

The effect of the agreement to accept, in monthly installments, interest which under the terms of the bond was payable every six months, presents a similar question though in different form. It is said that such agreement followed by acceptance of monthly check extended the time for the payment of the principal sum. The doctrine that extension of time for payment of the principal debt even for a few days discharges the surety, has been established by a long line of decisions. *National Park Bank v. Koehler*, 204 N.Y. 174, 97 N.E. 468; 4 Williston on Contracts, § 1222. Leniency shown to a debtor in default, delay permitted by the creditor without change in the time when payment of the debt might be *demand*ed, does not, however, constitute an extension of the time for payment. That requires a binding

contract which precludes the creditor from enforcing payment according to the terms of the original contract and confers upon the debtor the *right* to withhold payment after the original debt has become due. In this case it is said that such a binding agreement arises from the receipt of checks for \$50 intended as monthly payments of interest on the principal debt.

This court in *New York Life Ins. Co. v. Casey*, 178 N.Y. 381, 70 N.E. 916, 918, cited with approval the applicable rule as stated in *Brandt on Suretyship*: "The general rule is that the reception of interest *in advance* upon a note is *prima facie* evidence of a binding contract to forbear and delay the time of payment, and no suit can be maintained against the maker *during the period for which the interest has been paid* unless the right to sue is reserved by the agreement of the parties. The payment of interest *in advance* is not of itself a contract to delay, but is evidence of such contract, and while this evidence may be rebutted, yet in the absence of any rebutting evidence it becomes conclusive," Italics are new. Cf. *Kings County Trust Co. v. Giovinco*, 266 N.Y. 137, 194 N.E. 60. In this case there has been no "period for which the interest has been paid" in advance. In January, 1933, the mortgagee agreed to accept in monthly installments interest which had become due and payable earlier. The principal of the mortgage debt was long since due. The mortgagee might have demanded at any time, payment both of principal and past due interest. There was no contract, express or implied, which would have given the principal debtor the right to refuse payment of principal and past due interest and there never was an instant of time when some interest was not past due. Even a binding agreement to accept payment of past due interest in monthly installments—and we do not intimate that here the mortgagee's agreement constituted more than a proffered favor without binding effect—would not have discharged the surety. *Coe v. Cassidy*, 72 N.Y. 133.

In this case the surety claims that unqualified benefit bestowed upon the principal debtor and leniency and consideration shown to the principal debtor discharges the surety. That is not the law of this State. The surety guaranteed the performance of the obligation of the principal debtor. The creditor's agreement to forego part of his rights does not discharge the surety from responsibility for failure of performance by the principal debtor of that part of the original obligation which still remains and *which remains untouched and unaffected by the creditor's remission of the remainder of the obligation*. The surety is held to no obligation which he did not assume and if the surety meets that obligation he will be subrogated to the creditor's cause of action against the principal debtor, in accordance with the terms of the original contract.

The judgments should be reversed and judgment granted for the plaintiff, with costs in all courts.

NOTE

39 Colum.L.Rev. 1254 (1939) comments on the principal case:

"New York has neither discarded the strict rule, nor adopted the more liberal Massachusetts approach. Rather, in declaring what amounts to a further limitation on the applicability of the strict rule, it has added to an already complicated situation another variable factor, namely, the necessity of deciding whether that which the surety seeks to establish as an "alteration" is actually such an alteration as to bring into operation the strict rule."

The commentator then suggested legislation which would enact the Massachusetts rule, which is that an alteration which is in its nature beneficial to the surety, or which, self-evidently, cannot prejudice him, does not discharge the surety.

SECTION 5. ORIGINS AND DEVELOPMENT OF LEGISLATIVE POLICY

A. Introductory

ABBOT LOW MOFFAT, THE LEGISLATIVE PROCESS

24 Cornell L.Q. 223, 228-233 (1939).*

What seems to be the most common misconception as to the legislative process is its basic nature. Despite the procedure which at first glance may seem to be unrelated to other democratic processes, it is, in its essence, a judicial process, and this is clearly recognized in Massachusetts, where the legislature is known as the General Court. . . . Very little legislation ever originates within a legislature itself. The legislature is the tribunal to which are brought proposed changes in the rules governing our lives. That tribunal, weighing the arguments for and against, renders judgment by the adoption or rejection of the proposed amendment to the laws. . . .

While a court in granting relief or awarding judgment is bound by the laws applicable to the case, even though personal justice may not always be served thereby, the legislature in its decisions is ultimately bound by the will of the majority of the people whom it represents. I use the word "ultimately" because there are several factors which come into play and sometimes cause a postponement of such a decision.

Individual influence can play an important part in the disposition of legislation. Sponsorship of a measure by an unpopular individual will seriously militate against its adoption. The support or opposition of an individual who is a dominant character or who has become recognized as an expert in a particular subject or who by seniority has become a committee chairman or achieved the ranks of the "older [in point of service] members" is not infrequently decisive. But the two chief factors are politics and caution.

* [Footnotes are omitted. Ed.]

Partisan politics play almost no part in the vast majority of legislation adopted or rejected. The extent of its absence, indeed, is always surprising to those who approach a legislature fed by lurid tales of partisan scheming. On the other hand, in important matters politics is a vital factor because it is the effort to ascertain what people want, as determined by votes which are the expression of democracy. When an organized minority, pressure group or other aggressive combination of citizens, who express their aggressiveness by votes, become interested for or against a proposal, they become an important element of the public whose views must be considered. Very frequently, the tribunal in giving its democratic judgment will bow to such an organized group, even though it may obviously be a minority, because their votes can be so directed as to outweigh and, indeed, outnumber the apathetic votes on the other side. This is the basic role which politics plays and it can be a factor in thwarting temporarily legislative decision in accordance with popular will.

The second important factor is the almost universal attitude that the burden of proof is on the plaintiff. A legislature is very disinclined to make an important change of law where there is serious opposition to such change even though a majority, were a census to be taken, favor the proponents. A legislature is inclined to be mildly conservative about changing the rules under which people are living. It must be satisfied not only that the change is desirable but that the great majority of people want it. A 51-49 division of opinion among the public would probably not result in the enactment of the legislation sought by the 51 per cent.

This attitude when intelligently applied is by no means harmful. Those desiring a major change must convince the great bulk of their fellow citizens. As a result, when the change is adopted, the people are behind it, those opposed have had time to anticipate the result, and what a few years before may have been considered a dangerous or radical innovation becomes quietly effective with little or no social or economic disturbance. Far different would have been the situation had the 51 per cent been able to force enactment of a proposal violently disliked by 49 per cent of the people. Then again, this caution serves to winnow the passing emotional fancy from the deep rooted substantive reform. Public views are seldom static. If the 51 per cent cannot succeed in persuading the bulk of their fellow citizens that their particular reform is desirable, the proposal will soon be disclosed as a temporary emotional surge and its own adherents will drop away.

The very process of education has beneficial results. When first some new change is offered, a kernel of sound and intelligent reform may well be completely enclosed in a shell of impractical proposed administration. The advocates fight for the kernel, the opposition is terrified by the shell. Gradually, the arguments on each side make some impression on the other and, because of merit or expediency, or both, changes are made to make the program more effective and workable. The waiting period forced by the conservative policy of most

legislatures results in knocking off the rough edges of many such proposals and, incidentally, in greatly improved draftsmanship.

But against these advantages, there exists one very serious danger. The normal delay of a legislative body may and, indeed, often does develop into a lag that makes its attitude completely reactionary and a force that militates against sound democratic government, since it is out of tune with the settled opinion of the people.

It has long been a popular pastime in this country to make fun of legislative bodies and legislators; yet a legislature reflects fairly accurately the public which, as a body, it represents. There are always enough buffoons, individuals of limited intellect, and gentlemen with sticky fingers, to be a source of comedy or scorn. The many able individuals in legislative bodies, who quietly go about their tasks and perform the duties assigned to them, escape the public notice. When a legislative body or a member does something of which the press does not approve, cartoons aplenty festoon newspaper pages. On the other hand, when their actions are reasonable and sound such is taken for granted and passed over in silence. As a result, idiosyncrasies and occasional errors or stupidities receive the great bulk of publicity by which public opinion is molded.

This aspect of diminishing legislative prestige has been accompanied by two others. Almost no attempt is made by the public to understand the actual problems before a legislature. We are a people who love labels. Only infrequently does the public endeavor to determine whether a label is properly affixed. In writing of pending legislation, the press generally finds it impossible to discuss the details of a proposal and, accordingly, over-simplifies its comments. It is apt to advocate a proposal simply because it approves the kernel or condemn a proposal because of the shell. Once a label is affixed in the public mind, it is almost impossible to secure rational consideration and perhaps needed modifications. A member may sincerely believe in a certain social reform but feel that the bill before him is so badly drafted or its administrative provisions so unworkable that the result sought would not be accomplished. Unable to secure intelligent amendment, he votes against the bill. Promptly he is damned by those who care only for the publicized objective, who are totally unfamiliar with the details, and who, indeed, care nothing about the details of the bill itself.

A further aspect of declining esteem, and one that is of especial importance, is the prestige and power of the executive which, for several decades, has been progressively increasing at the expense of the legislature. A long time has passed since the struggle between royal governors and the representatives of the people who fought for the liberties of the people. The American people like personalities. They can render hero worship to an executive as a person, which is something they can never do to a legislative body made up of numerous individuals. Many executives have taken advantage of this simple psychological fact. Baiting the legislature is an accepted political formula for an executive, which, unless he is almost wholly in the wrong, is

more often than not only too successful. When an executive talks, the radio and the press carry his version of a controversy to every citizen. But the legislature with its large membership cannot so speak, and it is at a complete disadvantage in broadcasting its point of view, whether on the air or in print. Such a controversy, furthermore, often becomes in the public mind a quarrel between the courageous one and the contemptuous many.

In recent years, for one cause or another, there has been a tendency on the part of executives to try to break the innate caution of legislative bodies and to force changes at a faster rate than the legislature feels desirable. Frequently this leadership has been very necessary. A legislative body which lags behind settled public opinion not only is a threat to democracy, but of itself is an incentive to opposite extremes. On the other hand, when an executive forces the legislature to accept his judgment in all matters and to enact changes before they are supported by settled public opinion, there is an equal threat to democracy—one which is in line with tendencies visible today in so many parts of the world.

Representative democracy requires a balance between a legislature which lags behind contemporary thought and an ill-considered bending to every passing breeze. It also requires a balance between the executive branch and the legislative branch of government. The breakdown of the one is, indeed, frequently the cause of the collapse of the other.

There is a definite obligation on every citizen to preserve the legislative bulwark of representative democracy, striving militantly to maintain the essential balance. There should be tolerance for the foibles and faults of legislative bodies—too often but the mirror of our collective selves. There should be understanding and sympathy with the work and the actual problems before legislative bodies—too often condemned or praised on labels or emotional appeals. But above all, there must be an end to that fatal attitude of letting others run the government; there must be a resurgence of active interest in all government, and there must be widespread participation, to some extent at least, in the politics which make it operate.

ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION

Chicago: 1917. University of Chicago Press. 215-218.

By contrast with the common law, every proposition of which claims to be a dictate of reason and logic, statute law is conventional in the sense that in many cases it merely represents the legislator's free choice between a number of different possible and perhaps equally reasonable provisions. The natural desire to avoid the charge of arbitrariness in legislation produces a strong tendency to follow precedents, and, in consequence, a certain uniformity of provision with regard to relatively indifferent matters which has nothing to do with

principle, and which is yet likely to impose itself upon legislation with more than the force of principle. In every jurisdiction it is possible to cite instances of this kind in which the mere force of habit supports practices which have nothing else to recommend them; witness the usual clause at the end of a New York statute: "this act shall take effect immediately," or the requirement which is common in Illinois that the governor approve vouchers for expenses which are charges against appropriations. Such practices offer little general interest.

So long as legislation claims to produce law it must also strive to realize in its product that conformity to principle from which law derives its main sanction and authority. The difference between common law and statute law in this respect, however, is that while the data of the common law are fixed and beyond conscious and deliberate transmutation, those of legislation vary with varying purposes and conditions. While principle in common law simply stands for logic, reason, and established policy, its meaning in legislation is far more complex. We can hardly say more to begin with than that it means a settled point of view, and any closer analysis requires careful differentiation.

At the opposite ends of the various classes of considerations that move the legislator we should place constitutional requirement and policy. The constitutional rule must be obeyed no matter what opinion may be entertained of its wisdom, and is thus withdrawn from argument except for the purpose of interpretation. It may be absolutely conventional, as, e. g., in the requirement and wording of an enacting clause, or convention and principle may be mixed, as in specifying brief terms of office, or it may state a principle pure and simple, as in the rule against *ex post facto* laws or against double jeopardy. The mandatory character of the rule is affected by these differences only in the varying latitude of constitutional construction.

Policy, on the other hand, represents the freedom of legislative discretion. No matter what array of facts and arguments we may bring to bear upon certain problems, we must recognize that in the present state of human thought and knowledge their determination is controlled by considerations which lie beyond the forum of compelling reason, and depends upon fundamental differences in habits and ideals. Strict or liberal divorce laws, high license or prohibition, free trade or protection, free or regulated business, the limits of combination and of competition, form or informality in legal acts—these constitute issues with regard to which opinions of men will continue to differ, and which for the present must therefore be left to the domain of policy.

Contrast with these the legislative attitude toward polygamy, toward monopoly, toward gambling, or toward vice, and we shall find these latter policies as firmly established as any common-law principle. The common law embodies, in addition to reason and logic, also a great deal of policy, as, e. g., the pronounced favor to the accused in criminal procedure. That policy has in America been transformed into a constitutional rule, as has been the more modern policy of freedom of thought and of religion; there are even instances in which

highly controversial policies have been enacted into constitutional provisions in order to withdraw them from legislative change; witness the prohibition clauses in the constitutions of Kansas and Oklahoma.

Where this is done, it is not inaccurate to say that policy has been changed into principle; we then simply attribute to principle the meaning of settled policy. In this sense any policy adopted by the legislature becomes the principle of the statute enacted to effectuate that policy—principle to the extent that it controls or should control the details of provisions and their application and interpretation. Considering the statute without reference to these details, we should of course realize that we deal with legislative policies and not with principles of legislation in the more specific sense. The legislative determination of policies is generally, and in a sense justly, regarded as a matter of free discretion; in any event the considerations guiding that discretion are ordinarily not counted as falling within the province of jurisprudence.

Principle as applied to legislation, in the jurisprudential sense of the term, thus does not form a sharp contrast to either constitutional requirement or policy, for it may be found in both; but it rises above both as being an ideal attribute demanded by the claim of statute law to be respected as a rational ordering of human affairs; it may be a proposition of logic, of justice, or of compelling expediency; in any event it is something that in the long run will tend to enforce itself by reason of its inherent fitness, or, if ignored, will produce irritation, disturbance, and failure of policy. It cannot, in other words, be violated with impunity, which does not mean that it cannot be or never is violated in fact. Perhaps the best criterion of principle is that reasonable persons can be brought to agree upon the correctness of a proposition, though when they are called upon to apply it their inclinations or prejudices may be stronger than their reason.

The question is whether our legal science has developed an adequate system of principles of legislation in this sense.

B. Legislative Precedent

"Laws, like inherited disease, descend:
They slyly wind their way from age to age,
And glide almost unseen from place to place."—
Goethe, *Faust*.

*(i) ILLUSTRATION FROM EARLY AMERICAN LAW*STEFAN A. RIESENFELD, THE DEVELOPMENT OF AMERICAN
POOR LAWS IN GENERAL.*

Section 5. The Unsettled Person in Need of Assistance.

B. American law during the colonial period.

If we look at the American law as it developed during the colonial days we find a host of details which characterize it clearly as an offshoot of the English system. Yet it is necessary to realize that the situation here was vastly different from that on the other side of the Atlantic. Labor was scarce and there was no shortage of land. The colonies had no agricultural proletariat. Destitution because of lack of employment was unknown, although comparatively early some towns were saturated with certain skills. Need for relief was the result of age, infancy, sickness, physical infirmities or widowhood. An able-bodied male without livelihood was necessarily a vagrant or a rogue. The early settlers were, however, from the beginning quite concerned about strangers who might become either a financial burden or otherwise obnoxious. Thus the early statutes combine frequently the suppression of vagrancy with the regulation of relief.

Even in the earliest colonial period the maintenance of the poor was recognized as a matter of local concern. The court records of the 17th century as published by the various historical societies and state governments are studded with orders concerning relief or removal. Gradually the colonies passed their own statutes on the subject which show many interesting features. In the first place their very wording shows that even the earliest draftsmen had either the pertinent English statutes before their eyes or an abridgement thereof such as was contained in the various manuals for Justices of the Peace by Lambard, Dalton or Nelson.¹ Secondly, legislation of some of the

* This extract from the manuscript for a new book on "Modern Social Legislation" is used here with the permission of Professor Riesenfeld. Several of the footnotes have been omitted. Ed.

¹ These manuals had apparently a substantial circulation in the colonies. American editions appear early. Care's *English Liberties* with additions by Nelson relating to Justices of the Peace, Churchwardens, etc., was printed in its 5th ed. in Boston in 1721. It contained an abridgment of the poor laws p. 267ff. The *Conductor Generalis*, an American version of Nelson's *Justice of the Peace*, 1707, appeared in 1722. It presented the law relating to the poor and vagrants, pp. 132ff, 21ff. Webb published his *Justice of the Peace* in 1736, containing English and Virginia law.

colonies influenced decidedly that of their neighbor provinces and was either directly copied by them or adopted in a modified version.² Thirdly, as the English law itself developed qualifications and refinements the colonial statutes and practice followed the example.

The pioneer in poor legislation among the New England provinces was the Massachusetts Bay Colony. Her acts were copied to a large extent by Connecticut and New Hampshire. Rhode Island on the other hand followed the English law fairly closely but stood otherwise by itself. Pennsylvania was another colony which not only borrowed directly from England but influenced also the sister provinces of New Jersey, Delaware and later to a certain degree New York. Maryland again seems to have merely adopted the general trend of the surrounding colonies. South Carolina, Virginia, North Carolina, and Georgia finally form another group, the legislation of which shows either common features or direct copying among one another. . . .

C. The period from the acquisition of statehood to the present day.

The general features of the legislation regarding the relief and treatment of settled and unsettled poor did not undergo any radical changes during the subsequent period. The pattern was set in the colonial days. The force of tradition and the weight of legislative precedent prevented any far-reaching deviations from the accepted scheme.

1. *The weight of the legislative precedent.* It is perhaps worthwhile to illustrate this phenomenon with further examples. The separation from England necessarily diminished or at least delayed the influence of her statutory developments on American legislation. The lead now goes to the Atlantic seaboard states, particularly Pennsylvania, Massachusetts, and New York. Congress itself fostered the practice of borrowing law by requiring in the celebrated Ordinance for the Territory Northwest of the River Ohio that the territorial statutes should be adopted from the original states, although the mandate was tempered with a "necessary and best suited to the circumstances" clause.³ As a result the Poor Law of Pennsylvania of 1771 was adopted in 1795⁴ and became subsequently with an amendment of 1799⁵ the law of the Territory of Indiana⁶ and Illinois.⁷ The Michigan Territory

² Of course the existence of such families of laws among the colonies is by no means accidental. The New England colonies of Massachusetts Bay, Plymouth, Connecticut, and New Haven had formed a confederation as early as in 1643, the articles of which were first printed in the 1656 edition of the Laws of New Haven Colony. (1858 reprint). New York, New Jersey, Pennsylvania at first combined with Delaware, had become English colonies at the same time and started out with the famous Duke Laws (1665). The southern colonies had a strong geographical tie.

³ Ordinance for the Government of the Territory of the United States northwest of the river Ohio, 1787, 1 U.S.Stats. at Large, 1789-1799, 50.

⁴ Pease, *The Laws of the Northwest Territory, 1788-1800*, 216.

⁵ *Ibid.* 510.

⁶ Philbrick, *The Laws of Indiana Territory 1801-1809*, 308. The State of Indiana, established in 1816, retained the bulk of these provisions in the Revision of 1824, Indiana, Revised Laws, 1824, 278.

⁷ Philbrick, *Pope's Digest*, 1816, Vol. 2, 1940, 215.

adopted first, in a considerably modified form, a New Jersey provision,⁸ switched in 1820 to a portion of the Ohio statute of 1816⁹ and copied later word for word with a few omissions the New York statute of 1813.¹⁰ Rhode Island incorporated in 1798¹¹ into her poor law of 1765 large portions of the Massachusetts statutes of 1794.¹² The state of Illinois retained at first the territorial statute with slight modifications.¹³ In 1827 it was replaced by a much simpler and apparently original act.¹⁴ But this statute in turn with its amendments¹⁵ was copied by the Territories of Iowa and Wisconsin,¹⁶ which law was again adopted by the Revision of 1851 of the Territory of Minnesota.¹⁷ The state of Michigan in the Revision of 1838 copied verbatim the poor law of New York of 1827 with its amendments prior to that date.¹⁸ The Territory of Iowa adopted in 1843 the poor law of the State of Ohio of 1831.¹⁹ Some states drafted their law by engrafting upon their older statutes provisions which were taken from a number of states. Thus Vermont revised its poor law of 1787²⁰ by borrowing heavily from New York, Virginia, and Massachusetts, as a comparison of the Vermont statute of 1797²¹ which the laws of these states show. Similarly Wisconsin used the Massachusetts settlement law of 1794 and the New York poor law of 1827 for the drafting of its first poor law after acquiring statehood.²² These examples could easily be multiplied.

NOTES

1. For an illustration of the origin of a legislative precedent and its persistent application, see Leighton, "Origin of the Phrase 'Intended to Take Effect in Posses-

⁸ 1 Laws of the Territory of Michigan, 1805-1821, 1871, 90, 208.

⁹ *Ibid.* 531. While Ohio, of course, was not one of the original states, it was held that the term "Original state" in the Ordinance for the Northwest Territory, *supra* note 38, which applied to the government of the Michigan Territory, meant any state existing at the time of the adoption of its law, *Williams v. Bank of Michigan*, 1831, 7 Wend.(N.Y.) 539, 552. The Ohio poor law of 1816 was a revision of a statute which had been passed in 1805 and amended before in 1810. 3 Laws of Ohio, 1805, 572, 8 *ibid.* 220, 14 *ibid.* 197.

¹⁰ Act for the Relief and Settlement of the Poor, 1827, Laws of the Territory of Michigan, 1827, 404; Act for the Relief and Settlement of the Poor, 1813; 1 Laws of New York (Van Ness) 1813, 279.

¹¹ The Public Laws of the State of Rhode Island, 1798, 345, 348.

¹² 2 Massachusetts Laws, 1801, 606, 619.

¹³ 1 Laws of Illinois, 1819, 127.

¹⁴ Illinois Revised Code, 1827, 309.

¹⁵ Illinois, Revised Laws, 1833, 480; 1 Illinois Laws 1834-1835, 66.

¹⁶ Laws of the Territory of Iowa, 1840, Ch. 50; Statutes of the Territory of Wisconsin, 1830, 132.

¹⁷ Territory of Minnesota, Revised Stats., 1851, 121.

¹⁸ Compare Michigan, Revised Statutes, 1838, 179ff, with 1 New York, Revised Statutes, 1827-1828, 1829, 613ff.

¹⁹ Compare Territory of Iowa, Revised Statutes, 1843, Ch. 118 with Statutes of the State of Ohio (Swan), 1841, Ch. 85.

²⁰ Statutes of the State of Vermont, 1791, 126.

²¹ Laws of the State of Vermont, 1798, 262.

²² Wisconsin, Revised Statutes, 1849, 235.

sion or Enjoyment At Or After . . . Death' (Section 811(c), Internal Revenue Code)", 56 Yale L.J. 176 (1946).

2. For a comprehensive discussion of precedent in statute making, see Frank E. Horack, Jr., "The Common Law of Legislation", 23 Iowa L.Rev. 41 (1937).

(ii) ILLUSTRATION FROM 20TH CENTURY AMERICAN LAW

HESS v. PAWLOSKI

Supreme Court of the United States, 1927.
274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was brought by defendant in error to recover damages for personal injuries. The declaration alleged that plaintiff in error negligently and wantonly drove a motor vehicle on a public highway in Massachusetts, and that by reason thereof the vehicle struck and injured defendant in error. Plaintiff in error is a resident of Pennsylvania. No personal service was made on him, and no property belonging to him was attached. The service of process was made in compliance with chapter 90, General Laws of Massachusetts, as amended by Stat.1923, c. 431, § 2, the material parts of which follow:

"The acceptance by a nonresident of the rights and privileges conferred by section three or four, as evidenced by his operating a motor vehicle thereunder, or the operation by a nonresident of a motor vehicle on a public way in the commonwealth other than under said sections, shall be deemed equivalent to an appointment by such nonresident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said nonresident may be involved while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the registrar, or in his office, and such service shall be sufficient service upon the said nonresident: Provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the writ and entered with the declaration. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action."

Plaintiff in error appeared specially for the purpose of contesting jurisdiction, and filed an answer in abatement and moved to dismiss on the ground that the service of process, if sustained, would deprive him of his property without due process of law, in violation of the Fourteenth Amendment. The court overruled the answer in abatement and denied the motion. The Supreme Judicial Court held the

statute to be a valid exercise of the police power, and affirmed the order. *Pawloski v. Hess*, 250 Mass. 22, 144 N.E. 760, 35 A.L.R. 945. At the trial the contention was renewed and again denied. Plaintiff in error excepted. The jury returned a verdict for defendant in error. The exceptions were overruled by the Supreme Judicial Court. *Pawloski v. Hess*, 253 Mass. 478, 149 N.E. 122. Thereupon the superior court entered judgment. The writ of error was allowed by the Chief Justice of that court.

The question is whether the Massachusetts enactment contravenes the due process clause of the Fourteenth Amendment.

The process of a court of one state cannot run into another and summon a party there domiciled to respond to proceedings against him. Notice sent outside the state to a nonresident is unavailing to give jurisdiction in an action against him personally for money recovery. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565. There must be actual service within the state of notice upon him or upon some one authorized to accept service for him. *Goldey v. Morning News*, 156 U.S. 518, 15 S.Ct. 559, 39 L.Ed. 517. A personal judgment rendered against a nonresident, who has neither been served with process nor appeared in the suit, is without validity. *McDonald v. Mabce*, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed. 608, L.R.A.1917F, 453. The mere transaction of business in a state by nonresident natural persons does not imply consent to be bound by the process of its courts. *Flexner v. Farson*, 248 U.S. 289, 39 S.Ct. 97, 63 L.Ed. 250. The power of a state to exclude foreign corporations, although not absolute, but qualified, is the ground on which such an implication is supported as to them. *Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co.*, 243 U.S. 93, 96, 37 S.Ct. 344, 61 L.Ed. 610. But a state may not withhold from nonresident individuals the right of doing business therein. The privileges and immunities clause of the Constitution (section 2, art. 4), safeguards to the citizens of one state the right "to pass through, or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise." And it prohibits state legislation discriminating against citizens of other states. *Corfield v. Coryell*, 4 Wash.C.C. 371, 381. *Fed.Cas.No.3.230*; *Ward v. Maryland*, 12 Wall. 418, 430, 20 L.Ed. 449; *Paul v. Virginia*, 8 Wall. 168, 180, 19 L.Ed. 357.

Motor vehicles are dangerous machines, and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and nonresidents alike, who use its highways. The measure in question operates to require a nonresident to answer for his conduct in the state where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the nonresident may be involved. It is required that he shall actually receive and receipt for notice of the serv-

ice and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense. It makes no hostile discrimination against nonresidents, but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required. *Canadian Northern Ry. Co. v. Eggen*, 252 U.S. 553, 561, 562, 40 S.Ct. 402, 64 L.Ed. 713. The state's power to regulate the use of its highways extends to their use by nonresidents as well as by residents. *Hendrick v. Maryland*, 235 U.S. 610, 622, 35 S.Ct. 140, 59 L. Ed. 385. And, in advance of the operation of a motor vehicle on its highway by a nonresident, the state may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. *Kane v. New Jersey*, 242 U.S. 160, 167, 37 S.Ct. 30, 61 L.Ed. 222. That case recognizes power of the state to exclude a nonresident until the formal appointment is made. And, having the power so to exclude, the state may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served. Cf. *Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co.*, supra, 96 (37 S.Ct. 344); *Lafayette Ins. Co. v. French*, 18 How. 404, 407, 408, 15 L.Ed. 451. The difference between the formal and implied appointment is not substantial, so far as concerns the application of the due process clause of the Fourteenth Amendment.

Judgment affirmed.

NOTE

In *Knoop v. Anderson*, 71 F.Supp. 832 (D.C.Iowa 1947), Graven, D. J., said: "The earliest Non-Resident Motorist Service Act was enacted by New Jersey in 1908, P.L.1908, p. 613. That Act provided that non-residents could not drive an automobile upon the public highways of New Jersey without first executing a written instrument designating the Secretary of State as attorney for the service of process in actions growing out of the operation of the automobile in that state. The constitutionality of that statute was upheld in the case of *Kane v. New Jersey* (1916) 242 U.S. 160, 37 S.Ct. 30, 61 L.Ed. 222. . . . All of the 48 states and the District of Columbia now have Acts which provide that the operation of a motor vehicle upon their highways by a non-resident shall be deemed to constitute a designated public officer in the state the agent or attorney of the non-resident for the service of process in actions growing out of the operation of motor vehicles in the state."

(Judge Graven cites all 49 statutes in alphabetical order of states.)

MAURICE S. CULP, PROCESS IN ACTIONS AGAINST NON-RESIDENTS DOING BUSINESS WITHIN A STATE

32 Mich.L.Rev. 909-912 (1934).

Many state legislatures have undertaken to subject non-resident persons or unincorporated groups, or both, to the power of their local courts in relation to business transacted within their limits. No less than forty States have at one time or another enacted statutes providing for substituted service of process in actions arising out of such transactions. Most of these statutes apply to non-residents generally;

but in eighteen States statutes, now or formerly in force, have provided in express terms for substituted service on non-resident partnerships or unincorporated associations. Both types alike provide that service may be made upon an actual agent of the nonresident or upon a statutory agent who may or may not have the duty of giving notice of such service to his principal.

The statutes also fall into two classes in another respect: those which apply to all kinds of business done by non-residents and those applying to particular types of business such as business transacted by non-resident seed dealers, contractors, motor carriers, public utility and real estate brokers. The Iowa statute is an example of the first type:¹³

"When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on an agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

The Michigan statute is representative of the type designed to authorize substituted process in actions growing out of specific business transactions:¹⁴

"Every issuer or applicant for the filing of securities who is a non-resident of the state of Michigan, shall . . . file with the commission his irrevocable consent that suits and actions arising out of or founded upon misrepresentation or fraud in connection with the sale of such securities in this state may be commenced against him by the proper court of any county in the state in which the plaintiff may reside, by the service of any process or pleadings authorized by the laws of this state, on the chairman of the commission, said consent stipulating and agreeing that such service of such process or pleadings on such chairman shall be taken and held in all courts to be as valid and binding as if due service had been made upon the applicant himself. . . . All process or pleadings required in this act to be served upon said chairman shall be served in duplicate copies, one (1) of which shall be retained in the office of the commission and the other forwarded by registered mail forthwith to the head office of the person against whom said process or pleadings are directed."

In general all these types of legislation raise essentially the same question: the type applicable to all non-residents, to non-resident partnerships and associations, and to non-residents engaged in the transactions of special business. They raise the same questions of constitutional power and procedural form. . . .

The number of statutes is indicative of the need felt for this kind of legislation. And from the scope of some of these statutes, applying to one or more specific businesses, it is apparent that the use of substituted service on such non-residents has developed as the evils re-

¹³ Iowa Code (1931) § 11079.

¹⁴ Mich Comp.Laws (1929) § 9787.

sulting from particular situations have demanded attention. The common object of all such legislation is to protect residents against the financial hardship and inconvenience of seeking out the defendant in the State of his residence. Under such a statute the State compels the non-resident in return for the privilege of doing business within, and the protection afforded by, the local community to submit to the process of the local courts as to causes of action arising out of that business.

LAWS OF PENNSYLVANIA, 1937

No. 558, 12 P.S. § 331.

AN ACT

Providing for the service of process in civil actions on nonresident owners, tenants, or users, of real estate located within the Commonwealth of Pennsylvania, and the footways and curbs adjacent thereto, or any such resident of this Commonwealth who shall subsequently become a nonresident, and making the ownership, possession, occupancy, control, maintenance, and use of such real estate, footways, and curbs, the equivalent of the appointment of the Secretary of the Commonwealth of Pennsylvania as the agent of said nonresident, upon whom civil service may be served; and providing for further notice to the defendants in any such action.

Section 1. Be it enacted, &c., That, from and after the passage of this act, any nonresident of this Commonwealth being the owner, tenant, or user, of real estate located within the Commonwealth of Pennsylvania, and the footways and curbs adjacent thereto, or any such resident of this Commonwealth who shall subsequently become a nonresident, shall, by the ownership, possession, occupancy, control, maintenance, and use, of such real estate, footways, and curbs, make and constitute the Secretary of the Commonwealth of Pennsylvania his, her, its, or their agent for the service of process in any civil action or proceedings instituted in the courts of the Commonwealth of Pennsylvania against such owner, tenant, or user of such real estate, footways and curbs, arising out of or by reason of any accident or injury occurring within the Commonwealth in which such real estate, footways, and curbs are involved.

VEHICLE AND TRAFFIC LAW

N.Y.Consol.Laws, c. 71 (enacted in 1931).

“§ 52-a. Service of summons on residents, who remove from the state prior to commencement of action against them. The operation by a resident of a motor cycle or a motor vehicle on a public highway in this state, or the operation on a public highway in this state of a motor vehicle or motor cycle owned by such resident, if operated by his consent or permission, either express or implied, shall, in all cases where such resident shall have removed from this state, prior

to the service of legal process upon him in actions hereafter described, and shall have been absent therefrom for thirty days continuously, be deemed equivalent to an appointment by such resident of the secretary of state to be his true and lawful attorney upon whom may be served the summons in any action against him, growing out of any accident or collision in which such resident may be involved while operating a motor vehicle on such a public highway, or in which such motor vehicle or motor cycle may be involved while being operated on such a highway with the consent, express or implied, of such resident owner; and such operation shall be deemed a signification of his agreement that such summons against him which is so served shall be of the same legal force and validity as if served on him personally within the state. Service of such summons shall be made in the same manner, and with the same force and effect, as specified and set forth for the service of a summons upon a nonresident in section fifty-two of this chapter. The court in which the action is pending may order such extensions as may be necessary to afford the defendant reasonable opportunity to defend the action."

MARANO v. FINN

Supreme Court of New York, Appellate Term 1935.
155 Misc. 793, 281 N.Y.S. 440.

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

PER CURIAM. The sole question involved herein is whether section 52-a of the Vehicle and Traffic Law applies to this defendant who is a resident of New York City but absent therefrom for more than 30 days attending college in another state. The section permits service of a summons on residents who remove from the state prior to the commencement of an action against them, and who shall have been absent therefrom for more than 30 days continuously, by delivery of the summons to the secretary of state and by mailing or delivery to defendant outside the state. The language used in both the title and the text of the section indicates it was intended to apply to those who were residents of the state at the time the cause of action accrued, who have since changed their residence to another state. The use of the word "remove" indicates an intention to require more than a temporary absence. In *Kurland v. Chernobil*, 260 N.Y. 254, 257, 183 N.E. 380, 381, the Court of Appeals said: "Section 52-a must, therefore, be held to operate only prospectively and to relate exclusively to those who as residents use the highways of this State subsequent to the passage of the act and who later become nonresidents."

Temporary absence at college would not seem to effect a change of residence within the meaning of the sections, though such absence persisted for more than 30 days during the usual school term.

Order affirmed, with \$10 costs. All concur.

MINNESOTA LAWS, 1947

Chapter 46—S. F. No. 105

An Act authorizing service of process upon the Commissioner of Aeronautics of the State of Minnesota in behalf of any non-resident owner or operator of an aircraft, or upon a resident owner or operator of an aircraft, who has remained without the state where aircraft is used or operated within the State of Minnesota, which use or operation results in damage or loss to person or property.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. The use and operation of an aircraft by a non-resident or his agent in the State of Minnesota or by a resident owner or his agent who has remained without the state continuously for thirty days prior to the commencement of an action against him, shall be deemed an appointment by such non-resident or absentee of the Commissioner of Aeronautics, to be his true and lawful attorney upon whom may be served all legal processes in any action or proceeding against him growing out of such use or operation of an aircraft in the State of Minnesota, resulting in damages or loss to person or property, and said use or operation shall be a signification of his agreement that any such process in any action against him which is so served shall be of the same legal force and validity as if served upon him personally. Service of such process shall be made by serving a copy thereof upon the Commissioner or by filing a copy in his office, together with the payment of a fee of \$2.00, and such service shall be sufficient service upon said non-resident or absentee, provided that notice of such service and a copy of the process are within ten days thereafter sent by mail by the plaintiff to the defendant at his last known address, and that the plaintiff's affidavit of compliance with the provisions of this act are attached to the summons.

The court in which the action is pending may order such continuance as may be necessary to afford the defendant reasonable opportunity to defend any such action not exceeding ninety days from the day of the filing of the action in such court. The fee of \$2.00 paid by the plaintiff to the Commissioner at the time of service of such proceeding shall be taxed in his costs if he prevails in the suit. The said Commissioner shall keep a record of all such processes so served which shall show the day and hour of such service.

App. 2-28-47.

NOTES

1. In its report to the Minnesota State Bar Association the Committee on Aeronautical Law, (1947 Comm.Rep., Minn.St.Bar Assn. p. 3), states: "Your committee recommended . . . the enactment of a statute providing for service of process upon a non-resident plane owner having an accident or incurring liability within the state. This bill was introduced and passed at the 1947 session. . . . The state Commissioner of Aeronautics has been made the agent for service of process. The law also places resident owners of aircraft who remain out of the state for

30 days or more after the incurring of liability, in the same situation as non-resident owners so far as service of process upon them is concerned. This last feature is a new one, and is not found in the statute on the comparable subject in the automobile law. There may be some question as to its constitutionality."

In Culp, "Recent Developments in Actions Against Nonresident Motorists", 37 Mich.L.Rev. 58 (1938), the author states at p. 69: "Obviously, if a person who is a nonresident and therefore only temporarily and transitorily subject to the jurisdiction of a state may constitutionally be served with process in actions growing out of accidents happening within the state, one who has been subject to the jurisdiction by virtue of his residence within the state cannot object to the constitutionality of such legislation. In other words, the police power may with just as much reason assert jurisdiction over the resident who removes after the accident."

The jurisdictional problems raised by these statutes are treated and the relevant literature is cited in Cheatham, Dowling, Goodrich and Griswold, "Cases and Materials on Conflict of Laws", 2nd Ed. 1941. (The Foundation Press.)

2. That adherence to legislative precedent is not necessarily conducive to uniformity of the rules of law applied by the courts is well illustrated by the study of the New York Law Revision Commission of "Statutes in Other States Changing the Common Law as to Seals," (1936) N.Y.Leg.Doc.No.65 (D) 366-373. It concludes: "The diversity of interpretation of statutes which are almost identical in language may be attributed to three factors: first, the loose wording and ambiguous terms used in these statutes; second, the varying views which the courts of separate states had with respect to the common law doctrines of seals; third, the different views of the courts as to how great a departure from common law doctrines as to seals was socially desirable once they were freed by these statutes from the shackles of the common law doctrines."

C. Some Factors and Agencies That Influence Legislative Judgments

(i) SOURCES OF BILLS AND SOME CONSEQUENCES

PHILIP STERLING, SOME PRACTICAL ASPECTS OF LEGISLATION

38 Rep.Pa.Bar Ass'n 381, 399-401 (1932).

How Does a Legislative Idea Originate?

From what source or sources do the many legislative ideas originate? By whom are they created? The least number are conceived out of the independent thought and judgment of the legislator. The experienced member of a legislative body having a comprehensive understanding of the Statute law of the State, well informed on the intricate structure of the State Government, able to analyze the social, political and economic problems of its citizens, often will introduce legislation borne out of his own creative spirit—but the number of such bills, when compared to the whole number introduced during a legislative session is inconsequential. On the other hand the inexperienced legislator will generally introduce a bill when he has been wronged in his own person, when his pride has been hurt, or his dignity assailed or his rights invaded or when at least the injury, if

not visited upon him personally, has befallen one who has his attention or his counsel or is near and dear to him. To the inexperienced legislator the demand of a constituent that "there ought to be a law" brings quick response. But again the quantity of such legislation introduced bears small ratio to the total of all bills presented.

The great bulk of the legislation of our own Legislature has its origin in the departments and bureaus of the State Government under the Executive Branch thereof, notably the Department of Revenue, Department of Highways, Department of Justice, Department of Education and Department of Property and Supplies. Borough, Township, City and County organization bring to every session of the Legislature for introduction by a favorite son great masses of bills, or the ideas from which they take form. Not infrequently a lawyer in his practice, either in the trial of a cause or other undertaking is unable to bring to his client the desired results because of the provisions of an existing law or because, on the particular point involved, there is no statutory law. Speedily, he seeks a friend in the Legislature through whom a bill is presented to prevent a repetition of his unfortunate experience.

Organized labor, civic, social, welfare, industrial and agricultural groups, trade, professional and fraternal organizations, all have their friends in the Legislature through whom, without censor or even hesitation, legislative ideas may be brought for consideration to the lawmaking body of the Commonwealth. Not every such measure is introduced by a member with the thought of final passage. For the most part, the member feels his obligation performed with the introduction of the bill. Its fate thereafter rests with the committee to which it is referred for study. More often than otherwise such a bill does not gain the dignity of a place on the calendar.

NOTES

1. In Walker, "Who Writes the Laws?", 12 State Govt. 199 (1939), the author tabulates the results of a study of all bills introduced in the Ohio legislature during the 1939 session as follows:

BILLS CLASSIFIED BY SOURCE

	Introduced		Became Law	
Individual members	162	24%	30	25%
State Offices	89	13%	28	24%
Local (municipal) Offices	55	8%	8	7%
Lobby	236	35%	47	37%
No information on source	135	20%	8	7%
Totals	677		121	

2. See Witte, "The Preparation of Proposed Measures by Administrative Departments", Report of the President's Committee on Administrative Management (1937).

GEORGE E. ALTER, LEGISLATION, ITS VOLUME, ITS TENDENCIES AND THE CAUSES AND PROCESSES THROUGH WHICH IT IS BEING BROUGHT INTO BEING

31 Rep Pa Bar Ass'n 5, 11-13 (1925).

While it is quite clear that more laws are needed now than in the earlier years, I think it is equally clear . . . that the quantity produced at every session is far beyond the public need. They come too easily. Considerable experience, both in the Legislative and Executive service, has impressed me with the fact that changes are made for causes which are too slight.

Surely, one of the characteristics of law should be stability. It seems scarcely appropriate to apply the term "law" to that which was one thing yesterday, is another today and still another tomorrow. It is hard to realize that what was proper yesterday can be very wrong today and all right again tomorrow.

While in matters relating to the executive departments and bureaus experience often shows the wisdom of modifications in the law from time to time, it is also true that incumbents frequently are too eager to develop ideas which they want to have enacted into laws. A real up-to-date administrator must have "policies." Often they are useful. Very often they are of trifling value. Sometimes they are hurtful. Nearly always they serve to perplex people who, with the aid of experts, are trying to keep track of the laws relating to their own affairs. Often it might be better to make the administrative policies conform to the law than to make the law conform to the policies.

It is human for the office holder to seek to magnify his office, to broaden its jurisdiction and increase its powers. Enactments often indicate the discovery of some remaining fragment of local authority, which must be absorbed, or at least regulated, by some department or bureau of the State. The same tendency is to be seen at Washington, where it has been responsible for much mischief.

Of legislation of a more general character, quite a little originates in law offices. Members of the Legislature often receive it from their lawyer constituents in the form of bills ready, or supposed to be ready, for introduction. Occasionally these bills represent a really valuable thought that has occurred to some lawyer in the course of his experience. Often they represent a concrete problem wherein the existing law, as applied to a particular case, is unsatisfactory, and a change would be helpful to some client. I noticed a bill in the last session which was a most palpable effort to escape the consequences of an important and recent adjudication with which I was familiar. It failed to pass.

The reformer of various types and with various hobbies is usually to be relied upon for his quota of material. It is surprising what an amount of time and effort people will expend to enforce their ideas. They seek pledges from timid candidates, as do also groups who desire legislation for the protection of some business or the annoyance

of business rivals, and thus much support is frequently secured for very remarkable measures.

Those who have had much contact with the law-making bodies realize the extent to which the passage of bills is due to what may be termed comradeship. Of course this does not apply to measures of great public interest, but to the common run of bills. The inclination generally is to vote in the affirmative, unless some substantial reason is shown for a negative vote. The burden frequently seems to be on those who object to a change, not on those who propose it. If a bill is introduced by a member who stands well with his colleagues and generally votes for their measures, its lack of merit must be rather clear or it is very likely to pass. A member who is hard to convince of the merits of the bills sponsored by his colleagues is not likely to leave much of a monument of legislation of his own. . . .

I am not finding fault with the members of the General Assembly or their methods of procedure. In these things that I may seem to criticize, I have taken part. I am only stating certain phenomena that help to account for what is generally conceded to be more than an abundance of legislation. The aim of almost all members is to do right, and very few would vote for a measure they thought was really wrong. But the habits and traditions that have grown with the years have created a condition where it is too easy to tinker with the laws.

What has been said has no special application to any particular session. Only general tendencies and causes always in operation have been in mind.

NOTES

1. See also concerning the amount of legislation, Chapter 2, Section 1, *infra*, at pp. 227-233.

2. In Dickinson, "Legislation and the Effectiveness of Law", 37 *Rep.Pa.Bar Ass'n* 337, 356-358 (1931), the author said:

" . . . I wish to suggest a reason which I think will properly support the charge that our Legislatures are guilty of overproduction. This reason, which seems to me directly responsible for much of our production of statutory enactments, is nothing less than another of those widespread and oversimplified commonplaces of public opinion which are accepted as statements of fundamental truth and acted upon as such. I refer to the conviction held by many of us as a matter of course that all rules and regulations of conduct to be enforced by public authority must emanate directly from no less high a source than the supreme law-making body, the Legislature itself. This idea is a corollary of the so-called "theory of separation of powers" which is supposed to be fundamental in our American form of government. If it is true, as the theory of separation of powers seems to require, that 'legislative power can only be expressed by the Legislature,' it follows necessarily that every rule and regulation enforced by the State must be the direct and immediate product of the Legislature itself and may not emanate from any other source. The result is that if it seems desirable to prescribe a rule of conduct, no matter how relatively insignificant or confined in operation to matters of technical or minor detail, such a rule must none the less pass through the legislative mill, come forth in the full dignity of a statute and swell the total num-

ber of pages of the statute book. The result is that the statute book teems with minute and detailed enactments "

The author concludes by recommending delegation of rule making power to administrative authorities on such matters, thus insuring "that the regulations will emanate from the kind of body best fitted to formulate them and will be subject to revision by a more rapid and easy process than statutory amendment".

See also Weeks, "Administration Through Lawmaking", *infra*, p. 571.

G. W. KEETON, PROBLEM OF LAW REFORM AFTER THE WAR

58 L.Q.R. 246, 249-251 (1942).

The material with which the lawyer deals to-day may be divided into two fairly distinct parts. On the one hand, there is that large and growing body of legal rules which expresses in legal form political, economic and social reforms. This is for the most part embodied in statutes and statutory rules and orders, and it includes such material as the Housing and Public Health Acts, the trade union legislation, the legislation relating to marketing and other boards, as well as the legislation relating to workmen's compensation, national health insurance and similar matters. Legislation of this kind is the concern of the community as a whole, and the lawyer's task here is simply to assist in the task of drafting statutes embodying changes which may be regarded as desirable, and to apply the legislation when passed. To suggest what changes may in themselves be desirable is to pass from the sphere of the lawyer to that of the economist, the social reformer and the politician. On the other hand, there is a great body of law which is sometimes called "lawyer's law", comprising legislation and caselaw, which has developed for centuries, almost exclusively in the hands of lawyers, and which is too technical for laymen in general to tackle. It is here that the lawyer alone can perform a useful task in simplifying the law, more especially as reforms here do not commonly involve controversial political, economic or social questions. It is in this sphere, too, that reforms are achieved normally on the initiative of lawyers, and when agreed upon they occupy very little Parliamentary time in their passage. All the important work upon the property legislation of 1925 had been performed by lawyers before these measures were brought to Parliament, and the successive law reform Acts which have been passed since 1934 have become law practically without any Parliamentary debate at all. In earlier times reform in law of this type was usually suggested to the Government of the day by the Lord Chancellor, after informal consultation with both branches of the legal profession. In recent years proposals for reform have emanated from successive reports of the Lord Chancellor's Law Revision Committee—an extremely valuable and important innovation. . . . It is suggested, . . . that more extended use ought to be made of the Law Revision Committee as an instrument of law reform,

This alone is not enough, however. . . . It is suggested that this spirit of inquiry ought to find expression in the lawyer's professional organizations. . . . In this way close contact with the profession would be assured, and law revision would lose its present piecemeal character.

NOTES

1. Concerning the nature and work of the English Law Revision Committee, see Winfield, "Recent Reforms of English Private Law", in *Interpretations of Modern Legal Philosophies*, 788 (1947).

2. See *infra*, Chapter 3, Sections 3 and 4, concerning the various national agencies, composed mainly of lawyers, which promote the passage of model or uniform state laws.

(ii) TWO "CASE STUDIES" ON SHAPING AND PRESENTING ISSUES

Study No. 1.

MAYNARD E. PIRSIG, PROPOSED YOUTH CORRECTION ACT

Report of Committee on Youth Correction Act of the
Minnesota State Bar Association *
28 Minn.L.Rev. 300 (1944).

INTRODUCTION

This state has always recognized that violations of law committed by children of tender years ought not to be treated as criminal offenses and ought not to be punished by the usual methods prescribed by the criminal law. During the early years of the state, males under the age of 16 and females under the age of 15 were required to be sent, on conviction of a crime, to the then existing state reform school where they were to be treated not as criminals but as children needing training and correction. Much progress has since been made. The age of those affected has been increased to under 18 years. We have today, among other facilities, the state training school for boys and the home school for girls and a liberal and humane juvenile court act.

What is not generally appreciated is that this state did not stop with these measures. For more than fifty years there has been a clearly defined policy that older youths as well should be distinguished from the adult criminals for the purposes of the criminal law and that separate treatment should be given them. The first step in this direction came with the establishment of the reformatory at St. Cloud, Minn., in 1887. The act creating it permitted the trial court to send to the reformatory any person not less than 16 or over 30 years of age who had not theretofore been convicted of a crime. It was the clear object of the act to confer the power and responsibility for the

* [Footnotes are omitted. Ed.]

proper treatment of the youth on those in charge of the reformatory and the object of the treatment was to be the correction and reform of the youth given to their charge. . . .

To enable these objectives to be achieved, the act required the sentence to be an indeterminate one not exceeding the maximum term provided by law for the crime of which the youth was convicted. The board of managers of the reformatory were to decide when the youth should be discharged and they were given the power to place him on parole under proper rules and regulations.

This act was a notable step. But it was not the only one. In 1899, statutory recognition of probation was introduced. It was on a limited scale. It applied only to counties having a population over 50,000. The significance of it is, however, that probation was provided especially for youths, namely those under 18 years of age. The age was increased to 21 in 1903. Here again was recognition of the need for special consideration and treatment of the problems of the youth offender.

Since these original steps were taken, probation and parole have come to be recognized as important tools in the sound administration of the criminal law generally. A probation act applicable to all criminals irrespective of age has been in force since 1905. Special acts applicable to the larger counties have been enacted in more recent times. Parole has been extended to most crimes irrespective of the age of the criminal involved. Moreover, the courts of the state have disregarded the restrictions on those to be sent to the reformatory for men and have sent criminals there of all ages and irrespective of whether they had prior convictions or not. This received limited legislature sanction in part in 1939 by the removal of the older age limit.

The effect of these later developments has been that procedures and facilities originally intended to apply to youth offenders only have been extended to all criminals. In that process, since youth and adult criminals are now treated by the same personnel and facilities, the policy of the state, that it should give special attention to its youth who are convicted of crime and take advantage of the greater possibilities of correction and rehabilitation, has been largely lost sight of. None would deny that that policy is as sound today as it was fifty years ago. Yet, in the administration of criminal justice in this state today, it is not as clearly perceived as it was when the statutes of 1887 and 1899 were enacted. The report of the committee, which appears below, indicates that this state needs to reconsider its program for youth offenders, particularly for those 18 years of age or older. . . .

The committee was originally created two years ago to consider the Youth Correction Authority Act as drafted by the American Law Institute. That act applies only to those under 21. The committee began its work and conducted much of its research on the assumption that whatever it recommended would similarly be restricted. But as preliminary drafts of the committee's proposed act

were given circulation criticisms came in that the scope of the act was too narrowly restricted and that the problem of the youth offender does not stop at the age of 21. As indicated above the act creating the reformatory for men fixed the age at 30. In addition, it was pointed out that one of the major values of the act would be in providing needed facilities for dealing with young discharged servicemen convicted of criminal offenses and that for this purpose an older age should be fixed. The weight of these considerations led to fixing the maximum age at under 25. . . .

REPORT OF THE COMMITTEE

This committee was created by the State Bar Association pursuant to the resolution at the last annual meeting of the Association for the purpose of examining the provisions of the model Youth Correction Authority Act proposed by the American Law Institute. The model act, in brief, sets up an agency and empowers it to take control of youths under the age of 21 who have been convicted of designated crimes after a trial by the normal criminal procedure. The model act does not affect those subject to the jurisdiction of the juvenile court. In this State, it would cover those over the age of 17 and under the age of 21. It covers the late adolescent period as distinguished from the earlier adolescent age. At its last meeting, the State Bar Association endorsed the principles of the model act, namely that in the treatment of youth offenders, emphasis should be upon rehabilitation and reform rather than upon punishment as such. The task assigned to the committee was to determine whether the model act as recommended should be proposed for this state or whether some modification thereof should be undertaken. For reasons which follow, the committee has concluded that a modification of the act adapted to existing conditions in this state is to be preferred. The model act contemplates variety and flexibility in the use of medical, psychiatric, psychological, and educational treatment and the use of social case work in the attempt to rehabilitate and reform youths convicted of crime and within the age stated. Such a program may well have its advantage and would unquestionably make use of the latest scientific knowledge and theories about the causes of and remedies for criminal conduct. California, in 1941, enacted most of the provisions of the Youth Correction Authority Act. The success of the program in that state is indicated by its further development and extension through legislation in 1943 and by communications to this committee from those in intimate contact with the development in that state. This committee, however, believes that for the present, it would be wiser for this state to proceed with an extension and improvement in the facilities with which the state is now familiar, to retain the advantages which experience has shown to be inherent therein, and to undertake to bring about the more effective use of available facilities for the treatment of youth offenders by a better unification and coordination of them. The Act drafted by the Committee and submitted herewith proceeds upon this basis.

THE YOUTH OFFENDER PROBLEM

Even before the present war directly affected this country, crimes committed by our youth presented a major and national problem. . . . and the experience following the last war give every indication that we will be facing an aggravated problem of youth delinquency following the conclusion of the present war. It is vitally important that the state be prepared to meet this situation by taking adequate preliminary steps to meet it.

Youth of the adolescent age present problems not to be found in the adult population. They have great sources of energy and strong emotional reactions. Outlets for their energies have not been fixed and hardened. The irresponsibility and irrepressibility of childhood has not yet disappeared. Unless directed and controlled, their energies and emotional activities may find their outlets in crime instead of in the normal socially approved conduct. At the same time, youths of this age are confronted with some of the major decisions of their lives. Their school work has normally just ended. They must readjust from the routine of school work to the pursuit of some gainful employment. Many find themselves rudely shaken in their ambitions and their hopes not realized. Combine this with harmful home and community environment and resort to crime as the easy way out is too often the likely result.

The records of a few cases taken from the reformatory at St. Cloud will illustrate the background of some of our criminal youth.

[The three illustrative cases are omitted. Ed.]

These relatively few examples point to what the committee is assured by those in charge of the reformatory exists in the large majority of cases. Sixty to seventy per cent of the inmates have less than normal intelligence. Large numbers of them come from communities and families from which one could hardly expect a mentally healthy youth to develop. Broken homes, conflict, antagonism, and strife within the family, drunkenness and dissolute conduct by one or the other or both of the parents, general neglect of the youth in his childhood, poverty, lack of employment, these are the typical backgrounds of those that make up the bulk of the inmates within the age group here discussed. Criminality and general disrespect for law and order are almost the inevitable results of such conditions. The combination of inadequate mental equipment and hopeless and degrading community conditions are in a large degree responsible for our criminal youths who themselves are hardly aware of the fountain source of their criminal conduct.

[Tables showing types of offenses committed by youths under 21 in Minnesota are omitted. Ed.]

From these figures, it is evident that the great proportion of crime committed by youth involves the acquisition of property. When one considers that these youths come from homes of limited means and

low moral standards, it may be gathered that their crimes represent their misguided solution of personal problems which they felt unable or unwilling to meet by legitimate methods.

The foregoing information corresponds to a very high degree with the facts found in an extensive research made of the inmates of the Massachusetts Reformatory by Sheldon and Eleanor T. Glueck and recorded in their publication entitled *500 Criminal Careers*. A careful and exhaustive study was made by them of each of approximately 500 inmates. Their history and background were carefully examined as was their conduct after their discharge from the reformatory or from parole. Probably no more complete study of the conduct of criminals after their release has ever been made. It revealed that the large majority of the inmates came from families with criminal histories, dependent economically, uneducated, and with poor work habits. Abnormal home conditions and broken homes were common. About 70 per cent had less than normal intelligence; 21 per cent were feeble minded. This study revealed that almost *80 per cent of those studied committed further known crimes within five years after their discharge*.

The committee does not suggest that similar conclusions should be drawn with respect to those who have been discharged from the institutions in this state, but the resemblance between the group studied by the Gluecks and that found in our institutions is striking and compels the conclusion that better means should be provided than now exist for examining the results of our present methods of handling our convicted youths.

PRESENT TREATMENT OF YOUTH OFFENDERS

At the present time, the provisions of our laws for treatment of youths over 17 are the same as those for adults generally. So far as our penal laws are concerned, a criminal over the age of 17 is deemed to be an adult. No doubt our courts, probation and parole officers, and penal institutions recognize, in the course of their work, the greater possibilities existing for the rehabilitation of youth offenders. Our statutes also contain some provisions especially applicable to youths under 21 years of age. Thus confinement in our jails separate and apart from adult inmates is required. Pardons extraordinary were made available in 1941 to those under 21. At an early date, probation facilities were extended to youths to a degree not available to adult criminals. In general, however, the facilities available for the treatment of our youth, and the treatment in fact given, are no different than those existing for other criminals.

The agencies now dealing with youth convicted of felonies are as follows:

The District Courts. . . .

Probation officers and departments. . . .

Penal institutions. There are three major penal institutions to which those over 17 years of age and convicted of a felony may be sent.

These are the State prison at Stillwater, the reformatory for men at St. Cloud, and the reformatory for women at Shakopee. The reformatory for men is the principal institution to which male offenders under 21 are committed. . . .

(But) there are to be found, . . . in the reformatory today, not only youthful first offenders, but hardened adult criminals as well. . . .

Our inspection of the reformatory indicates that the spirit and program of the institution is animated by a very real desire to improve the lot and outlook of those confined there. Its activities in the field of education in particular are praiseworthy. However, no special and separate program has been developed for the youth offenders who are confined there.

The state prison and its program exist essentially for adult criminals. . . .

State Board of Parole. This board was established as an independent agency in 1911. . . .

All criminals over the age of 17 confined in our penal institutions, with minor exceptions, . . . come under the jurisdiction and control of the parole board which determines whether and when an inmate shall be released from the institution and what conditions shall be imposed during his supervision under parole. . . .

This committee is not in a position, nor is it its function, to pass judgment upon the quality of the work done by the parole board. It may accept the claim of the board made in its last biennial report that it stands among the six best in the country. Descriptions of its procedures reveal a careful examination of each case prior to the granting or denial of parole or discharge and that it carries out its functions in as complete a manner and extent as limited funds and personnel permit. The method employed is essentially to prescribe modes of conduct for persons under its supervision which are designed to remove them from temptation to further criminal conduct. The threat of immediate incarceration in a penal institution serves as a powerful incentive to compliance with the prescribed conduct.

The literature available to the committee however, discloses no special program of supervision or special consideration of the problems of the youths that come before it. They are subject to the same rules and regulations and type of treatment and supervision as those prescribed for adults.

WEAKNESSES IN PRESENT SYSTEM

The Youth Correction Authority Act approaches the problem of youth delinquency from the standpoint of re-education and shifting of the youth's point of view away from that which led to the crime. The program it contemplates seeks to develop an acceptance of the standards and ideals of a good citizen of the community. Correction rather than merely suppression of criminal habits and attitudes is

what it aims to achieve. These aims have the endorsement of the State Bar Association at its last meeting.

The Youth Correction Authority Act also proceeds on the belief that these aims cannot be achieved without a specialized personnel which understands the problems of youth, knows how to win its cooperation and respect and has the facilities with which to carry out the necessary corrective treatment on a single consistent coordinated plan. With this the committee agrees. It further submits that, from its examination of the situation in this state, as to youths over 17 years of age, there is among existing agencies but limited recognition of the special problems of youth delinquency, and that the needed specialized personnel with a special program for corrective treatment has not been developed.

Our examination of the situation in this State discloses several major weaknesses in the treatment of our youth offenders over the age of 17. These weaknesses may be listed as follows:

(1) The fact has already been commented upon that throughout our methods of dealing with youths only limited consideration appears to be given to the fact that they represent not only peculiar problems but also greater possibilities for rehabilitation. This is true both in and out of our penal institutions. Only in our juvenile court system is special recognition given to the problems of juvenile delinquency. Only those under 18 come under its purview. This committee does not believe that our youths cease being youths at the age of 18, and believes that we should extend our recognition of their special problems into later years, as provided by the proposed Act.

(2) The records at the reformatory for men disclose a wide disparity of sentences among those committed for identical crimes. Lengths of sentences imposed in many instances have no relation whatever to the crimes committed or to the character or record of the offender. Hardened criminals may receive a light sentence for a given crime in one part of the State while youths from another part receive a severe sentence for a first sentence involving the same crime. . . .

Absolute uniformity in sentences imposed for a given crime is, of course, not the sole objective, but differences in sentences should have some relation to the actualities of the respective cases and should not depend upon the particular views of individual judges or upon the fortuitous circumstance that different judges happen to be imposing the sentences. The recommended act creates a single body to which the function is assigned of prescribing the proper treatment called for by the individual case. This will make possible a consistent policy and a sound decision based on actual observation of results over a period of time.

(3) Outside the major counties, facilities for adequate probation are lacking. . . .

(4) Coordination of effort among the various agencies now dealing with our youth is practically non-existent. . . . The plans and

programs of the courts, of probation officers, of institutions and of the parole board are, for the most part, independent of each other and make difficult if not impossible any consistent treatment of the youth delinquent. The system may be adequate enough for adult criminals. It is not adequate for a program of rehabilitation and correction of youth offenders.

(5) Youth offenders and hardened criminals are sent to and inter-mix in the same penal institution. This is particularly true at the reformatory which has, of course, nothing to say as to who shall be sent there. This is certain, almost, to expose the youth offender to the deteriorating influence of the older criminal. However carefully an institution is run, contact and a measure of intermixing between the youth and the hardened criminals is inevitable.

THE PROPOSED ACT

It might be possible to bring about some improvement here and there in existing agencies by particular and limited measures. But we believe a more aggressive program directed to the heart of the problem is needed if substantial improvement is to be made in our methods of dealing with youth offenders. What is called for is a co-ordinated system of treatment directed specifically at youth offenders and the problems they present and made available throughout the state. It is not possible to do this on a local or county-wide basis. The number of cases within a county are too few to permit the employment of the needed personnel, to say nothing of more expensive methods of treatment calling for institutional care. It is necessary therefore to create a state agency charged with the responsibility of carrying out the needed program, but making use of such local facilities as may exist for the purpose.

The act recommended herewith by the committee accordingly creates a division of the parole board to whom all youths convicted of a felony or gross misdemeanor and not put on probation by the courts are committed automatically for treatment. The division of the board after investigation then determines what shall be the treatment to be administered. It may grant probation, or commit to a penal institution. It may ask the cooperation of the penal institution in developing special procedures and methods of dealing with youths committed to the institution. At the appropriate time it may grant what is the equivalent of parole. Whatever is done from the time of conviction to discharge would be part of a single consistent plan directed specifically to the rehabilitation of the youth involved. The Act would also make available additional pre-sentence investigation facilities to the district courts where youths are involved. As previously stated, it would also make available to the juvenile courts probation services throughout the State.

Such an agency could also develop modes of treatment intermediate between parole and probation and which now do not exist. It could for example permit selected youths to engage in gainful employment

but to live in dwellings organized more or less on a co-operative dormitory plan under the supervision and control of a resident agent of the agency. Educational features could be incorporated into the plan. This would be but adopting the Borstal system of England, the forestry camps plan of California, the Virginia system of dealing with youth under 18 years, and others of a similar character which have met with outstanding success. One year under such a plan would do more for the correction of a criminal youth than five years of the usual institutional life. . . .

The committee is confident that the program contemplated by this proposed act would save large numbers of our youth that have become involved in crime. It would also make possible for the first time a thorough study of the problem of youth delinquency and the causes and remedies therefor.

Neither this plan nor any other will be successful unless those selected to administer it have the necessary qualifications. In the proposed act, the example of the California act has been followed in creating a panel which recommends lists from which the selection is to be made. This should prevent predominantly political considerations from entering into the selection. A salary also has been designated which it is believed should be provided to secure the type of men or women needed for the Division, although it is recognized that it is above the level now paid for similar state positions. The agency set up is also made a part of the State Parole Board so that their respective programs may be effectively coordinated.

In addition to the members of the Division, it is estimated that from ten to fifteen field workers, agents, etc., and necessary clerical assistance will be needed. A total annual appropriation of about \$75,000 will be required to carry out the functions imposed on the Division under the act.

Whether such an expenditure is justified must be tested by what may reasonably be expected to be obtained by it. The committee is confident that the program offered by the act would divert many more of our youth from lives of crime than present facilities do and would convert them into useful citizens of the community. It would also make possible a comprehensive examination into the causes of youth delinquency and a corresponding development of more effective methods in dealing with the problem. Even from the purely financial point of view, the gain resulting from the increase in the number of useful productive citizens and from the reduction of predatory and destructive criminals and of the number of criminal inmates in our penal institutions would far outweigh the cost to the state.

Regarding the technical drafting of the act it will be observed from the notes to the various sections that the Youth Correction Authority Act and the California act, based thereon, have been heavily drawn upon whenever the provisions of these acts were of assistance in developing the plan proposed by the committee. The committee thus had

the benefit not only of the work of an experienced organization but also of an act which has been in successful operation.

EXPLANATORY NOTE

The act as ultimately passed by the legislature differed from that proposed by the Committee mainly in creating a separate commission instead of merely a division of the State Board of Parole. The measure was enacted as Minn.Laws 1947, c. 595 (M.S.A.1945, § 260.125), with the short title "Youth Conservation Act".

The purpose of the act and the provisions establishing the Commission appear in M.S.A. 1945 as follows:

"Subd. 1. Purpose. The purpose of this Act is to protect society more effectively by providing a program looking toward the prevention of delinquency and crime by educating the youth of the state against crime and by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of young persons found delinquent or guilty of crime.

"Subd. 2. Creation of commission. There is hereby created a Youth Conservation Commission to provide and conduct a program looking toward the prevention of juvenile and youth delinquency and to provide and administer preventive and corrective training for persons committed to the Commission.

"Subd. 3. Personnel of commission; quorum; director appointed by governor; compensation. The Commission shall consist of five persons including the director of the division of public institutions, the chairman of the state board of parole, and three others appointed by the Governor, with the consent of the Senate. A majority shall constitute a quorum. The Governor shall designate one of the appointed members as the chairman, who shall be the full time director of the Commission. The director of the division of public institutions and the chairman of the state board of parole shall serve without additional compensation. The Director shall be responsible for the administration and enforcement of this act under the direction of the Commission. All other members shall serve on a per diem basis.

"Subd. 4. Term of office. The term of office of the appointed members of the Commission shall be for four years, except that initially one shall be appointed for a four-year term, one for a three year term, and the third for a two-year term. Members shall be eligible for reappointment.

"Subd. 5. Vacancy. All appointments to a vacancy shall be made by the Governor and shall be for the unexpired term. Each member shall hold until the appointment and qualification of his successor.

"Subd. 6. Qualification of appointees. All persons appointed to the Commission shall, in so far as possible, have legal and administrative ability, educational experience, and experience in the study of juvenile and youthful offenders, and in planning and conducting programs of prevention of juvenile and youth delinquency and crime and

one shall be a juvenile court judge who is also a judge of probate. A person particularly well qualified for such appointment may be appointed, even though such person is not, at the time of the appointment, a resident of this State."

Only those provisions of the Committees' draft act which demonstrate its essential features are reproduced here. Several changes of detail were made during the prenatal stages of the act both before and after the bill was introduced in the legislature. Some of the changes were made to gain support of certain professional organizations, some on additional expert advice, and some for tactical reasons having to do with the process of enactment. Some lessons are to be learned by making a detailed comparison of the measure as originally drafted by the Committee with the act as it appears in the statute book, but they are not considered sufficient justification for reproducing M.S.A.1945, § 260.125, in full here.

In addition to the features of the measure as a crime prevention device, observe the use of precedent and the adaptations of the Uniform Youth Correction Act.

Excerpts From Committee's Draft Act.

Sec. 3.—The State Board of Parole is hereby directed to create a division of the Board to be known as the Youth Correction Division, whose function shall be to provide and administer preventive and corrective training for persons committed to the Board, as hereinafter provided, and which is hereinafter called the Division.

The Youth Correction Authority Act creates a separate board. This proposed Act incorporates its administration in the parole board. The 1943 amendment of the California act calls the agency simply "Youth Authority."

Sec. 19—When in any criminal proceeding in a court of this state a person has been convicted of a felony or gross misdemeanor for which the judge has power under Section 20 to commit to the Division, the judge of that court shall determine whether the person was less than twenty-five years of age at the time of the apprehension from which the criminal proceeding resulted. Proceedings in a juvenile court in respect to a juvenile are not criminal proceedings as that phrase is used in this Act.

This incorporates Section 12 of the Youth Correction Authority Act with the age increased to 25 years. It appears as Section 1731 of the California act.

Sec. 20—After a certificate has been filed with the clerk of the district court of any county as provided by Section 18, the district court of such county shall commit to the Division every person convicted of a felony or gross misdemeanor who is found to be less than 25 years of age at the time of his apprehension and who is not sentenced to imprisonment for life, or in a county jail for 90 days or less, or to a fine only. Such commitment shall be for the maximum term provided by law for the crime for which such person was convicted. Execution of sentence may be stayed by the court and the defendant placed on probation.

Such probation shall not be granted until an investigation and recommendation shall have been made by the probation officer of the court, if there be one, otherwise by the Division, concerning the advisability and terms thereof, but the granting or denial and the terms of probation shall be within the discretion of the court. If probation is granted, the court in its discretion may place the defendant under the supervision of the Division. Otherwise such probation may be granted pursuant to law without regard to this Act.

The first part of this section follows substantially Section 1731.5 of the California act. The latter part respecting probation is new but is suggested by the proposed federal act which provides for recommendation of a board before final sentence.

Sec. 21—A person, who is convicted of a felony or gross misdemeanor and who is found to be less than twenty-five years of age at the time of apprehension, may not be imprisoned in any place which has been disapproved for that purpose by the Division.

This is an adaptation of Section 1732.4 of the California act with an important modification. The California act, following the language in Section 13 (1) of the Youth Correction Authority Act, permits imprisonment only in approved places. The above provision prohibits imprisonment in disapproved places. The purpose of the change is a practical one. As the California and model acts are drawn, no jail in the state could be used until approved. This might leave the state without places of imprisonment or as an alternative the approval by the Division of places it feels should not be approved. As drawn, the burden is on the Division to determine that a place is unsatisfactory for confinement of a youth.

Sec. 22—When a judge commits a person to the Division the judge may order him conveyed forthwith to some place of detention approved or established or designated by the Division or may direct that he be left at liberty until otherwise ordered by the Division under such conditions as in the judge's opinion will insure his submission to any orders which the Division may issue.

This adopts Section 18 of the Youth Correction Authority Act and Section 1738 of the California act. The words "or designated" have been added. The thought in mind is to make clear where the defendant is to be sent by the court upon commitment to the Division.

Sec. 24—When a person has been committed to the Division it shall, under rules established by it, forthwith examine and study him and investigate all the pertinent circumstances of his life and the antecedents of the crime because of which he has been committed to it, and thereupon order such treatment as it shall determine to be most conducive to the accomplishment of the purposes of this Act. The court and the prosecuting and police authorities and other public officials shall make available to the Division all pertinent data in their possession in respect to the case.

The first sentence adopts Section 28 (1) of the Youth Correction Authority Act and Section 1761 of the California act. The second sentence follows Section 21 of the Youth Correction Authority Act. The California act, Section 1741, has added considerably further detail and provisions as to the officials to whom it applies and the nature of the information required, and providing for reports on forms furnished by the Division.

Sec. 25—When a person has been committed to the Division it may (a) place him on probation under such supervision and conditions as it believes conducive to law-abiding conduct; (b) order his confinement to such reformatory, state prison, jail, or other place of confinement to which he might have been sentenced by the court in which he was convicted except for this Act. Such reformatories, state prisons, jails or other places of confinement are hereby required to accept such persons in like manner as though they had been committed by such court; (c) order his release on parole from confinement under such supervision and conditions as it believes conducive to law-abiding conduct; (d) order recommitment or renewed parole as often as conditions indicate to be desirable; (e) revoke or modify any order except an order of discharge as often as conditions indicate to be desirable; (f) discharge him from its control when it is satisfied that such discharge is consistent with the protection of the public.

The control of the Division shall cease at the expiration of the maximum term provided by law for the crime for which such person was convicted and he shall thereupon be entitled to a discharge in any event whether on probation, parole or under confinement.

This adopts with substantial changes Section 30 (1) of the Youth Correction Authority Act and Section 1766 of the California act. Subdivision (a) provides for probation, subdivision (b) for commitment to an existing institution, and subdivision (c) for parole. As thus drawn it corresponds more closely with recognized existing practices in this state than the proposed Youth Correction Authority Act. The difference from present practices is primarily in shifting the determination of these matters from the court and the present parole board to the Division. Subdivision (f) provides for discharge. In effect, it is a termination of the sentence determined at the end of corrective treatment rather than at the beginning. In any event its control ends with the expiration of the maximum term which the sentence carries or on the defendant's 25th or 30th birthday. See Section 33. The last sentence of subdivision (b) is taken from Section 25 (5) of the Youth Correction Authority Act, and section 1755 of the California act.

The last sentence of this section has been added since commitment to the Division under this Act as drawn is for an indefinite term not exceeding the maximum fixed by statute for the crime involved.

Sec. 26—As a means of correcting the socially harmful tendencies of a person committed to it, the Division may (a) require participation by him in vocational, physical, educational and corrective training and activities; (b) require such conduct and modes of life as seem best adapted to fit him for return to full liberty without danger to the public welfare.

This adopts Section 31 of the Youth Correction Authority Act and Section 1768 of the California act with subdivision (c) thereof omitted.

Sec. 31—The Division shall make periodic re-examinations of all persons within its control for the purpose of determining whether existing orders and dispositions in individual cases should be modified or continued in force. These examinations may be made as frequently as the Division considers desirable and shall be made with respect to every person at intervals not exceeding two years

This incorporates Section 28 (2) of the Youth Correction Authority Act and Section 1762 of the California act except that the California act requires examinations every year.

Sec. 32—The Division shall keep written records of all examinations and of the conclusions predicated thereon and of all orders concerning the disposition or treatment of every person subject to its control.

This copies Section 28 (3) of the Youth Correction Authority Act and Section 1763 of the California act.

Sec. 33—Unless previously discharged under the provisions of this Act the Division shall discharge the defendant from its control and give him his liberty on his twenty-fifth birthday if he was under the age of 21 years at the time of his apprehension and on his thirtieth birthday if he was over such age unless the Division shall determine that such discharge at that time would be dangerous to the public in which event the Division shall terminate its control in the following manner:

(1) If he be then on probation under the supervision of the probation officer of a district court, the future control and disposition of the case shall be in all respects as though such probation were under the order of said court; (2) if he be then on probation, but not under the supervision of a local probation officer, or if he be on parole, control of him shall be transferred to the state parole board who shall thereupon assume like control over him as though he were on parole following sentence of a court for a maximum term provided by law for the crime for which he was committed; (3) if he be then confined in a penal institution, the control of the Division shall cease and such confinement shall be upon like terms and conditions as though it had been under sentence of court for the maximum term provided by law for the crime for which he was committed.

The function of the Division is to deal with youth. The maximum sentences under which youths will be committed to it will sometimes be for long terms. If they remained for that length of time under the control of the Division, it would mean that in time substantial numbers of adults would be under the control and direction of the Division. This would be outside its purpose. Hence, the above section provides the means by which its control shall terminate at his twenty-fifth or thirtieth birthday, depending on his age at the time of his apprehension, by transferring him to the jurisdiction of the district court or to the parole board or, if he is confined, leaving it to the parole board under existing law for further action.

Sec. 34—In addition to the powers now conferred by 2 Mason Minn. Stat., 1927, sec. 8648, the juvenile court of any county not having a probation officer shall have the power, in its discretion and with the consent of the Division, to place any child, whom it has adjudged delinquent as defined in 2 Mason Minn.Stat., 1927, sec. 8636, in the care or custody of the Division on such terms and conditions as the court may prescribe. The Division shall not have power by virtue thereof to place such child in any penal institution. Such juvenile court may also request, and it shall be the duty of the Division to make, an investigation and recommendation to the court, either before or after the hearing, respecting the proper disposition which should be made of such child.

This will extend the probation facilities of the Division to the juvenile courts and is regarded as one of the important provisions of the Act.

Sec. 35—The care, custody or control of any delinquent child which has been committed to it by a juvenile court shall cease on the 21st birthday of such child.

This corresponds to a similar provision in the existing juvenile court law.

Sec. 36—If a sentence of imprisonment for life is imposed upon a person under twenty-five years of age at the time of his apprehension, and if before he reaches the age of twenty-five, the Board of Pardons commutes the sentence by committing him to the Division, the Division shall assume control over him pursuant to the provision of this Act.

This incorporates Section 14 of the Youth Correction Authority Act.

Sec. 37—Whenever the Division is of the opinion that there are grounds for believing that a person committed to it is insane or a psychopathic personality as defined in Laws of Minn., 1939, chapter 369, sec. 1, the Division may institute, or cause to be instituted, proceedings in the probate court of the county in which such person then resides or is confined to determine he is insane or a psychopathic personality. If the court shall so find, he shall be transferred by the order of the court to the state asylum for the dangerous insane or to a state hospital for the insane in the discretion of the court, there to be kept and maintained as in the case of other persons. If, in the judgment of the superintendent of the asylum or hospital, his sanity is restored before the period of his commitment to the Division has expired, he shall be returned by the director of public institutions to the Division for such further disposition or treatment as is provided by this Act.

Similar provisions now exist with respect to penal institutions. See Minn. Stat., 1941, sec. 253.21.

Sec. 39—Whenever a person, who has been committed to the Division upon conviction of a crime, shall be discharged from its control other than by expiration of the maximum term of commitment as provided by this Act, or under the provisions of Section 33, such discharge shall have the effect, when so ordered by the Division, of restoring such person to all civil rights and shall have the effect of setting aside the conviction and nullifying the same and of purging such person thereof and such person shall never thereafter be required to disclose the conviction at any time or place other than in a criminal proceeding thereafter instituted against him.

This follows the language of Section 638.02, 2 Minn. Stat., 1941, providing for a pardon extraordinary for minors.

NOTES

1. The first publicity designed to marshall public opinion in support of the proposed Youth Correction Act appeared in the *Minneapolis Tribune* on July 9, 1944, and consisted of a summary of the Committee's report. The newspaper story said that the "core of the plan is to create a division of the parole board to which all youths convicted of a felony or gross misdemeanor and not put on probation by the courts are committed automatically for treatment".

2. *Minneapolis Star-Journal*—Nov. 30, 1944: "Clash on Youth Authority Seen.—Difficulties expected to confront those urging passage by the state legislature of the proposed youth correction act were cited Wednesday night by panel discussion speakers before the Minnesota Hygiene Society. Belief that passage will be difficult was expressed by Howard Hush, Hennepin County probation officer; Maynard E. Pirsig, University law professor, and John J. Doyle, Ramsey County probation officer. Legislative opposition, all three agreed, will center principally around appropriations, \$75,000 the first year, with an expected increase eventually to nearly \$500,000 yearly. Doyle suggested further opposition because, he said, the act will take power from the district judges.

Ramsey County District Judge Gustavus Loevinger, principal speaker, outlined advantages and objections of opponents and proponents of the act. Advantages were listed as segregation of juveniles, late adolescents and adults; standardization of correction procedure and better correction facilities. Among objections, he said, are lack of personnel to carry out the act; possible disruption of the present legal system; putting commission under control of the pardon board; likelihood that judges would mete out more fines and less than 90-day sentences to avoid giving the commission custody, and establishing the maximum age limit too high."

3. *Star Journal*—Mar. 21, 1945: "Dillon Asks Aid for Youthful Law Violators.—Practice of sending youthful law violators to institutions where they come into contact with hardened criminals was sharply criticised by Michael J. Dillon, Hennepin County attorney, at a meeting of the Loring Park Community Council. He praised the proposed Youth Correction Act now before the Legislature."

4. *Star Journal*—Apr. 18, 1945: "Youth Aid Bill Death Seen in Senate. Failure of any member of the senate finance committee to make a motion to recommend passage of the youth correction act today meant the virtual death of the measure. A product of the Minnesota Bar Association which studied the problem for four years, the bill was passed in the house of representatives and has been pigeon-holed in the finance committee. The finance committee does not plan to meet again, before adjournment at midnight, for passage of bills, but if other matters make a meeting possible, the bill could be revived."

5. *Report of Committee on Youth Correction Authority Act, 1945:*

TO THE MINNESOTA STATE BAR ASSOCIATION:

Pursuant to the duties assigned to it at the last meeting of the Association, the committee did what it could to present to the public the nature, purpose and provisions of the Youth Correction Act as endorsed by the Association. After giving the proposal full consideration, it was endorsed and sponsored by the Minnesota County Attorneys Association, the Minnesota Junior Chamber of Commerce, the Minneapolis Junior Chamber of Commerce, the Council of the Minnesota State Medical Association and various other organizations. There is every indication that it has wide public support.

The bill was introduced in the House of Representatives at the last legislative session by Representatives George A. French, Walter F. Rogosheske, Carl Wegner, Sigvald B. Oyen and Everett L. Peterson. After a full hearing, the civil administration committee of the House approved the measure for passage. Amendments were made by it which made the members of the proposed division other than the chairman of the Parole Board part time members. They also reduced the maximum age covered from 25 to 21 and made corresponding reduction in the appropriations the bill carried. These changes were made after careful consideration and based on considerations of policy which appeared persuasive to the committee.

A hearing was subsequently had before the appropriations committee of the House which likewise recommended the bill for passage. On the floor of the House,

he bill was amended to substitute appointment of the part time members by the governor with confirmation by the Senate for the methods provided for in the original bill. As so amended the bill passed the House with only one dissenting vote.

The authors of the bill in the Senate were Senators A. O. Sletvold, chairman of the Judiciary Committee and Thomas P. Welch. After amendments conforming the bill to that before the House the Judiciary Committee, after hearings, recommended the bill for passage and obtained a position for it on General Orders giving it a preferred status for action by the Senate. The first open opposition to the bill appeared at these hearings. Mr. Carl Swanson, director of the Division of Public Institutions, Warden Utecht of the prison at Stillwater and Mr. C. J. Jackson, of the State Training School for Boys spoke in opposition to the bill to the effect that it was new and untried, that its objectives could be achieved under present arrangements and that the gravity of youth delinquency had been exaggerated.

The bill met its death in the Finance Committee of the Senate. Questions by its acting chairman, Senator H. H. Sullivan of St. Cloud, indicated the view that what the bill proposed could be accomplished under the present set up and that a judge after trial is in a better position to render sentence than a board such as that provided in the bill. The bill remained in the committee until the expiration of the legislative session.

After the wide support accorded the bill, both in and out of the Legislature, your committee believes that the association should continue its efforts to keep informed concerning developments in this and other states, to acquaint the public further with the bill and to prepare for further effort to gain its enactment at the next session of the Legislature.

6. *The Minneapolis Star and Journal*—Tues., Jan. 7, 1947:

"NEW BACKING, NAME GIVEN YOUTH BILL

"The proposed 'youth correction act' was retitled 'youth conservation act' and given fresh impetus for possible 1947 passage when lawyers, social workers and other proponents met with Gov.-elect Luther W. Youngdahl Monday at Nicollet hotel.

"Purpose of the act, backed by the Minnesota State Bar association and other groups, is 'prevention of delinquency and crime . . . substituting for retributive punishment methods of training and treatment directed toward rehabilitation

"Co-operation between the state division of social welfare and the division of public institutions to form a commission to operate with a third party or 'youth conservation commissioner,' appeared assured. Attending yesterday's meeting were Carl Swanson, public institutions chief, and Jarle Leirfallom, director of social welfare.

"There was no opposition from wardens and superintendents of state reformatories. Superintendent C. J. Jackson said he would favor a three-man youth commission.

"A youth guidance clinic, expunging of juvenile delinquency records after treatment of the delinquent and uniform sentencing are things we need,' said Reuben Brustuen, chairman of the state board of parole.

"The model 'youth correction act' prepared by Prof. Maynard E. Pirsig of University of Minnesota law school, was amended in several details.

"Frank Rarig, Jr., director of Wilder charities, St. Paul, proposed a statewide board to guide administration of youth conservation work.

"Youngdahl himself proposed the change in title from 'youth correction' to 'youth conservation.'

"Theodore Knudson, assistant Hennepin county attorney and vice president of the Hennepin County Bar association, recommended that each juvenile delinquency case be reviewed once a year instead of once in two years, as currently proposed.

"Mrs. Lawrence D. Steefel, 2808 W. River road, pointed out that proper setup of the youth conservation commission might entitle Minnesota to federal grants as high as \$3,000,000 for mental-hygiene work."

7. *The Minneapolis Star*—Sat., Feb. 22, 1947:

"YOUTH PLAN IN STATE RATED ONE OF BEST

"Minnesota, in youth conservation plans, is among four leading states in the nation, John R. Ellingston, Philadelphia, special adviser on criminal justice for youth, American Law institute, told state legislators.

"Only California, which has had a full-fledged youth program since 1941, is ahead of Minnesota, he said at a hearing Friday on the proposed youth conservation measure in the judiciary committee of the house of representatives.

"Wisconsin, after a two-year study by a legislative interim committee, introduced last week a bill similar to the Minnesota measure, he reported, and Illinois is still in the planning stage on a statewide program to apply modern prevention and cure methods to boys and girls apt to get in trouble.

"Ellingston urged broad year-round community school programs, better probation service, case-work training for local police officers, and health and mental checkups preceding disciplinary action whenever youngsters are in trouble.

"Juvenile arrests in California have dropped 'phenomenally' in recent years, despite rapid population growth and crowded housing, he added.

"Delinquency workshops in six California colleges, and state forestry camps for boys, were described by Theodore B. Knudson, newly-appointed Minneapolis municipal judge.

"The judiciary committee chairman, Representative Frederick P. Memmer, St. Paul, said:

"If this goes far enough to really build up fundamental values in our youth, we may do away with the materialistic philosophy under which we live today."

8. *The Minneapolis Star*—Thurs., Mar. 27, 1947:

"ATTORNEYS BACK YOUTH MEASURE

"Support for Gov. Luther Youngdahl's youth conservation bill, which already carries indorsement of the Minnesota State Bar association, was expressed by members of the legal profession before the house appropriations committee today.

"Sponsored by Representative George French of Minneapolis and others, the measure would establish a youth conservation commission empowered to prescribe corrective treatment for persons under 21 years old who are convicted of crime.

"M. J. Dillon, Hennepin county attorney, termed the bill 'a piece of preventive legislation which would do scientifically what we would have done haphazardly, or have neglected to do, up to the present time.'

"Municipal Judge Theodore Knudson, Minneapolis; John R. Ellingston of New York, representing the American Law institute; Judge Douglas Hunt of Montevideo and Gordon Wright of Minneapolis, representing the state bar association, also spoke for the measure, which already has been approved by the house judiciary committee.

"The measure carries an appropriation of \$300,000 for the biennium, but Wright said the bar association believes that \$75,000 for the first year and \$125,000 for the second will get the project under way."

9. *Report of Youth Correction Authority Act Committee, 1947:*

TO THE MINNESOTA STATE BAR ASSOCIATION:

Your Committee recommends:

Recommendation

That a Committee on the Youth Conservation Act be created, and that it be charged with the duty of studying the operation and administration of the act, of consulting and advising with the Youth Conservation Commission concerning the same, of cooperating with other agencies and groups interested in the successful functioning of the act, and of reporting its observations, conclusions and recommendations, if any, to this association.

Report

At the legislative session just concluded the Youth Conservation Act was enacted into law. Minnesota is the second state in the Union to adopt this legislation. The act represents the greatest advance in the field of criminal law since the adoption of the Juvenile Court Act, at the turn of the century. The act adopted originated in the bill prepared by this committee. It was approved by this Association, and was presented to the legislature under the sponsorship of the Association.

The Minnesota State Bar Association may take pride in the fact that it stands alone among state bar associations in securing the enactment of this legislation. At the same time, full recognition and appreciation should be given for the indispensable support and assistance which the bill received from many other organizations and individuals. Within the confines of this report, only the organizations operating on a state-wide level, and coming to the attention of this Committee can be mentioned. These include:

- County Attorney's Association
- Minnesota State Medical Association
- League of Minnesota Municipalities
- Minnesota Federation of Women's Clubs
- Minnesota Junior Chamber of Commerce
- Minnesota Federation of Church Women
- Association of Minnesota Colleges and Universities
- Probate Judges Association
- Mental Hygiene Society
- Association of Applied Psychology
- Minnesota Welfare Conference
- Minnesota Probation and Parole Association
- Minnesota Association of University Women

So many individuals aided in securing the enactment of this legislation, that to name any, risks the omission of others equally deserving of mention. A few carried the major burden of supporting the bill step by step, through its course to enactment. Some special acknowledgment of their efforts should be made, for they spelled the difference between failure and success.

The governor's continuous and vital support is of course well known. Hon. Theodore B. Knudson, recently appointed judge of the Municipal Court of Minneapolis, took a leading part in urging this legislation from the time it was first considered. When a committee was formed to coordinate the legislative efforts of the various organizations interested in the bill, he was named its secretary, and as such, fully measured up to the responsibility entrusted to him in organizing and directing an effective presentation of the matter to the legislature.

John R. Ellington, special advisor on this subject to the American Law Institute, was of indispensable assistance to the public and to the legislature in clarifying and

explaining the practical operation of the act, and in providing first-hand information of the workings of the similar act in California.

Hon. H. J. Ruegger, president of the Probate Judges Association, with his long experience and recognized knowledge of the problem, carried great weight with members of the legislature in presenting his endorsement of the bill. This was true, also of Hon. Douglas P. Hunt, chairman of the legislative committee of the same association, who actively supported the bill.

Mention should also be made of members of the legislature who carried the burden of securing passage of this bar legislation. The authors in the Senate were Senators Sletvold, who presented the bill on the floor, Welch and Feidt. The authors in the House of Representatives were Messrs. Dunn, Hartle, French, Rogosheske, who presented the bill on the floor, and Root. The efforts and the confidence reposed in each of the authors accounted in considerable part for the success that was achieved. Acknowledgment should also be made of the unrelenting support and drive contributed by Representative Carl Wegner on behalf of the bill in the House.

In this, as well as in the previous session, the sponsorship by the president of this association and the chairman of the legislative committee were of a high order. The tact, prestige and ability exhibited by our president, Senator Galvin, and by Gordon Wright, chairman of the Legislative Committee, deserve the gratitude of the association.

Passage of the act should not be the occasion for this association discontinuing its interest in the subject. There still remains the equally important task of securing an effective administration of the act. Many problems will arise and experience may show the need for some changes in the act not now foreseeable. In these respects, the bar can and should be of material assistance. For the reasons the recommendation at the beginning of this report is made. Having assured the public that this act will work, that it provides a more effective instrument for attacking the problem of juvenile delinquency, and for correcting and rehabilitating delinquent youths, the bar must assume some responsibility for seeing that these objectives are realized.

Study No. 2.

EXPLANATORY NOTE

Although much can be learned concerning the methods of shaping and presenting issues to the legislature and the other factors characteristic of the legislative process by careful analysis of "case studies" such as the specimen just set out, a much more effective device is to make a first hand study of the original materials which establish the pre-natal history of a particular statute. As a part of its collateral work, each class in Legislation at the University of Minnesota Law School makes a study of the latest volume of session laws, the result being embodied in a Note in the Minnesota Law Review designed to acquaint the lawyers of the state engaged in general practice with the essential features of the new laws. [The latest example will be found in 31 Minn.L.Rev. 35 (1946).] The following questionnaire has been evolved by trial and error as a guide for this study. It is included here rather than in an appendix, since the sample answer illustrating its use presents a case study demonstrating additional points relevant to the topic of this Section and several to be encountered in later Chapters.

Questions to be Answered in Study of Session Laws**I. SUBSTANCE OF THE ACT**

1. (a) Is the act law-making, or merely "legislative administration"?
(b) If the former, Is the act declaratory, creative, amendatory, supplementary, or revisory?
2. Does it affect any statutes other than those specifically mentioned in it?
3. What was the previous law on the subject? How, if at all, does this act change that previous law?
4. Has the act been applied by courts or administrative tribunals? If so, how?
5. What is the broad objective of the act?
6. What were the specific fact situations for which the former law was alleged to provide an inadequate remedy? Did the alleged defect actually exist? Does the new act remedy the alleged defect?
7. What sanctions are used in the act? Are they calculated to achieve the result desired?

II. STATUTORY HISTORY OF THE ACT

1. What was the first statute in this state dealing with the subject?
2. Trace the statute from its origin to its present form, paying particular attention to amendments and repeals, express or implied.
3. Are there any defects revealed by the statutory history of the act which affect the validity of the present act?

III. LEGISLATIVE HISTORY OF THE ACT

1. Who sponsored the act? Why?
2. Who authored the act? Why?
3. What arguments were advanced for and against the act? Who advanced them? At what stages in the process of enactment were they made?
4. Who lobbied for and against the bill? How was the lobbying conducted?
5. What changes were made in the bill during the course of its enactment either in committee or on the floor of either House? Why were these changes made? Are the changes properly incorporated into the act?

IV. DERIVATION OF THE ACT

1. Did the act originate in this state, or was it derived from some other source?
2. If the act was derived from another state or country, what has been the experience of that state in applying the act, judicially or otherwise? Have any theoretical or practical difficulties been encountered? How have they been met?

3. How many states have the same or similar acts? Give citations to the acts.
4. Has this or any similar act been interpreted in any state in which it is in force? If so how does the interpretation affect this act?

V. CONSTITUTIONALITY OF THE ACT

1. Is there any question concerning the constitutionality of the act from a substantive viewpoint?
2. Is there any question concerning the constitutionality of the act from a procedural or legislative viewpoint?
3. Has any constitutional question been raised in any state having the same or a similar act? How was it disposed of?
4. In particular, does the title of the act conform to constitutional requirements?

VI. SUBSEQUENT HISTORY OF THE ACT

1. Has the act in any way been affected by subsequent legislation?

NOTE: In any case in which reference is made to any statute or case, from this state or any other, use the proper citation.

THE VOLUNTARY NON-PROFIT MEDICAL SERVICE PLAN CORPORATIONS ACT

(Study of 1945 Session Laws of Minnesota, Chapter 255)
(M.S.A.1945, c. 159)

By ROY W. HOLMQUIST and JAMES WANVIG, Class of 1947
The Law School, University of Minnesota.

I. SUBSTANCE OF THE ACT

1. Chapter 255¹ is a creative statute providing for the incorporation and regulation of nonprofit medical service plan corporations, which are authorized to make contracts with subscribers under which the subscribers are entitled to specified medical and surgical care. Such corporations may not, however, sell cash indemnity contracts. The act, among other regulations as to the organization and operation of such corporations, requires that under the contract the subscriber shall have free choice of any doctor of medicine.

This act is supplementary to Minnesota Laws, 1941, c. 53,² which provided for the incorporation of nonprofit hospital service plan corporations, in the sense that the medical service plan and the hospital service plan will be supplementary in providing complete prepaid medical care.

¹ 1 Minn.Stat.1945, Chap. 159.

² 2 Minn.Stat.1945, secs. 309.10-17.

2. This act does not affect any other statutes directly.

3. Prior to the enactment of this law there was no Minnesota Statute dealing specifically with nonprofit medical service plan corporations, nor are there any judicial decisions dealing with such corporations. There was some doubt, however, as to the validity of such corporations in the absence of specific enabling legislation. Similar corporations had been subjected to legal attacks on two grounds: (1) that they were engaged in the corporate practice of medicine,³ (2) that they were insurance companies, and that in failing to comply with the insurance laws they were acting invalidly.⁴ This act eliminates any doubt on either ground by: (1) specifically authorizing such corporations, and (2) exempting them from operation of the insurance statutes, with specified exceptions.

4. This act has not been applied by the Minnesota Courts as yet. The projected nonprofit medical service plan corporation is still in the process of organization by the Minnesota State Medical Association, and has not yet commenced operations.

5. The announced objective of this act is "to make possible a wider and more timely availability of medical care, thereby advancing the public health and the science and art of medicine in this state." It is sought to achieve this objective through a plan for the prepayment of medical expenses, at reasonable rates, so that medical service will be available and paid for when needed. Another objective of the act is to preserve the "right" of free choice of physician by subscribers to the plan.

6. Socially, the facts calling for a medical service plan were that adequate medical service was unavailable to a large share of our population,⁵ and that severe financial strain was imposed by sudden severe illness upon many of those families to whom medical care was available. Legally, the stimulus for this legislation was the doubt which existed as to the validity of corporations organized to provide prepaid medical care. As has been suggested,⁶ the corporations might have been valid without enabling legislation, but this act clearly established their legal

³ See *Dr. Allison, Dentist, Inc. v. Allison* (1935) 360 Ill. 638, 196 N.E. 799; *Painless Parker v. Board of Dental Examiners* (1932) 216 Cal. 285, 14 P.2d 67; but see *State ex inf. Sager v. Lewin* (1907) 128 Mo.App. 149, 106 S.W. 581; *State Electro-Medical Institute v. State* (1905) 74 Neb. 40, 103 N.W. 1078, 12 Ann.Cas. 673. It seems unlikely, however, that a nonprofit corporation entirely controlled by licensed physicians would be subject to attacks on this ground, even in the absence of specific enabling legislation. See *Levy and Mermin, Cooperative Medicine and the Law* (1938) 1 Nat. Lawyers Guild 194, 204.

⁴ It had been held that somewhat similar groups were not insurance companies where they were not for profit. *Hall D'ath v. British Provident Ass'n* (1932) 48 T.L.R. 240; *Jordan v. Group Health Ass'n* (1939) 71 App.D.C. 38, 107 F.2d 239; (1939) 25 Ops. Att'y Gen. Wis. 192. But cf. *Physicians' Defence Co. v. Cooper* (9 Cir. 1912) 199 F. 576; *Physicians' Defense Co. v. O'Brien* (1907) 100 Minn. 490, 111 N.W. 396.

⁵ See *Levy and Mermin, Cooperative Medicine and the Law*, (1938) 1 Nat'l Lawyers Guild Q. 194.

⁶ Footnotes 3 and 4.

status. Whether the plan contemplated by the act will accomplish its purpose remains to be determined. The sponsors have never suggested that the plan is a panacea; but it seems likely that a considerable group of persons will be able more easily to meet the financial requirements of illness by the prepayment method.

7. Sanctions are not a major element of this act, since it is primarily an enabling act. But it is also a regulatory act, and some sanctions are therefore used.

A forfeit of \$50.00 is imposed for failure to comply with a requirement that an announcement of incorporation be published and proof of publication be filed with the secretary of state.

It is provided that in the event a corporation has acted in a manner detrimental and unjust to subscribers, or contrary to or in violation of its articles and by-laws, the commissioner of insurance may request the attorney general to bring an action against such corporation to terminate its corporate existence.

Finally, it is provided that a violation of any provision of the chapter, or any false statement with respect to any report or statement required by the chapter, shall be a misdemeanor.

It would seem that these sanctions are the only kind reasonably adapted to enforcing an act such as this. It might be noted that the provision with respect to filing of articles of incorporation and publication of notice of incorporation⁷ have been adopted almost verbatim from the Minnesota Business Corporations Act,⁸ where the same sanction is effectively employed. There is no similar requirement of publication, however, with respect to nonprofit hospital service plan corporations,⁹ nor with respect to certain other nonprofit corporations.¹⁰

Similarly, there is no provision permitting the insurance commissioner to request the attorney general to bring suit to terminate the corporate existence of nonprofit hospital service corporations. On the other hand, rules governing chambers of commerce and trading exchanges are considerably more stringent, making it mandatory that the attorney general shall by quo warranto initiate proceedings to terminate the corporate existence, as well as prosecute and enjoin further violations.¹¹ The provision in the medical service plan bill, together with others giving some controls to the insurance commissioner, was added by amendment in the Judiciary Committee of the Senate, and probably manifests a legislative opinion that some control of such corporations by the insurance commissioner was desirable, and that some sanction was necessary to make such control effective. That the degree of control and sanctions imposed was considerably less than

⁷ 1 Minn.Stat.1945, sec. 159.04.

⁸ 2 Minn.Stat.1945, sec. 301.06.

⁹ 2 Minn.Stat.1945, sec. 309.12.

¹⁰ For example, corporations organized to acquire and manage public land and provide recreational facilities. 2 Minn.Stat.1945, sec. 310.02.

¹¹ 2 Minn.Stat.1945, sec. 311.06.

that imposed upon some other types of corporations is probably an indication of legislative confidence in the sponsors of this act and of a desire not to hinder by excessive regulation the full and rapid growth of medical service plan corporations.

In some acts relating to corporations, violations of the provisions of the act are made felonies.¹² In view, however, of the nonprofit nature of medical service plan corporations, of the high ethical standards to be expected from the medical profession, of the relatively smaller opportunity for fraud, and of the great public pressure exerted on professional groups, it was apparently believed that making violations a misdemeanor would be sufficient in this instance.

II. STATUTORY HISTORY

Since this is the original enactment dealing with medical service plan corporations, the statute has no history in Minnesota prior to its enactment in 1945.

III. LEGISLATIVE HISTORY

1. The Minnesota State Medical Association sponsored this act.¹³ Why did they sponsor it? This act would enable the medical profession to devise and operate a plan whereby the persons with average incomes could pool their resources in purchasing medical service. It was designed to meet this need, but, of course, is applicable to persons in the higher income brackets too. The plan which this act visualizes not only serves this purpose, but it at the same time protects the private interests of the individual doctors. It assures that the individual shall have complete freedom in choosing any doctor whom he desires. It specifically prohibits corporate medical practice. The medical profession disfavors any plan involving corporate medical practice or a compulsion to be treated by a certain doctor or group of doctors. It assures their profession freedom and competition which they feel is the only method of maintaining the present high standards of the medical profession and progress of the medical sciences. Yet the medical profession sensed that they were not fulfilling their duty to the public and that too many people were unable to purchase needed medical service. To maintain their professional freedom and at the same time make their services more available, this act was sponsored by the medical profession of the state.

2. Companion bills were introduced in each house of the legislature. The authors of Senate File No. 308 were: Harry L. Wahlstrand, W. B. Richardson, and J. V. Weber. The authors of House File No. 382 were: Lawrence M. Hall, Roy E. Dunn, A. M. Burnap, A. B. Anderson, and Claude Allen.

¹² For example, 2 Minn.Stat.1945, sec. 311.05.

¹³ 28 Minnesota Medicine 221, March, 1945.

The Minnesota State Medical Association obtained the signatures of the above named representatives and senators as authors of the bill. These legislators were strongly in favor of the bill and very influential in their respective houses. Their names on a bill carried much weight. They had the leadership and following to see the bill through both houses of the legislature. The Minnesota State Medical Association drafted the bill which was introduced in both houses as companion bills.

3 & 4. The Minnesota State Medical Association lobbied for the bill and was responsible for its passage. The Insurance Federation of Minnesota and the Group Health Association were the two chief opponents of the bill who lobbied against it. In addition a few insurance companies had legal counsel appear before the committees on their behalf, but the principal lobbyists pro and con were representatives of these three organizations.

Members of the Minnesota State Medical Association, its legal counsel, and the authors of the bill advanced most of the arguments for the bill. They cited the need for such an organization to equalize the burden of medical service among those who subscribed to the plan. This was to be a non-profit organization operated by the medical doctors themselves. Being nonprofit it could provide medical care at rates more reasonable than rates of insurance companies offering health insurance policies. This bill was designed to provide a plan which would appeal to and help the average wage earner. All persons would be able to subscribe to the plan whatever their risk. Insurance companies now only insure the good risks which deprives many persons in most need of such insurance of the advantage of it. Of course, waiting periods would be enforced to protect the corporation from fraudulent claims.

The proponents went on to point out the success of the Blue Cross Organization in Minnesota. The medical service plan was designed to supplement it—the Blue Cross providing hospitalization, and the medical service corporation the medical care. At the time this bill was under consideration nonprofit medical service plans were in operation in 21 states.¹⁴ The growth and success of these plans was cited. In addition, in a poll taken by the Medical Association it was found that 83% of the people of the state favored such a plan.¹⁵

Furthermore, this plan would protect the medical practice and safeguard the individual's right to choose his own doctor. Competition and initiative would be retained.

The lobbyists against the bill advance the argument that this would deprive insurance companies—free and competitive enterprises—of much business. They further contended that insurance companies were adequately fulfilling the need and the demand of the public for such protection and service at a price within reach of most people and that the number of people carrying health insurance was rapidly

¹⁴ 28 Minnesota Medicine 470, June, 1945.

¹⁵ 28 Minnesota Medicine 221, March, 1945.

increasing. They pointed to similar plans in other states which met with failure.¹⁶ In their opinion this was a plan fostered by the medical profession to save themselves from socialized medicine and was not for the protection and welfare of the average wage earner.

5. In the House of Representatives the bill met with little opposition. It was sent to the Committee on Health and reported out favorably without any amendments.¹⁷ The House passed it by a substantial majority in its original form as introduced.¹⁸

Its passage through the Senate was more difficult. The Senate bill was referred to the Committee on Public Health. This committee recommended its passage without amendment.¹⁹ A futile attempt was made to rerefer the bill to the Committee on Insurance.²⁰ This can be interpreted as an effort by the opponents of the bill to kill it in committee or to amend the bill so as to put the corporations under the supervision of the Commissioner of Insurance to the same extent as insurance companies. The bill was then referred to the Judiciary Committee. It was reported out with recommendations for passage, but with the following amendments:²¹

a) In the first sentence of section 2 the words "hereinafter incorporated" were inserted after the word "corporations". So the section read as follows: "Nonprofit medical service plan corporations **HEREINAFTER INCORPORATED** may be organized under and in accordance with the provisions of this chapter by not less than 21 persons, . . . etc." (The amendment is in capital letters.) This was inserted to insure that this act would be applicable only to medical service corporations coming into existence after the act was passed and to leave no doubt that it did not apply to such corporations then in being.

(b) To section 3, subdiv. (g) was added: ". . . all of which shall be paid in in cash before the corporation commences business". This subdivision provides that the corporation must have a stated capital of not less than \$25,000. before commencing business. It was added to insure that this \$25,000. was not only contracted for, but in the form of ready cash.

c) The following addition (amendment in capital letters) was made to section 3: "Articles of incorporation may contain any other provisions, consistent with the laws of this state, for regulating the corporation's affairs, **WHICH SAID ARTICLES OF INCORPORATION AND ANY BY-LAWS ADOPTED THEREUNDER OR ANY AMENDMENTS THERETO, AS WELL AS THE CONTRACT TO BE SOLD TO THE SUBSCRIBERS, SHALL BE SUBMITTED TO**

¹⁶ In particular the Michigan plan which went heavily into debt at first, but has since recovered.

¹⁷ Journal of the House, Minnesota, 1945, p. 441.

¹⁸ Journal of the House, Minnesota, 1945, p. 710.

¹⁹ Journal of the Senate, Minnesota, 1945, p. 251.

²⁰ Journal of the Senate, Minnesota, 1945, p. 650.

²¹ Journal of the Senate, Minnesota, 1945, p. 881.

THE ATTORNEY GENERAL FOR EXAMINATION AND APPROVAL, SO AS TO CARRY OUT THE INTENT AND PURPOSE OF THIS CHAPTER." In the bill as introduced no provision was made for the submitting of the articles or contracts to the Commissioner of Insurance. It was the desire of the sponsors of the act that this organization would be independent of any governmental supervision. They argued that it was to be a nonprofit organization, incorporated and operated by the sponsors of the bill. There could be no incentive to make large profits at the expense of the public. The organization was for the welfare of the public. For these reasons the sponsors did not see the need for supervision. However, the committee felt some need for a check to insure complete protection of the public interest. This amendment was therefore made. To further safeguard the public interest, section 13, providing for an annual report by the corporation to the Commissioner of Insurance was inserted as an amendment by the committee. An amendment was added to section 14 providing that the Commissioner of Insurance may request the Attorney-General to bring an action to terminate its corporate existence if the corporation "has acted in a manner detrimental and unjust" to the subscribers.

d) In the last part of section 6 the following italicized words were deleted: ". . . the sum contributed as the working capital of such corporation shall be repayable only out of surplus earnings of such corporation, *and after adequate and reasonable reserves to assure faithful performance of such contracts are provided for.*" In lieu thereof the following was inserted: ". . . after reserves for incurred claims, unearned subscriber's payments and a reasonable amount for contingencies have been provided and approved by the Commissioner of Insurance." This substitution was made for the protection of the public. Note that here again the committee provided for approval by the Commissioner of Insurance. Furthermore the committee desired that it be made more explicit what provisions are to be made financially by the corporations before the working capital is repaid. They had in mind the fact that the doctors contributed that working capital and through their control of the corporation might provide for its repayment before the subscribing members were fully protected financially.

e) To section 7 was added the following provision: "The names of the doctors of medicine belonging to said corporation or enrolled as members therein, shall not be printed or listed upon any contracts furnished to subscribers." The committee added this amendment to assure that doctors would not be able to insert their names on the contracts and through this association with the corporation have their individual names and practices advertised.

These amendments were duly adopted by the Senate²² and also the following were adopted by the Senate in Committee of the Whole:²³

²² Journal of the Senate, Minnesota, 1945, p. 882.

²³ Journal of the Senate, Minnesota, 1945, p. 966.

a) Senator Carr proposed that section 2, line 1 be amended by striking the words "Every nonprofit" and in lieu thereof inserting the word "Nonprofit". He further proposed that the word "corporation" as used in the original bill in section 2, line 1 be changed to "corporations". The proposed amendments were so passed. These two amendments were of little significance and merely changed the wording of the sentence.

b) Senator Johnson proposed a third amendment in section 2, line 1. This was that the word "shall" after the words "hereinafter incorporated" be stricken and the word "may" be inserted in lieu thereof. It was duly adopted. This amendment did create a change in meaning and made incorporation of nonprofit medical service plan corporations *under the provisions of this act* discretionary. The retaining of the word "shall" would have made it mandatory. As it now reads the incorporators may incorporate under the provisions of charitable corporations act if they so desire.

The bill was passed by the Senate in this amended form,²⁴ sent to the House of Representatives for their approval and passed without any further amendments.²⁵ These amendments were correctly incorporated into the act.

IV. DERIVATION

1. The act was not original to Minnesota. Neither was it derived wholly from any one other state. At the time it was passed in Minnesota a number of states had similar acts—the first of its kind being passed in 1939. But the Minnesota statute is most closely allied to the Michigan Medical Service Plan Act passed in 1939.²⁶ At the time the Minnesota State Medical Association was drawing up the bill a number of member doctors went to Michigan and studied the operation of the plan incorporated under the Michigan act. Both of the Michigan and Minnesota acts specifically provide for free choice of doctor.²⁷ In both states the Commissioner of Insurance has the same checks and controls over the operation of the corporation. However, the Michigan act specifically provides that actions against the corporation based upon the physician-patient relationship are barred,²⁸ whereas the Minnesota statute does not. But the Minnesota act specifically forbids any contractual relationships between the corporation and the doctors "directly or indirectly".²⁹ This would seem to protect the corporation from any suit arising out of the physician-patient relationship.

²⁴ Journal of the Senate, Minnesota, 1945, p. 1009.

²⁵ Journal of the House, Minnesota, 1945, p. 1165.

²⁶ Mich.Stat.Annot., secs. 24.592-24.607. The act is discussed in Panchuk, *Hospital and Medical Service Plans*, 19 Mich.State Bar J. 570.

²⁷ 1 Minn.Stat.1945, sec. 159.07; Mich.Stat.Annot., sec. 24.600.

²⁸ Mich.Stat.Annot., sec. 24.604. Mr. Panchuk, in his article cited in note 12, says at page 571: "Contractual liability, if any, to the subscriber would have to be predicated upon negligence in acceptance for registration, incompetent doctors, or failure and neglect to contract with physicians to render stated services".

²⁹ 1 Minn.Stat.1945, sec. 159.08.

The Minnesota statute has no tax exemption statute as does the Michigan act.³⁰ These corporations not being charitable, the sponsors of the Minnesota act saw no necessity or justification for tax exemption.

2. The Michigan statute has had no judicial interpretation. Its constitutionality has not been challenged in the courts. This history may justify the conclusion that the act was well drafted and that there have been no serious difficulties in its application. The medical service plan incorporated under the Michigan enabling act has worked very satisfactorily, although they went heavily into debt at first.³¹ There have been no amendments to the Michigan act since it was passed in 1939.

3. Twenty-two states, other than Minnesota, have similar acts.³² The statutes (see table attached as appendix.) vary in the degree of supervision exercised by the Commissioner of Insurance.³³ Chapter 255 provides for relatively little control by the Commissioner.

Some states have passed statutes under the provisions of which both medical and hospital service corporations may be incorporated or either of them. Minnesota's act provided only for the incorporation of medical service corporations because nonprofit hospital service plans had been provided for in the Blue Cross Hospital Service.³⁴

Approximately half of the states having a similar law specify that the doctor is to be under some kind of a contractual obligation with the corporation—in most instances to perform medical services for the subscribers. But the Minnesota act specifically forbids the corporation to enter into such contracts and provides that "all such matters shall be a matter of agreement directly between the patient and the doctor of medicine selected by the patient to treat him."³⁵ This provision assures the patient freedom to seek the services of any licensed medical doctor.

4. No cases were found interpreting the Minnesota statute nor any similar statute of another state.

V. CONSTITUTIONALITY

1. There is no question concerning the constitutionality of the act from a substantive viewpoint. The act does not deprive any person or persons of life, liberty, or property. Therefore, no question of due process is here involved. It does not in any manner impair

³⁰ Mich.Stat.Annot., sec. 24.605.

³¹ 28 Minnesota Medicine 470, June, 1945.

³² See tables attached as appendix listing these states (including Minnesota), the citations to their respective statutes, and the most important features of each statute.

³³ It might be mentioned at this point that shortly after the bill now under discussion was introduced another bill was introduced enabling the incorporation of nonprofit medical service plans, but providing for a very considerable amount of control by the Commissioner of Insurance.

³⁴ 2 Minn.Stat.1945, secs. 309.10-309.17.

³⁵ 1 Minn.Stat.1945, sec. 159.08.

the obligation of contracts. As has been brought out above³⁶ the Minnesota act specifically insures complete freedom of choice of doctor and there is no contractual obligation between the doctor and the corporation.

2. From a procedural or legislative viewpoint there is no question of the constitutionality of this act. Its passage through the legislature was in compliance with the procedural requirements of the Minnesota Constitution. The bill was read on three different days as required by the Constitution.³⁷ It was passed by a majority of both houses and the vote recorded in the journals.³⁸ The bill was properly enrolled³⁹ and upon passage signed by the presiding officers of each house and sent to the governor for his signature.

The act is not special legislation within the meaning of and prohibited by Art. IV, sec. 33 of the Constitution. The effect of judicial interpretation is that Sec. 33 forbids special legislation only on the subjects therein particularly enumerated, and the subject of this act is not one of those enumerated. But even if it were this would not be special legislation as its application is general: it applies equally to all persons who can comply with its prerequisites. Only medical doctors can by its terms organize a medical service plan under the provisions of this act⁴⁰ but this classification is germane to the purpose of the act. There is no question of uniformity of application and operation.

3. No constitutional problem has been raised in any state having similar statutes, so far as can be determined. A search has been made for cases dealing with the statutes listed in the appendix. Reference has been made to annotations of the statutes where available, to Shepard's Citations where state citators are available, and in all cases to the tables of Statutes Construed contained in the regional reporters of the National Reporter System. No cases were discovered. A further search was made for cases or opinions of the attorney general construing the Minnesota statute relating to non-profit *hospital* service plan corporations⁴¹ on the theory that such constructions would have persuasive effect by analogy. No such cases or opinions were found, however.

4. The title of the act appears to conform to Art. IV, sec. 27 of the Minnesota Constitution. The law seems to embrace only one subject, and that subject seems to be clearly expressed in its title, but maybe the title by specifying in greater detail than is necessary the objects of the act will have to be amended in a statute that later amends its substantive details.

³⁶ See sec. IV, subdiv. 3 of this paper.

³⁷ Minnesota Constitution, Art. IV, sec. 20.

³⁸ Minnesota Constitution, Art. IV, sec. 13.

³⁹ Minnesota Constitution, Art. IV, sec. 21.

⁴⁰ 1 Minn.Stat.1945, sec. 159.02.

⁴¹ 2 Minn.Stat.1945, secs. 309.10-309.17.

VI. SUBSEQUENT HISTORY

The act was in no manner affected by the 1947 legislation.

APPENDIX *

DATE	CITATION	HOSPITAL OR MED. PLAN	CONTROL BY TAX EXEMPT- INS. COM- TION STATE- MISSIONER UTE OVER CORPS.	DOCTORS UNDER CONTRACT OBLIG. WITH CORP.	SUABILITY CLAUSE	MINIMUM CAPITAL INVESTMENT CLAUSE
1. Alabama	Chapt. 50, 1945 Session Laws	Hosp. & Med.	Strict	No	No	None specified.
2. California	Deerings Calif. Code, Sec. 114 91	Hosp. & Med.	Strict	No	No	Yes—In ac- cordance with the no. of in- dividuals enti- tled to bene- fits.

* [Most of the Appendix is omitted. Ed.]

(iii) PRESSURE OF ORGANIZED INTERESTS AND PUBLIC OPINION

NOTE—IMPROVING THE LEGISLATIVE PROCESS:
FEDERAL REGULATION OF LOBBYING

56 Yale L.J. 304 (1947).

In a world in which the center of political gravity is shifting from legislature to executive the Legislative Reorganization Act of 1946¹ represents an attempt by Congress to reassess and strengthen its position as an integral part of representative government.² Congress has recognized the need for reorganizing and streamlining the decision making process if it is to recapture its position as the dominant policy determining branch of government. Reformation of the standing committees,³ increased use of governmental experts,⁴ higher sal-

¹ Pub.L.601, 79th Cong., 2nd Sess. (Aug. 2, 1946) (hereafter cited by section only). The Act is the product of the Joint Committee on the Organization of Congress, of which Senator LaFollette (Wis.) was chairman and Representative Monroney (Okla.) vice-chairman.

² "Our committee was created in response to a widespread congressional and public belief that a grave constitutional crisis exists in which the fate of representative government itself is at stake. Public affairs are now handled by a host of administrative agencies headed by nonelected officials with only casual oversight by Congress. The course of events has created a breach between government and the people. Behind our inherited constitutional pattern a new political order has arisen which constitutes a basic change in the federal design. Meanwhile, government by administration is the object of group pressures which weaken its protection of the public interest. Under these conditions . . . the time is ripe for Congress to reconsider its role in the American scheme of government and to modernize its organization and procedures." Sen. Rep. No. 1011, 79th Cong., 2nd Sess. (1946) 1. The Joint Committee made recommendations for congressional reorganization in this report. A subsequent report was submitted discussing the Act as drafted by the committee with the assistance of the Office of Legislative Counsel. See Sen. Rep. No. 1400, 79th Cong., 2nd Sess. (1946). Both reports will hereafter be cited by number only.

³ Sections 102, 121. The 33 standing committees of the Senate and the 48 standing committees of the House are reduced to 15 and 19 respectively, thus eliminating many repetitive and overlapping functions previously performed. Regularization of committee procedure in respect to hearings, meetings, and record-keeping as well as definition of committee powers are all provisions designed to make more efficient utilization of both time and personnel. An unavoidable weakness of these sections is that they have only the force of Rules of the respective houses, and either may revoke provisions applicable to it. Opposition of legislators with vested interests in former committees may result in the mushrooming of new standing committees over a period of time. Although there is no indication that the number of standing committees will be increased by the 80th Congress, a growth in the number of special committees might also vitiate these provisions.

⁴ Sections 202, 203, 204. Appropriations to the Legislative Reference Bureau and the Office of Legislative Counsel are to be increased from \$198,000 to \$750,000 and \$90,000 to \$250,000 respectively in the hope that these services will be improved both in the quality of their work and in the number of legislators served. Other provisions provide for the employment of four experts to advise each standing committee and improved clerical aid. The original bill went even further in providing for an administrative assistant for each congressman and the establishment of an Office of Congressional Personnel designed to end the so-called patronage system. S. 2177, 79th Cong. 2nd Sess. (1946) §§ 201, 204. Opposition to the loss of such a political bonanza prevented their becoming a part of the Act. See 92 Cong. Rec., June 8, 1946, at 6654-6.

aries for members,⁵ prohibition of private legislation,⁶ regulation of lobbying activities⁷ are all methods of improving the intelligence function of government so as to increase the probability of rational legislative decision.

The provisions of the Act which regulate lobbying are, therefore, to be regarded as one element in a larger scheme to improve present political processes. Democratic political theory assumes that rational decision can best be reached after hearing and evaluating the interests of the component members of society. These interests are in theory expressed by individuals through the medium of their elected representatives in the legislature. Election of these representatives on a geographical basis overlooks the fact that individuals identify their interests not only with a state or political subdivision, but more importantly with a business, economic, social, or fraternal group. Technological advances in communication and transportation have facilitated group interests which are no longer confined within political boundaries. The failure of the Constitution to provide for group representation, the decline of the political party as a prompter of opinion and policy, the intrusion of government into virtually all fields of economic activity, and the increasing complexity of modern legislative problems have led to the development of a powerful extra-legal machinery for achieving group aims. Today legislation is the result of a compromise between these conflicting group interests, but survival of geographical representation largely obscures the functional basis for legislative action.

Two groups have advanced remedies designed to reconcile the existing fact situation with political theory. The first seeks a means by which group interests can be fitted into the formal pattern of government, a system of functional representation as a substitute for, or supplement to, existing political institutions.⁸ On the other hand, a

⁵ Section 601. The original bill proposed a flat \$15,000 salary but this was amended in the House to include only a \$2,500 increase and continuance of the previous \$2,500 tax-exempt expense allowance.

⁶ Section 131. The provisions of Title IV (Federal Tort Claims Act) which transfer adjudication of tort claims from Congress to the federal courts or, in minor instances, to the administrative agency involved and Title V (General Bridge Act), which eliminate the necessity of Congressional approval for the construction of bridges over navigable streams, are complementary to the ban on private legislation.

⁷ Section 301 et seq. Section 301 provides that Title III of the Act may be cited as the Federal Regulation of Lobbying Act. See Comment (1947) 47 Col.L.Rev. 98.

⁸ Proposals for functional representation have never been as well received in the United States as in Europe. Political scientists have suggested constitutional revisions designed to eliminate the geographical system. See, for example, MacDonald, *A New Constitution for a New America* (1921). But practical efforts have been limited to proposals for advisory councils to represent economic interests as a supplement to geographical representation. In 1931 Senator LaFollette introduced a bill embodying this concept in Congress. See S. 6215, 71st Cong., 3rd Sess. (1931). Such a body to advise the executive was suggested by President Hoover's Research Committee on Social Trends, *Recent Social Trends in the United States* (1933). Pressure groups, notably the National Lumber Manufacturers Association and the United Steelworkers (CIO), have expressed approval of the idea. Statement of Robert K. Lamb, Hearings before the Joint Committee on the Organization of Congress pursuant to H. Con. Res. 18, 79th Cong., 1st Sess. (1945) 1013.

Parliaments of industry or advisory councils have been widely adopted in Europe. Results in these countries have not, however, indicated that a formal joining of politics and economics is an effective solution to the problem of pressure groups.

second group regards the problem or representation as subordinate to a rationalization of the whole legislative process. Their emphasis is upon administrative efficiency, extension of federal research and information services, increased governmental planning, and bringing "lobbying" activities into the open. It is this view which Congress has espoused in the Reorganization Act.⁹

THE PROBLEM

If lobbying is defined in its broadest terms as any attempt by individuals or groups to influence governmental decision, it is apparent that in some form it inheres in all government.¹⁰ American history is full of examples of legislation passed at the instance of, and for the benefit of, special interests.¹¹ But lobbying today is both qualitatively and quantitatively a different problem from lobbying in the past. Whereas the old-style lobby, confined almost entirely to representatives of business interests, operated secretly and depended for its success upon personal solicitation of legislators, often accompanied by corruption, such methods are largely obsolete today.¹² Modern lobbyists, or legislative agents, act on behalf of almost every con-

Herring, *Legalized Lobbying in Europe* (1930) 31 *Current History* 947. For more general discussions of groupism see Cole, *Guild Socialism Restated* (1920); Duguit, *Law in the Modern State* (1919); Laski, *Grammar of Politics* (1925); Wallas, *The Great Society* (1914).

⁹ A full discussion of the congressional reorganization is found in Galloway, *Congress at the Crossroads* (1946). Dr. Galloway was advisor to the joint committee which drafted the bill. See also, Report of the Committee on Congress of the American Political Science Association, *The Reorganization of Congress* (1945); Simmons, *Reorganization of the Federal Government* (1945) 31 *A. B. A. J.* 63.

¹⁰ In general see Blaisdell, *TNEC Rep., Economic Power and Political Pressure*, Monograph No. 26 (1941); Chase, *Democracy Under Pressure* (1945); Crawford, *The Pressure Boys* (1939); Herring, *Group Representation Before Congress* (1929); Lobby, (9 *Encyc. Soc. Sciences* 565 (1933); Boeckel, *Regulation of Congressional Lobbies* (1928) 1 *Ed. Res. Rep.* 207; Brewer, *Congressional Lobbying* (1946) 1 *id.* 317; Logan, *Lobbying* (1929) 144 *The Annals* (July Supp.); *Pressure Groups and Propaganda* (1935) 179 *id.*, *passim*. More specialized studies which throw light on the pressure group problem are Schattschneider, *Politics, Pressures and the Tariff* (1935) and Zeller, *Pressure Politics in New York* (1937).

¹¹ See Merriam, *American Party System* (1923) 113 *et seq.*; Odegard, *Lobbies and American Legislation* (1930) 31 *Current History* 690, 692. A recent study of 90 major laws disclosed that pressure groups were important in securing passage in every case, and that seven of these laws were in effect enacted by pressure groups, both the President and Congress subordinating their views to those of powerful lobbies. Chamberlain, *The President, Congress, and Legislation* (1946) 61 *Pol. Sci. Q.* 42, 49.

¹² Discussions of the old-style lobby are found in Herring, *op. cit. supra* note 10, at 30-40; Boeckel, *supra* note 10 at 211-14; 2 Poore, *Perley's Reminiscences* (1886) 515 *et seq.* Occasionally the corruption resulted in a national scandal such as that which accompanied the operations of Cornelius Wendell, creator of the infamous "whiskey ring" during the administration of President Grant. The investigation of the Credit Mobilier in 1872 likewise revealed distribution of stock, free passes, telegraph and express franks to members of Congress. The old lobby center was Pendleton's Game Rooms, the "Hall of the Bleeding Heart," on Pennsylvania Avenue, where bribes were passed to impecunious legislators in the form of card winnings. Corrupt practices are still occasionally resorted to today. See the revelations of the activities of Robert Smith by the Black Investigating Committee, discussed in 27 *Time* (Mar. 30, 1936) 15-16, and the more recent disclosures of the Mead Committee Investigation of War Contracts, *N. Y. Times*, July 18, 1946, p. 1, col. 6. The greatest temptation to resort to bribery seems to be found in the awarding of contracts by governmental agencies.

ceivable business, economic, and social group,¹³ generally operate openly and frankly,¹⁴ and rely upon public opinion, real or stimulated through judicious use of publicity and propaganda, to compel legislative action.

Fundamental reasons for the transition from old to new lobby are to be found in the same considerations which have given rise to demands for functional representation.¹⁵ As the technological barriers to group organization on a national scale have been removed, the common interests of workers, farmers, professional men and social reformers have led each to strive to participate in governmental decisions. Increased public scrutiny of the legislative process, a consequence of the growth of radio and press services, has made legislators more conscious of the force of public opinion. Pressure groups with large memberships are an effective threat to an elective office holder through the votes they control and the large segment of public opinion they represent; those with a smaller popular base can secure legislative consideration of their proposals only by stimulating or feigning public approbation.

Legislative investigations aimed at disclosing the extent of lobbying practices bear striking testimony to the effectiveness of utilization of mass channels of propaganda provided by the newspaper, the radio, the school, the theater, and the church. Pressure can be brought on legislators by publicity campaigns designed to prompt constituents, within or without the pressure group, to bring influence to bear by writing letters or sending telegrams; at election dates, candidates, regardless of party affiliation, considered favorably disposed toward group interests can be supported by the organization; or public opinion can be skillfully moulded to identify the public interest with legislation favored by the group.

To supplement these indirect methods of influencing legislation most pressure groups maintain a Washington expert, and a technical information service. The expert, or lobbyist, makes the group's views

¹³ Estimates as to the number of lobbyists in Washington vary widely. One writer puts the number at 6,000. Crawford, *op. cit.* supra note 10, at 3. A more conservative figure is 400, a number of which are ineffective. See Herring, *op. cit.* supra note 10, at 276-83; Blaisdell, *op. cit.* supra note 10, at 197. The list compiled by Herring in 1929 was used as the basis for TNRC compilation in 1940 and found substantially accurate. But various Washington correspondents estimate the number to have doubled during the war. See Brewer, supra note 10, at 322, n. 10; Mechling, *Washington Lobbies Threaten Democracy* (1946) 22 Va.Q.Rev. 321.

¹⁴ Since the power of modern pressure groups depends on the number of votes they control and their influence on public opinion there is little to gain from concealing their identity. For this reason many lobbyists, who represent groups with a large popular base, favor registration laws which will eliminate the "fake" lobbyist who represent non-existent groups. Furthermore, official recognition of their activities may serve to enhance their prestige. See Logan, supra note 10, at 73.

¹⁵ Other reasons advanced are (1) Reform of the House Rules in 1911; (2) Adoption of the practice of open committee hearings; (3) Direct election of Senators pursuant to the 17th amendment; (4) The lobby investigations of 1913. Herring, *op. cit.* supra note 10, at 41-6. Much of the old-time corruption may have been traceable to the system of closed committee hearings. See Wilson, *Congressional Government* (1885) 189-90.

[Footnotes 16 to 62 are omitted. Ed.]

known to legislators either through direct contact, testimony before committees or the submission of written statements, often carefully documented by highly paid legal counsel. He undertakes to provide extensive factual surveys to support his position, analyze legislation, draft bills, or perform any other service the congressman may desire. In addition he keeps the organization posted on the status of bills in committee or on the floor which may affect the group.

Even if no practical or constitutional difficulties were encountered, few observers today would advocate the abolition of pressure groups or forbid the activities of lobbyists. In addition to providing an unofficial form of functional representation, pressure group activities which publicize the legislative process, focus attention upon the voting records of congressmen, and keep the public informed as to the content and significance of legislative proposals are desirable in a democracy. The expert analysis of bills made by the competent lobbyist before congressional committees, and the link he provides between legislators and a large segment of the public may well improve the quality of legislative decision. While the larger and more cohesive the interest represented the more justification can be found for its activities, it remains true that the smallest minority has a right to be heard. It is hopeless to classify lobbies in terms of "good" or "bad", i.e., those which concern themselves with what they conceive to be the public welfare and those which work for the direct interests, usually economic, of their membership. All lobbies identify their interests with those of the general public and may, in particular situations, be justified in doing so. The danger to rational legislative decision lies not from hearing the claims of organized groups, but from inability to determine when those claims legitimately represent the welfare of the general public. This difficulty stems from the ignorance of legislators amidst the growing complexity of governmental functions, the unequal power of pressure groups, and the abuses which have survived the old lobby or arisen in the new lobby.

The evils disclosed by legislative investigations of lobbying fall roughly into two categories: (1) activities which leave the public and legislators with inadequate or unbalanced information on which to make decisions; and (2) activities which coerce or corrupt legislators.

Pressure group propaganda aimed primarily at influencing the public is often characterized by misrepresentation or distortion of fact, made more effective by concealment of source. When the source of a statement is undisclosed, or appears nonpartisan, legislators and the public, ignorant of motivation, cannot evaluate possible bias. Special interests have often created a favorable climate of opinion by such questionable practices as controlling newspaper editorial policy by placement or withdrawal of advertising, sending "canned copy" to country presses; hiring radio commentators and columnists to express favorable views, educators to write textbooks, and speakers to address clubs, schools, and churches without revelation of the contract of employment.

While most lobbyists admit their affiliations, many are prone to exaggerate the size and cohesion of their membership, and sometimes work for interests other than those they claim to represent. Often-times one group will serve as a "front" for another, disguising the partisan nature of the views it advocates; some lobbies of this type exist on paper only. The forces of group opinion can be magnified by instigation of letters, telegrams, and phone calls to congressmen which, though the sole creation of a special interest group, create a false impression of opinion in the legislator's home district.

Activities which coerce or corrupt congressmen are a hangover from the old lobby, and, though of lesser importance, are occasionally resorted to. Included in this category are such crude devices as bribery, threats, and promises of financial security, as well as the subtler techniques of social pressure.

PUBLIC UTILITIES—A CASE STUDY

The extent to which pressure groups engage in all forms of lobbying activities is well illustrated by the tremendous campaign of the public utility companies against government regulation or ownership. The investigation by the Federal Trade Commission in 1928-9 uncovered the expenditure of millions of dollars in a propaganda and educational program that achieved such proportions that the FTC was forced to conclude "that no campaign approaching it in magnitude has ever been conducted except possibly by governments in wartime."

The campaign was carried on under the direction of a Joint Committee of National Utility Associations which laid down the policy for twenty-eight state utility committees. Every effort was made to win newspapers to the Utilities viewpoint and techniques included placement of huge advertising contracts, social favors to editors and entertainment of newsmen, wide distribution of pamphlets and "clip sheets." An annual expenditure of over thirty million dollars a year in advertising proved an effective weapon. Financial support to news and editorial services, without disclosure to the public, also aided in achieving general newspaper support. Articles written by state publicity directors were placed in newspapers under the names of prominent men who had no apparent connection with utility interests.

A program of close cooperation with schools was likewise inaugurated so as "to fix the truth about utilities in the young person's mind before incorrect notions become fixed there." Friendly relations were cultivated with educators who were paid salaries during vacations to "learn the public utilities business at first hand." Funds for research were made available to institutions. Textbooks representing a viewpoint favorable to utilities were introduced in public schools and supplemented with pamphlets prepared by the state committees.

Public speakers representing the utility position made speeches before all types of audiences which were often later carried by newspapers as news stories. The rather narrow popular base of the group

was widened and made more effective by increased sale of stock throughout the country.

Amidst this publicity campaign highly paid Washington representatives were busy contacting congressmen and exerting pressure on influential government officials. Such activity reached its height immediately prior to the vote on the Public Utility Holding Company Act, in opposition to which the utility lobby spent over four million dollars. Ex-legislators were employed to influence their former colleagues, aid of the social lobby was enlisted, and a deluge of telegrams, sent without the knowledge or consent of the signers, swamped wavering congressmen. It was this latter practice that moved Congressman Driscoll to inaugurate the subsequent investigation of the lobbying activities connected with the Holding Company Bill.

Passage of the Bill did not put an end to pressure group opposition which merely shifted its primary target from legislature to courts. Literally dozens of suits were filed by utility companies alleging the unconstitutionality of the Act. Similarly the competition offered by government through the Tennessee Valley Authority was widely fought in the courts.

Today the fight against rural electrification projects goes on apace. On March 11, 1946, Speaker Rayburn called the attention of Congress to the fact that the Capitol was "seething with utility lobbyists" out to kill rural electrification and public owned power in general. The National Association of Electric Companies has spent \$192,000 on lobbying activities between August 2 and October 15, 1946. Its principal lobbyist receives a salary comparable to that of the President of the United States.

The methods of influencing legislation used by the Public Utilities lobby are employed to a greater or lesser extent by all national pressure groups. The problem of lobby regulation is not one of curbing the activities of a single, or even a few, special interests. It is, rather, the problem of insuring rational decision when legislators, and the public, are bombarded from all sides by the demands of hundreds of organizations. Solution to this problem does not necessarily resolve itself into a choice between suppressing such propaganda or allowing it to flourish. Exposure of lobbying activities to informed criticism through disclosure of the source of apparently disinterested statements is one method. The effectiveness of such publicity is well illustrated by the passage of the Public Utility Holding Company Act after discovery that the bulk of the opposition came from trumped-up Utility propaganda.

STATE REGULATION OF LOBBYING

While the Federal Regulation of Lobbying Act represents the first federal statute passed with the end of bringing lobbying activities into the open, it has precedent in a number of state laws. In addition to the universal prohibition against giving, offering, or receiving bribes, thirty-five states have enacted statutes aimed at limiting lobbying activities. All of these statutes while differing in their specific provi-

sions, proceed on the common principle that undesirable activities can best be controlled, not by prohibition, but by publicity.

The most frequent requirements of state laws are (1) registration, (2) filing expense accounts, and (3) prohibition of contingent compensation. The more comprehensive laws require registration of both the individual lobbyist and his employer with a governmental agency, usually the Secretary of State. Registration statements often include, in addition to name and address, specification of the legislation promoted or opposed, but here a very general answer suffices. Several states, following the pattern of the Massachusetts statute, make a distinction between "legislative agent" and "legislative counsel," but this differentiation appears to serve no functional purpose.

In seventeen states the employer and lobbyist must also file detailed statements showing the amounts received and expended in promoting or opposing legislation, including an affidavit as to the

41.

State	Laws Limited to Corrupt Practices	Registration Required	Distinction Between Counsel and Agent	Financial Statement Required	Contingent Com- pensation Prohibited
Alabama	x				
Arizona	x				
Arkansas		x			
California		x			
Colorado		x			
Connecticut		x		x	
Delaware		x			
Florida		x			
Georgia		x		x	x
Idaho		x			
Illinois		x			
Indiana		x	x	x	x
Iowa		x			
Kansas		x	x		x
Kentucky		x		x	x
Louisiana	x				
Maine		x	x		x
Maryland		x	x	x	x
Massachusetts		x	x	x	x
Michigan					
Minnesota		x		x	x
Mississippi		x			
Missouri	x				
Montana	x				
Nebraska		x		x	x
Nevada					
New Hampshire		x		x	
New Jersey					
New Mexico					
New York		x		x	x
North Carolina		x		x	
North Dakota		x		x	
Ohio		x		x	x
Oklahoma		x			
Oregon	x				
Pennsylvania					
Rhode Island		x	x	x	x
South Carolina		x		x	
South Dakota		x	x	x	x
Tennessee					
Texas	x				
Utah	x				
Vermont		x	x		
Virginia		x		x	
Washington					
West Virginia	x				
Wisconsin		x	x	x	x
Wyoming					

The table is adapted from Zeller, *State Regulation of Legislative Lobbying* in 5 Council of State Governments, *The Book of the States* (1944) 161, 165-6.

agent's salary. These expense accounts are usually submitted from one to four months after the close of the legislative session and are open to public inspection.

The frequent provision forbidding compensation which is contingent upon the success of the lobbyist in attaining the desired legislation is merely legislative condemnation of a contract which courts have long regarded as opposed to the public interest and unenforceable.

A major weakness of all state statutes is the lack of adequate enforcement provisions. Although criminal sanctions are imposed for violation of the registration requirements, no special agency is charged with investigating either the accuracy or inclusiveness of the registration lists and financial statements. That Attorneys General have exhibited no particular desire to bring actions except in the case of flagrant violations accompanied by wide publicity is indicated by the wide variation in the number registering from state to state and year to year, and the absence of entries of large sums in expense accounts. A conclusion that the law is broken with impunity is inescapable.

The failure of states to regulate pressure group activities successfully has often been attributed to lack of a specific statutory definition of "lobbying." Legislators drawing up state laws appear to regard lobbying as limited to the old methods of face-to-face persuasion with its accompanying graft and corruption, and give inadequate consideration to modern propaganda and publicity techniques. Even the most comprehensive laws emphasize the activities of the lobbyist rather than the pressure group he represents. This interpretation is most clearly indicated when statutes use such expressions as "to personally influence," "privately or secretly attempt to influence," or "improperly influence" to define lobbying practices. Not only the phraseology of the acts but their total divorcement from such analagous problems as corrupt election practices, improvement of legislative information services, and functional representation indicate that these statutes were directed at what was conceived to be an isolated evil which needed regulation. The failure, therefore, lies not merely in the inadequacy of statutory language, but in the more basic fault of which lack of precise definition is a manifestation: the inability of state legislatures to see pressure group regulation in its relation to the whole decision-making process.

PROVISIONS OF THE ACT

Legislative Background:

Just as the impetus to state legislation came from the disclosures of the Armstrong Committee's investigation of New York insurance companies in 1905-6, the most serious attempts at federal regulation have followed revelation of lobbying activities by the N.A.M. in 1913 on proposed tariff legislation, and by the public utilities in 1928 and 1936. Bills introduced by Senator Caraway in 1928 and Senator Black and Representative Smith in 1936 passed their re-

spective houses but did not meet with the approval of Congress. Their failure of passage has usually been ascribed to congressional fear of interference with the constitutional right to petition and opposition of lobbyists to registration requirements. To this might be added a belief by congressmen that they are not susceptible to group pressures.

The report of the House committee in 1913 defined lobbying as the "activities of a person or body of persons seeking to influence Congress in any way whatever" and this broad definition has been incorporated directly or indirectly in subsequent bills. But despite the broad possibilities of such a definition, none of the aforementioned legislative proposals showed any attempt to deviate from the rather narrow conceptions embodied in state statutes. The Caraway, Black, and Smith bills focused their attention upon the activities of the Washington representatives rather than the pressure groups themselves, and were particularly concerned about the lobbying of specious organizations. Senator Black's investigation of airmail contracts prompted him to expand the Caraway proposals to include lobbying before administrative agencies.

Although the wording of the 1946 Act is almost identical with that of its predecessors, there is evidence that the views of the present Congress toward lobbying are significantly broader than those of the past. The Act studiously avoids use of the word "lobbying" and the committee reports refer to the activities of "pressure groups" and their "agents," emphasis being given to the activities of the former. The unfortunate identity of language between the instant Act and the Black and Smith bills is not solely explicable in terms of congressional intent; it is attributable largely to the speed which marked the drafting of the Reorganization Act, the indifference with which legislators regarded the lobbying provisions, and the political expediency of avoiding too sharp a break from past attempts.

The clearest indication that the Lobbying Act represents a more mature congressional view of the pressure group problem is provided by its enactment as part of the Reorganization Act. The fact that it does not come as the result of demand for restrictive regulation following an exposé by a congressional committee is further proof that Congress intended more than elimination of some of the more obvious abuses of the right to petition. A proper evaluation of the Act can only be made if it is regarded as an initial step toward solution of the problem of fitting the activities of organized groups into existing patterns of government.

The structure of the Lobbying Act indicates its composite origin. Section 308, a slightly modified version of the Black Bill, relates to the activities of those engaged in lobbying for pay. Sections 303, 304, and 305, modeled after the Smith proposal, cover the financing of lobbying through solicitation of contributions, or expenditure of funds, to influence legislation. Section 307, also from the Smith

Bill, is a catch-all provision defining persons to whom the Act applies.

As in the analogous state statutes, the law establishes requirements for registration and provides for public disclosure of pressure group activities. But the vagueness of its provisions and the absence of any attempt to define directly the activities it seeks to regulate has led to much confusion as to who must register or file financial statements under the terms of the Act. The refusal of the Attorney General to render an official interpretation has left individuals and organizations the obligation of deciding for themselves whether or not the law is applicable to them.

Registration of Professional Lobbyists:

Section 308(a) provides that "Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation . . . shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate. . . ." Although "person" is defined elsewhere to include both individuals and groups, it seems clear that this section refers primarily to the individual lobbyist or legislative agent.

Certain exceptions to this provision should be noted. It does not apply to (1) persons who merely appear before a committee and "engage in no other activities to influence legislation"; (2) public officials acting in their official capacity; (3) newspapermen "acting in the regular course of business"; and (4) persons now required to report under the provisions of the Corrupt Practices Act.

Construed by itself, Section 308 sets up two conditions which must be satisfied before a person need register; he must be employed by another for a valuable consideration, and the purpose of the employment must be to influence legislation. But a difficulty arises as to whether this section, as well as the section which requires the organization to file an expense account, can be read alone or must be construed in the light of Section 307 which reads, in part, as follows:

"The provisions of this title shall apply to any person who . . . directly or indirectly solicits, collects, or receives money or any other thing of value to be used *principally to aid, or the principal purpose of which person is to aid*, in the accomplishment of any of the following purposes:

"(a) The passage or defeat of any legislation by the Congress of the United States.

"(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States." (Emphasis supplied.)

An interpretation of the Act which regards this section as qualifying all others would appear to have the support of legislative intent. On the floor of the House it was referred to by a member of

the Committee as containing "the gist of the anti-lobbying provision." Furthermore, unless this section is read literally as restricting the application of the Act, the phraseology in italics above is surplusage and serves no useful purpose.

The superimposition of the language of Section 307 upon that of 308 leaves a third condition which must be fulfilled before registration is required: not only must the person be engaged for pay to influence legislation, but this must also be his principal activity. Although it is probable that most of the professional lobbyists in Washington could meet all three of these conditions and be required to register, there are at least three fairly common fact situations which may cause difficulty.

The first, and quantitatively the most important, of these situations is the case of the Washington lawyer, or law firm, who is retained by a special interest group or corporation to advise on pending legislation, render opinions as to its effect and construction, and possibly to draft bills which the group will submit to Congress. This work may be part of a large law practice.

The second situation is that of the officer of a corporation whose general duties have no reference to legislative matters but who comes to Washington to oppose a specific bill which may adversely affect the interests of his firm. He speaks to congressmen, testifies before committees, and distributes literature. Immediately after the passage or defeat of the bill he returns to his usual duties.

The third problem is that presented by the member of a group who comes to Washington to testify before a committee, distributes literature to congressmen, and takes his local Representative to dinner. The group pays his expenses but nothing more.

It is probably that the lawyer would not have to register. Although the phrase "influencing legislation" is a broad one, it is not within the legislative intent to include activities of counsel who merely perform advisory functions.⁶³

The corporate officer would, on the other hand, have to register before he undertook to engage in such typical lobbying activities. He might, of course, argue that he was not employed to influence legislation and that this was not his principal activity. But it is reasonable to assume that at least part of his corporate duties are of this nature and thus part of his compensation is derived for such activities. He is acting in his official capacity and not as an individual since it is the interests of the corporation which are affected by the pending legislation. Likewise, it is apparent that the word "principal" can be defined only if given a time reference. Although over

⁶³ Many state statutes specifically exempt lawyers who do not personally approach legislators and confine their activities to interpreting and analyzing legislative proposals. Even in the absence of statutory exemption analogous state laws have been deemed inapplicable to attorneys engaged in a purely advisory capacity. See (1937) 26 Op. Att'y Gen. (Wisc.) 183-4.

[Footnotes 64 to 88 are omitted. Ed.]

a long period of time his principal activity may be with other corporate affairs, nevertheless his principal activity during his Washington stay is representing the corporate interest before legislators. This same rationale would apply to the lawyer in the first example if he went beyond interpreting legislation and approached congressmen, or if he himself submitted the drafted bill to a member of the legislature.

The representative of the interest group in the third illustration would not have to register. Although he meets the requirements of "influencing legislation" and "principal activity," he is not engaged for pay. The intent of Congress was not to limit in any way the individual's right to petition and was aimed only at professional lobbyists. If the compensation were merely actual expenses, it would not meet this test of employment for consideration, but if the sum given should substantially exceed expenses, he would have to register.

It may be difficult in any given case to determine just what constitutes "influencing legislation." The Act is indefinite in this respect and, since criminal statutes must define prohibited acts with certainty, this indefiniteness might make it technically defective. It is more likely, however, that courts will construe the provision strictly and require proof of actual intent on the part of an organization or individual to promote or defeat passage of a definite legislative proposal. Sufficient intent might, for example, be indicated by the presence of a legislative program endorsed and advocated by the group or its representative.

Filing of Expense Accounts:

A. By the Lobbyist:

Every person who registers under Section 308 is required to file in addition to the registration form a detailed report under oath of all money received and expended by him during the preceding calendar quarter. The report includes a statement identifying the person paid, the purposes for which the money was expended, and the legislation he is paid to support or oppose. He also must state the names of any papers or periodicals in which he has caused editorial or news matter to be published.

B. By the group or organization:

Section 305(a) provides that "Every person receiving any contributions or expending any money" to influence legislation must file a detailed statement every calendar quarter with the Clerk of the House. The term "person" again is defined to include any individual or group of persons, corporation, partnership or association, but excludes anyone registering under the Corrupt Practices Act.

As in the case of individual lobbyists the provisions of Section 305 are limited by Section 307. Thus construed, only those organizations which solicit money or receive contributions *principally* to aid in the influencing of legislation, or those receiving or expending mon-

cy whose *principal* purpose is to influence, directly or indirectly, legislation must register. Obviously the efficacy of the provision hinges on judicial interpretation of the word "principal."

Past congressional investigations have disclosed the fact that the most important pressure groups today are the National Association of Manufacturers, the Chamber of Commerce, the AF of L, the CIO, various trade and professional associations, labor groups, farm associations, and veterans' organizations. All of these special interests could argue that their principal activity is dissemination of information within the group for business or social purposes, trade promotion, or research, and that their lobbying activities, however extensive, are not the principal purpose of the organization. Such an interpretation would completely emasculate the Act; almost no group which exercises a substantial influence over public or legislative opinion would be required to register. Groups spending hundreds of thousands of dollars in propaganda activities would be exempt from reporting such expenditures, while other groups spending only insignificant sums would have to submit detailed accounts.

Despite the fact that a literal interpretation of "principal" makes little sense in the light of the factual situation, a strong argument to support this view can be made from the legislative history of Section 307. The Smith Bill, from which the section was copied almost verbatim, originally used the phraseology "in whole or in part," and its sponsor substituted the word "principally" when the breadth of the former provision was brought to his attention. When asked whether labor and fraternal organizations would have to register, Representative Smith replied in the negative. He stated that the provision was intended to exclude many large organizations with thousands and millions of members who spent only a minor part of their funds influencing legislation.

In debate on the instant Act it was stated that the groups which were included in this section were "those whose principal purpose, not incidental purpose" was "to influence the passage of legislation." Juxtaposition of the words "principal" and "incidental" indicates that all purposes of an organization which are not "incidental" are in the category covered by the Act, suggesting a much broader meaning of the word "principal" than it might be given if taken alone.

A classification of activities which only incidentally influence legislation can be found in cases construing provisions of the Internal Revenue Code. Tax exemption is provided for gifts to charitable and educational organizations "no substantial part of the activities of which is . . . attempting to influence legislation." The test imposed by the courts has been whether or not the political activity is incidental to the main purposes of the organization, and relevant criteria include its stated purpose as determined by the articles of association, the amount expended in political activities as contrasted with other business, the presence or absence of a political program, and the controversial nature of the propaganda promulgated. Under

these rules gifts to trade associations, labor unions, professional groups, and social reform organizations have been deemed taxable. Although the analogy of the instant problem to taxation is far from perfect, neither the classification of groups nor the criteria imposed seem entirely inapposite.

If a test case should bring Section 307 before the courts for judicial construction, any one of three results is possible. The court could construe "principal" narrowly to mean "primary," "chief" or "most important." Although this interpretation would exempt most pressure groups and vitiate the Act it would, nevertheless, have the support of Representative Smith's remarks, coupled with legal dogma requiring a strict construction of criminal statutes. Where, as in the case of the typical trade association or labor union, more than one activity is engaged in, the burden of proof upon the government to establish lobbying as the most important activity would seem to preclude many convictions. Exactly what the government would have to prove, assuming the difficulties of obtaining evidence were overcome, is largely a matter of conjecture; if the objective test of comparison of sums spent on lobbying with sums spent on other activities were adopted, would it be necessary to prove that more was expended on lobbying than any other activity or than all other activities, and over what period of time would it be necessary to compare such expenditures?

An interpretation of "principal" to mean "substantial," or any activity not purely "incidental," would overcome most of the objections to which the narrower construction is subject and has already proved workable in tax cases. While the problem of the correct time reference would still be present, the breadth of activities included would make it factually insignificant. Furthermore, this interpretation is the only one which appears reasonable in the light of the pressure group problem as apparently understood by the present Congress.

The third possible result of litigation would be a holding that Section 307 is so vague and indefinite as to require invalidation of the Act. There is little practical difference in a strict interpretation of the word "principal" and a holding that Section 307 violates the Constitution; in either case the operative effect of the Act would be negligible.

It should be noted that there is no interrelation between those who file statements under Section 305 and those who register under Section 308 as is common in state statutes. Thus, it is possible for an individual lobbyist to name an employer who need not file under Section 305. But if liberal interpretation is given to the word "principal," the correlation between the two lists should be high.

The quarterly statement of the group filed under Section 305 includes the name and address of all who contribute over \$500, the total sum of all contributions and the total expenditures including the name and address of those who receive an aggregate of ten dol-

lars or more. Further provisions require that detailed accounts of contributions and expenditures be kept and preserved for at least two years.

Enforcement.

Violations of any provisions of the Act are punishable by a fine not exceeding \$5000 and imprisonment for not more than twelve months. In addition, conviction automatically disqualifies a person from attempting to influence legislation or testifying before a committee for three years with more severe penalties provided for violation of this provision. Although this latter sanction appears to be directed at the individuals registering under Section 308, the broad statutory definition of "person" makes it applicable to associations and groups as well. How it could be enforced against the latter is not clear, and in any event it could scarcely bind the individual members of a group without deprivation of their constitutional rights.

THE REQUIREMENTS OF AN EFFECTIVE LOBBYING STATUTE

The inadequacies of the Regulation of Lobbying Act are in large measure attributable to the fact that despite evidence of a new and realistic congressional understanding of the problems raised by pressure group activity, the statutory vehicle for expression of its ideas was hurriedly drafted and modeled on anachronistic precedent. That the federal statute will be little more successful than its state counterparts is already indicated by the number of individuals and groups complying with its provisions. During the first quarter 36 organizations and 124 individuals filed statements under Sections 305 and 308. Only three important pressure groups complied with Section 305, others apparently relying on exemption by virtue of the "principal" requirement.

The most obvious weaknesses of the Act are the use of the word "principal" to restrict persons to whom the Act is applicable and the lack of adequate enforcement provisions. Such powerful pressure groups as the Chamber of Commerce and the NAM are construing the word narrowly and maintain that their principal purposes are trade promotion, education and research. Failure to submit accounts to the Clerk of the House indicates that most trade associations and labor organizations are adopting the same view. Although a test case might possibly result in an interpretation which would force their compliance, it would be preferable to amend the law so as to include all organizations which spend more than a specified sum influencing legislation.

Failure to provide sanctions to overcome the procedural difficulty of criminally prosecuting unincorporated associations is an elementary drafting error which may seriously weaken the punitive provisions of the Act. As a consequence it is questionable whether a large proportion of pressure groups could be made subject to its penalties, a shortcoming best cured by providing that all expense accounts be

signed by a responsible executive who is personally liable for violation. If no expense account is submitted, the officers of the association should be held.

The enforcement difficulties of the Act, however, are more extensive than those embodied in a mere technical drafting error. The Department of Justice will undertake prosecution of violators of the Act only when a violation is brought to its attention. The absence of provision for a special agency to investigate the activities of lobbyists has always meant non-compliance with state laws; there is no reason to believe that there will be a significant difference in the case of a federal statute.

One of the principal reasons for requiring registration of professional lobbyists was to reveal, in addition to their identity, the size and cohesion of the groups they claimed to represent. Such knowledge is indispensable to legislators seeking to evaluate the political force of divergent views. To this end the Senate Report recommended that the registration statement include evidence of bona fide membership;⁸⁹ but this provision was never embodied in the bill as submitted to Congress. Not only should this information be required but it should be supplemented by a statement as to how the membership decides its lobbying policy and by what right the lobbyist speaks for the group. Democratic procedures within the group itself are necessary if lobbying activities are to be regarded as a legitimate manifestation of a functional need.⁹⁰

The instant Act confines itself to persons who exert pressure on Congress. The decline of Congress as a policy making body and the increased discretion exercised by administrative bodies have, however, effected a parallel shift in lobbying activities. No adequate law can ignore the pressures upon all branches of government, and registration of all those who lobby before governmental agencies should be included within the provisions of the Act.⁹¹

⁸⁹ Sen. Rep. No. 1011 at 27. The statement as to the "bona fide total membership" of organizations was apparently left out of the Act by mere oversight in drafting attributable to the fact that it was copied from the corresponding section of the Black Bill.

⁹⁰ See Statement of George Smith, Hearings before the Joint Committee on the Organization of Congress pursuant to H.Con.Res. 18, 70th Cong., 1st Sess. (1945) 411. The same opinion has been stated by John Thomas Taylor, legislative agent of the American Legion. Colonel Taylor has publicly supported the bill, but feels that its many loopholes make it an inadequate solution to the problem of lobbying. In addition to the weaknesses already enumerated, he points out that the "social lobby" remains uncontrolled, that government officials often lobby for bills with which they have no official connection, that a lobbyist could screen his activities by becoming a precinct committeeman of a political party (and thus subject to Corrupt Practices Act), and that contributions can be broken down to sums less than \$500 and not recorded on the statement filed. Communication to Yale Law Journal, November 12, 1946.

⁹¹ The provisions of the Black Bill which provided for registration of lobbyists before administrative agencies with the FTC may have been left out of the instant Act because the Joint Committee was concerned with improvement of congressional procedures only. It may have felt such a provision was beyond the pale of congressional reorganization. The broad definition of "legislation" given by § 302 might make possible an interpretation including such activities, but this construction would find little support in terms of congressional intent.

The need for a specific enforcement agency:

Evolution of lobbying methods has made regulation of pressure groups primarily a problem in propaganda control. Control by either quantitative or qualitative suppression of political propaganda has never achieved success in the United States.⁹² Furthermore, it runs counter to democratic theory, made explicit in the First Amendment, that free discussion best promotes the informed public opinion necessary to rational legislative decision. But informed public opinion presupposes knowledge of all the facts, including any personal interest and bias on the part of the speaker. The force of partisan propaganda can be effectively diminished by revelation of its source and exposure to informed public criticism. This theory underlies lobby registration; the publicity principle⁹³ is embodied in the fact that all records are open to public inspection.

The publicity given to pressure group activities by the Act is more illusion than reality. Even if the loopholes in the registration provisions were plugged by amendment and additional pertinent information required, it is improbable that the Act would accomplish much toward mitigating the evils presently existing. Operation of the publicity principle requires that actual awareness of the extent of pressure group activities be known both to legislators and the public. The Lobbying Act depends upon the fact that the information is open to the public coupled with its publication in the *Congressional Record* to counteract the publicity methods of groups which use every possible communication outlet to propagate their viewpoints. Furthermore, the most important information from the public's point of view, that revealed by the group's financial statement, does not even get the limited circulation of the *Record*.

Examination of operation of the publicity principle under the analogous provisions of the Corrupt Practices Act,⁹⁴ the Voorhis Act⁹⁵

⁹² The provisions of the Corrupt Practices Acts, which limit campaign expenditures and contributions to political committees, have been consistently evaded. See Pollock, *Party Campaign Funds* (1926) c. 8; Overacker, *Presidential Campaign Funds, 1944* (1945) 39 *Am.Pol.Sci.Rev.* 899; Comment (1945) 44 *Mich.L.Rev.* 294. The Senate and House committees investigating operation of the Federal Act in 1944 came to the conclusion that the imposition of ceilings on expenditures was not an effective regulation and that publicity was the only workable solution. They reported, however, that the present publicity provisions were entirely inadequate. Sen. Rep. No. 101, 79th Cong., 1st Sess. (1945) 80-2; H. R. Rep. No. 2093, 78th Cong., 2nd Sess. (1945) 12.

⁹³ See Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure* (1943) 10 *U. of Chi.L.Rev.* 107; Smith, *Democratic Control of Propaganda through Registration and Disclosure I* (1942) 6 *Public Opinion Quarterly* 27, id. II (1943) 7 id. 707.

⁹⁴ 43 Stat. 1070 (1925), 2 U.S.C. § 241 and 18 U.S.C. § 208 (1940). The registration provisions of the Lobbying Act are almost identical to those of the Corrupt Practices Act. In both instances statements are filed with the Clerk of the House and the Secretary of the Senate. In view of the conclusions of the Senate and House committees in 1944 that such publicity is inadequate to inform the public of election practices, it would seem improbable that it will prove sufficient in the case of lobbying.

⁹⁵ 54 Stat. 1201, 18 U.S.C. § 14 (1940). The Act, requiring registration of subversive organizations, was never complied with, but its full and complete registra-

and the Foreign Agents Registration Act leaves no doubt that some positive steps to secure circulation of the information revealed on registration statements and financial records is necessary if the Act is to accomplish its objectives. Although registration of foreign agents was reasonably complete, no effort to turn the "pitiless spotlight of publicity" upon their propaganda was made. Administration by the State Department was so inept that it was transferred to a special division of the Justice Department, where information submitted was analyzed by experts and efficiently filed.

Special committees of the House and Senate appointed to investigate operation of the Corrupt Practices Act came to the conclusion that the analogous publicity provisions of that Act had not yet been made effective. Specific criticisms included the lack of a single central office with power to develop a uniform accounting system and render data intelligible to the public, as well as the lack of concern of officials over failure to file the requisite forms. Both committees, however, felt that disclosure could be made an operative regulatory device.

It is clear that neither the Clerk of the House nor the Senate Secretary has the administrative organization to analyze relevant information submitted under the Lobbying Act, make pertinent extracts from it, and adopt an efficient classification and indexing system. But efficient administration would be merely a prerequisite to preparing the data revealed into concise and comprehensible statements which would be made available to press and radio services. If the public is to be informed of the facts disclosed by registration, those facts must get the widest possible circulation in a simplified and intelligible form.

If registration is to become an effective device for revealing group pressures, a special enforcement agency must be established to investigate the accuracy of statements filed and the compliance of those to whom the law applies. It must be staffed to analyze propaganda, assess its effects, accurately summarize detailed financial statements, and make the information thus compiled readily available to press and radio services. Standard administrative procedure which combines civil and criminal sanctions should be adopted to enforce registration. Enforcement of disclosure requirements should depend in the first instance upon publicity; criminal sanctions should be invoked only as a secondary sanction to enforce compliance of recalcitrant registrants with the agency's regulations.

Such an agency could best operate under the supervision of a permanent joint congressional committee which would be charged with overseeing its methods and determining its policy. Full time personnel should be entrusted with carrying on the investigatory work

tion provisions might well serve as a model of the kind of information which could be required of lobbyists.

[Footnotes 96 to 100 are omitted. Ed.]

required. Congressional committees do not, in general, perform repetitive jobs efficiently, and it is unlikely that exposure of pressure group activities would be sufficiently sensational to overcome this handicap. Precedent for a committee in a supervisory capacity can be found in the Reorganization Act itself, which establishes congressional oversight of the Legislative Reference Service, the *Congressional Record* and the Office of Legislative Council.

New techniques for molding public opinion are constantly evolving and efficient administration of a registration act would require that statutory authority given an enforcement agency be flexible enough to meet all such developments. The act should, therefore, be broad enough to cover all organizations which mold political opinion in any way, and should give the agency authority to exempt those which it found to be outside the pressure group category, *e.g.*, genuinely educational societies. A similar measure of discretion should be given in the determination of the type of information to be submitted.

Instead of exempting, as does the present Act, all those subject to the narrow provisions of the Corrupt Practices Act, a comprehensive act would include them within its provisions. The problem of regulating election pressures is only part of the larger problem of regulating all political pressures exercised by organized groups. Support of favorable candidates is just one method used by special interests to influence legislation. If such activities were brought within the publicity provisions of an effective lobbying statute present inadequate legislation could be repealed.

OTHER PROVISIONS AFFECTING LOBBYING

Any legislative provision designed to improve the knowledge and efficiency of legislators will diminish the likelihood of lobbying abuses. The effectiveness of the professional lobbyist in securing legislation depends in large measure upon his technical knowledge of the complicated subjects of modern laws. Legislators, incapable of personally investigating every governmental problem, have become dependent on these experts for information in the field of their special interest; this information is, of course, often biased. Legislation proposed and drafted by lobbyists has been accepted without proper evaluation of its consequences.

The Reorganization Act has attempted to meet these problems by increasing greatly appropriations to the Legislative Reference Service¹⁰¹ and Office of Legislative Counsel.¹⁰² Employment of research

¹⁰¹ Section 203. The Legislative Reference Service is established as a separate department of the Library of Congress and appropriations will be increased annually until 1949 when the sum of \$750,000 will be provided. Specialists in certain fields such as agriculture, education, labor, taxation and others are available for special work with committees. Some of these specialists have already been appointed and include such recognized experts as Francis Wilcox (State department consultant), Howard Pignet (Chief economist of Tariff Commission), Gustaf Peck (Labor adviser to NRA, WMC, and WPB), T. A. Goldenweiser (Federal Reserve Board), Ray Manning (Taxation authority), George Galloway, Meyer Jacobstein (Brookings In-

experts to provide both committees and individual members of Congress with unbiased information on all subjects of proposed legislation will weaken the ability of pressure groups to determine congressional policy. Similarly, increased personnel to assist legislators in drafting legislative proposals will make congressmen less eager to accept the services of legal counsel employed by special interests. Presentation of factual data and digests of bills and hearings¹⁰³ to fit the needs of Senators and Representatives should aid them in coming to a rational decision.

The prohibition of private legislation and the transfer of responsibility for determination of governmental tort liability¹⁰⁴ to the judiciary may also serve to lessen the pressures of those seeking legislative favors. It is not improbable that these provisions aimed only indirectly at lobbying will be more effective than the direct regulation imposed by the lobbying title of the Act.

CONCLUSION

It is probable that the Lobbying Act will prove largely ineffective. The loopholes provided by the "principal" requirement, the incompleteness of the information required to be filed, the lack of an adequate enforcement agency, and the weakness of the publicity provisions may combine to make the Act as dead a law as similar state statutes.

Congress has recognized the need for regulating pressure group activities. It has seen the solution not as prohibition of an undesirable practice but as an adaptation of present imperfect mechanisms for expressing group opinion into a political pattern which will utilize this opinion to improve the decision-making process. It is to be hoped that this growing realization of the problem will lead Congress to amend the present Act to effectuate more nearly the congressional purpose.

NOTES

1. See also Roberts, "Federal Regulation of Lobbyists", 15 Geo.Wash.L.Rev. 455 (1947), and Note, "The Federal Lobbying Act of 1946", 47 Colum.L.Rev. 98 (1947). For an illuminating early study of lobbying in Massachusetts, see Beutel, "The

stitute), Dorothy Shafter (educator), T. J. Kreps (Stanford professor), and W. Brooke Graves. For the work of the Service prior to the instant Act, see Hearings before the Joint Committee on the Organization of Congress pursuant to H.Con.Res. 18, 79th Cong., 1st Sess. (1945) 413 et seq. Similar work in state legislatures is discussed by Witte, *Technical Services for State Legislators* (1938) 195 *The Annals* 137.

¹⁰² Section 204 of the Reorganization Act increases appropriation to the Office to \$250,000 by 1949 for bill drafting services. It is unlikely that this sum will be sufficient to satisfy the requirements of individual legislators, although it should be sufficient to draft bills for committees. Other provisions which will help improve the knowledge and efficiency of Congress are discussed *supra* notes 3, 4, 5, 6.

¹⁰³ Section 221. A congressional committee is charged with overseeing an improved digest service in the Congressional Record designed to enable congressmen to evaluate more easily legislation coming up for consideration.

¹⁰⁴ See note 6 *supra*.

Pressure of Organized Interests as a Factor in Shaping Legislation," 3 So. Calif. L. Rev. 10 (1920). For a comprehensive study, see Zeller, "Press-Politics in New York" (1937).

2. In "The Atlantic Report", the Atlantic Monthly for July 1947, 3-5, comments: "Lobbyists have become an essential feature of our government. They have been called the 'invisible government.' Yet there is nothing invisible about their operations. You will see them in the corridors of the Capitol every day, buttonholing or conferring with the legislators. Their aid is indispensable, and Representative Estes Kefauver goes so far as to say in block letters in his current book, *A Twentieth Century Congress*, that 'Congress cannot function today without lobbyists.'

"There are a number of contributing causes; the confusion and planlessness of the business of drafting laws, the complexity of present-day problems, the increasing role of government in our life, and the lack of enough expert aid at the Congressman's elbow. The legislators are so overburdened with work that lobby-inspired bills get by for want of adequate research and study time.

"Newcomers with a passion for good government are always appalled by this sloppiness. They are dismayed at the easy dependence on lobbyists by the old-timers. It is so convenient to let some lawyer or trade association do the donkey work in drafting new legislation. But the spectacle makes the freshmen itch for reform.

"It would be invidious to try to pick out the most influential of the lobbies. There is certainly no counterpart for that genius of the Anti-Saloon League, the late Wayne B. Wheeler. But there are scores of the ablest men in industry and labor who devote their talents to influencing legislation. Their activities have been exposed in at least two investigations. One was the Caraway inquiry; the other was the famous public utility probe conducted by the Federal Trade Commission.

"All that came out of these investigations was a bill requiring lobbyists to register. This was put into the law under the La Follette-Monroney Act of last year. The trouble lay in definition. A lobbyist is a person who devotes a 'major portion' of his time to influencing legislation. But how prove that lobbying takes up most of a person's time? It is so easy to demonstrate the contrary that relatively few lobbyists have complied with the registration requirements of the La Follette-Monroney Act.

"The real remedy for the power of the lobby is, of course, to put the Federal legislature in a position to rely on its own resources. Already a start has been made in this direction by the La Follette-Monroney Act. Congress has strengthened the bill-drafting service in the two houses, enlarged the legislative reference service of the Library of Congress, and given the committees more aid through the provision of expert staffs.

"Representative Kefauver thinks this is just a beginning in enabling Congress to become independent of lobbyists. The problem as he sees it is to give the legislators more time as well as more help to do their work. Thus he would limit debate in the Senate, do away with the intolerable burden of non-legislative duties, and improve the liaison with the Executive branch of government.

"By this last suggestion he does not mean that Congress should rely on experts in Executive employ. There is too much of that already. In a way, reliance upon the Executive is just as bad on reliance upon the outside aid of lobbyists. What is needed is the time that is now wasted in haggling with the Executive in matters that might be adjusted by a better method of liaison.

"Doubtless these steps will one day be formulated in a new measure. The chief preoccupation of reformers of Congress at present is to realize in performance the partial reorganization effected under the La Follette-Monroney Act of 1946. It is clear from the hubbub in Congress that this reform is not being administered according to plan."

FRANK V. CANTWELL,* PUBLIC OPINION AND THE
LEGISLATIVE PROCESS40 *Am.Pol.Sci.Rev.* 924 (1946).

The rôle played by public opinion in a democracy, particularly as it affects the legislative process, has long been a subject for speculation by political scientists. The advent of controlled quota sampling permits of the study of this important relationship in measurable terms. The object of the present discussion is to trace the interaction of public opinion and the executive and legislative branches of government as they have dealt with a single public question—reorganization of the Supreme Court, as presented to Congress for consideration by President Roosevelt on February 5, 1937. Enlargement of the Supreme Court from nine to fifteen members was the most controversial feature of the general reorganization of the federal judiciary proposed by the President, aimed at speeding up the process of clearing cases through the federal court system, and making the system more “representative” of the wishes of the people.

The debate on enlargement of the Supreme Court provides a useful and interesting case study for several reasons. The case as a public issue has a definite beginning and end, ranging from the proposal of the judiciary reform bill by the President on February 5 to the death of Senator Joseph T. Robinson on July 14, 1937. As it was debated by public and legislators, the issue was a relatively clear-cut one, uncomplicated by side issues or utterly foreign events that might have influenced the course of either legislators or the public. Finally, and of decided importance, the American Institute of Public Opinion made weekly measurements of opinion toward the proposal during the entire period that reorganization of the Court was a public question. This permits the correlation of reliable opinion samplings with events in the debate and the observation of their relationship.

From this observation it is hoped to throw light on several specific questions: (1) What is the general nature of the relationship between the public and its legislators? (2) What are the forces at work which determine the direction that public opinion will take in a debate of this type? (3) Is there a noticeable tendency on the part of legislators to follow the guidance of public opinion, and if so, to what extent do legislators take their lead from the public? (4) To what extent do legislators attempt to swing opinion to their way of thinking? (5) Are there any phases of the relationship between the public and legislators that might be improved so as to make it more effective in approaching the process of deciding public policy?

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I. THE DEBATE ON THE COURT BILL

From accounts of the Court debate as carried in the *New York Times*, the following short outline of leading developments in the debate has been prepared:

Chronological Listing of Events in the Court Debate

- February 5*—President Roosevelt sends message to Congress recommending reorganization of the federal judiciary, including increasing the membership of the Supreme Court from nine to fifteen members. President reported "calm and confident," reflecting his conviction that he has a huge popular mandate for what he is doing. Message creates shock throughout country.
- March 1*—The Supreme Court upholds Congressional resolution abrogating payments in gold. Decision is of aid to New Deal.
- March 4*—President Roosevelt, in Democratic Victory Dinner speech, calls for party loyalty on the Supreme Court issue.
- March 8*—The President, in a fireside chat, assures Americans that, in proposing reorganization of the Court, he is seeking to protect them from the Court's usurpations.
- March 9*—Homer Cummings, Attorney-General, opens Administration arguments before Senate Judiciary Committee, saying the bill will restore the governmental machinery to its proper balance.
- March 22*—Senator Burton K. Wheeler opens opposition arguments before Senate Judiciary Committee and reads a statement from Chief Justice Charles E. Hughes saying enlargement of the Court is "unnecessary." Statement is said to have the approval of Justices Brandeis and Van Devanter.
- March 29*—The Supreme Court reverses *Adkins v. Children's Hospital* decision and holds constitutional minimum wage law of the state of Washington. *Adkins* case specifically overruled by 5-4 decision. Decision opens way for federal minimum wage legislation.
- April 12*—In handing down decisions in four specific cases, the Supreme Court upholds the National Labor Relations Act (Wagner Act). Decision in chief case is 5-4.
- April 28*—Senators Hatch, McCarran and O'Mahoney, members of the Senate Judiciary Committee previously uncommitted on Supreme Court Bill, announce opposition on basis of testimony offered before the Committee.
- May 10*—Washington reports say that Justices Brandeis and Van Devanter will retire from Court in June.
- May 18*—Justice Willis Van Devanter, 78, retires.
- May 24*—The Supreme Court upholds the Social Security Act in ruling on three cases, two by 5-4 decisions.
- June 14*—The Senate Judiciary Committee reports unfavorably to the Senate on the Court bill, terming the proposal "a needless, futile, and utterly dangerous abandonment of constitutional principal." Vote is 10-8 against proposal.

July 14—Senator Joseph T. Robinson, majority leader of the Senate, dies suddenly. Supreme Court Bill will be abandoned.

Charts 1 and 2 have been prepared from two questions asked weekly by the Gallup Poll during the debate. The first question, recorded in Chart 1, was asked during the period from February 15 to April 5, and reads: "Are you in favor of President Roosevelt's proposal regarding the Supreme Court?" The second question, recorded in Chart 2, covers the period from April 12 to June 7, and reads: "Should Congress pass the President's Supreme Court plan?" In both questions, the Supreme Court plan was stated to be "President Roosevelt's." Possibly the use of the President's name might have introduced a bias, although throughout the debate, in the newspapers, on the radio, and in the halls of Congress, the plan was also identified with the President. In view of this very common identification, the possibility of such a bias is minimized. In any event, any tendency toward bias would not affect the validity of the figures as used in this study, since a bias would be constant.

Phase One of the Debate. The initial period in the debate extends from the introduction of the President's proposal on February 5, until the week immediately preceding the two speeches made by the President. As may be seen from Chart 1, in this early period public attitudes toward the proposal divided equally, 45 per cent of the people expressing approval of the proposal, and 45 per cent expressing disapproval, with 10 per cent in the "no opinion" category. These figures are from the Gallup Poll taken during the week of February 15. At approximately the same time, the *New York Times* reported that an informal poll of senators made by *Times* reporters showed that 32 senators were on record as favoring the proposal, 28 as against the proposal, while 35 remained uncommitted. Thus, while 90 per cent of the public had put themselves on record as favoring or disapproving the proposal, only 63 per cent of the senators had taken a definite stand. One week later, on February 17, the *Times* news columns carried this statement from a Washington staff member: "Conservative Democrats . . . especially those in the Senate, gagged at the proposals. . . . Many of them maintained a prudent silence, waiting to see how the cat of public opinion would jump."

In this first stage of the debate, newspapers and radio commentators began to take definite stands on the proposals, and senators and other public figures began to make statements setting forth their positions. Senator Norris declared against the bill; former Governor Alf Landon, who had carried the Republican standard in the presidential election a few months earlier, came out against the proposal; Senator Champ Clark declared against the scheme; and Senators Glass and Wheeler denounced it. The only figure of magnitude to raise his voice in favor of the proposal was Senator La Follette. In the face of this cumulation of official opinion against the proposal, public opinion began to turn against the plan, and by March 1 the Gallup Poll reported that the anti-proposal vote had grown to 48 per cent, while the pro-proposal vote had

slumped to 41 per cent—a difference of 7 percentage points. The President and his advisers became aware that public sentiment was turning away from the proposal.

As early as February 15, the *Times* reported that Attorney-General Cummings and Senator Sherman Minton were planning to make appeals for public support of the plan. The *Times* news columns said: "The frank object of all these appeals is to induce the backers of the President to send telegrams and letters to their senators and representatives to offset the thousands received at the Capitol in the last few days in opposition to his sweeping plan for remaking the Supreme Court with more liberal-minded men." On February 19, the *Times* said: "On the showing of informal polls that the Administration's judiciary reform bill may hang on the decision of less than a dozen senators, President Roosevelt and the forces identified with him, particularly organized labor, intensified their efforts to insure its passage as a prerequisite to further New Deal legislation. . . . The opposition strategists in the Senate . . . were . . . making preparations for one of the stiffest legislative battles of recent years. They were making no particular effort to dig into the dwindling reservoir of unpledged senators, leaving that to the weight of the letters and telegrams still coming in from all parts of the country." Phase One of the debate may be summarized by saying that the President introduced the proposal with the hope that public opinion, which had given him a handsome victory in November, would provide the pressure necessary to push the proposal through Congress. This public pressure was not forthcoming, and the public had become increasingly hostile. Opposition senators were biding their time as they watched public opinion swing behind them. So far as the Administration was concerned, a counter-attack was necessary to win back public favor to the proposal.

Phase Two. The second phase of the debate may be entitled the Administration drive for public support. The outstanding development during this phase was the entry of the President directly into the discussion. With opinion turning away from the proposal, it became obvious that use of the most power weapon in the New Deal arsenal was indicated—a personal appeal from the President. Consequently, the President made two speeches to the nation within five days, an address at the Democratic Victory Dinner on March 4 and a fireside chat on March 8. The *New York Times* reported the fireside chat in these words: "He had no intention of packing the Court with 'spineless puppets.' He simply proposed to return the Court to its 'rightful and historic place' and save the Constitution from 'hardening of the arteries.'" On the morning following the fireside chat, Attorney-General Cummings opened the Administration case before the Senate Judiciary Committee, saying that the proposal would restore the governmental machinery to its proper balance. The Gallup Poll for the week of March 1 immediately registered the impact of the President's speeches. As may be seen from Chart 1, the anti-proposal vote fell to 47 per cent and in two weeks dropped precipitately to 41 per cent, the lowest point reached by the No vote at any stage of the debate. On the other hand,

the pro-proposal vote began a climb that was to last until March 29, rising from 41 to 45 per cent during the month. Success had apparently crowned the effort of the Administration to win the favor of public opinion, for the Yes vote now held a slim margin over the No vote. However, as will be seen, this margin was to prove far from decisive.

Phase Three. On March 22, the opposition forces swung back into action as Senator Burton Wheeler, chief of the anti-court reorganization forces, opened the opposition arguments before the Senate Judiciary Committee. As the first opposition witness, Senator Wheeler read a statement from Chief Justice Charles E. Hughes saying enlargement of the Court was "unnecessary"; and the statement was said to have the approval of Justices Brandeis and Van Devanter. Chart 1 shows that during that week the No vote turned again and began a steady climb upward which was to mount almost steadily until the proposal was finally killed. Evidently, opposition arguments before the Judiciary Committee were sufficiently convincing to solidify the No vote, and Chart 2 shows the constant strength of the oppositionists among the public from this date onward.

Phase Four. The turning point in the debate was reached on March 29. On that day, the Supreme Court handed down a decision reversing an earlier decision in the *Adkins v. Children's Hospital* case. The effect was to hold constitutional the minimum wage law of the state of Washington, thus paving the way for federal minimum wage legislation, one of the chief objectives of the New Deal. The effect on public opinion of the switch by the Supreme Court was nothing short of profound. An examination of both Charts 1 and 2 reveals that the Yes vote, or those in favor of reorganization, began a sharp slump from which it never fully recovered. In terms of percentages, the Yes vote dropped from a high of 45 per cent in the week before the reversed decision in the *Adkins* case to a low of 31 per cent on May 17. It is safe to say that the Administration lost its case before the public on the day when the Supreme Court did its famous about-face. It is to be noted, however, that the Yes vote which became estranged from the proposal did not shift into the No group, but fell into indecision and became allied with the No Opinion group. Charts 1 and 2 show that the growth of the No Opinion group almost matches, point for point, the decline in the Yes group. This phenomenon will be enlarged upon below.

From the beginning of Phase Two onward, the Senate Judiciary Committee had been holding extensive hearings at which educators, farm and labor leaders, women's group leaders, and the representatives of almost every special interest group in the nation appeared and presented their case. To what extent the members of the Judiciary Committee were "holding off" from presenting the bill for a formal test on the Senate floor is difficult to tell with exactness. During this period, opinion was in a state of flux, and the Judiciary Committee served a valuable function by permitting opinion to crystallize. Some evidence of political maneuvering to take advantage of a favorable climate of

opinion is revealed in a charge made by Senators Wheeler and Van Nuys on April 3, five days after the Supreme Court handed down the decision in the Adkins case. The *New York Times* reported the two senators as charging Attorney-General Cummings with a "gag" attempt, based on reports that Mr. Cummings had hinted that he would like to see the Judiciary Committee bring the hearings to a close. The *Times* reported the Senators as saying: "There is no doubt the Attorney-General would like to close public hearings on this issue. . . . Hundreds of American citizens, holding responsible positions at the bar, in universities, and in the molding of public opinion have asked to be heard . . . it is the duty of the Senate Judiciary Committee to continue these hearings until every cross-section of public opinion has been given an opportunity to present its views." Senator Wheeler was astute enough to realize that the tide of opinion was running against the proposal, and that time was playing into the hands of the opposition, just as Mr. Cummings knew that time was playing against the Administration. The two opposition Senators realized the impact of the Supreme Court decision of March 29 on the public and were willing to continue the hearings of the Judiciary Committee until such time as the increased opposition they expected from the public should have an opportunity to register itself through witnesses at the hearings and through senatorial channels of sounding opinion. The Judiciary Committee did continue its hearings, and reports continued to furnish the bulk of newspaper and radio accounts of the reorganization debate. The incident is illustrative of the dependence that both sides placed upon the pressure of public opinion to furnish the force needed to carry the day. Opponents and proponents alike realized that without the backing of public opinion they were lost, and were anxiously trying to win opinion to their side, while waiting for opinion to crystallize sufficiently so that a clear-cut case of public support would be forthcoming.

On April 12, with the No vote holding a six per cent margin over the Yes vote, the Supreme Court handed down a decision upholding the National Labor Relations Act in rulings on four specific cases. In the chief case, the decision was five to four in favor of the act. Strangely enough, the effect of this decision on public opinion was the reverse of that in the Adkins case, as Chart 2 shows. The No vote went down slightly while the Yes vote mounted slightly. This reversal of opinion can be traced to the fact that the Administration immediately made capital of the two successive favorable decisions of the Court, following a series of reverses for the New Deal—maintaining that the two decisions proved the point that the Court was actually composed of human beings who were subject to error and could see the error of their ways. The Administration raised its famous cry that Court decisions rested on whether a Justice came down heads or tails, which indicated the need for a larger Court membership. This argument, although it had an immediate effect, was not powerful enough to change the trend of opinion, and the following week (April 19) the No vote rose three percentage points, while the Yes vote sank two points.

Phase Five. The next development of note in the debate occurred on May 10, when reports from Washington circled the country to the effect that Justices Brandeis and Van Devanter intended to retire from the Court in June, Chart 2 shows that the effect of this report was to increase public indecision, which had been mounting steadily from the introduction of the proposal, and after the report had gained credence the No Opinion group stood at a high of 25 per cent on May 17. It is worth pausing to note the state of opinion at this time.

TABLE 1
SHIFT IN VOTE ON COURT REORGANIZATION, FEBRUARY 15-MAY 17¹

	February 15	May 17	Difference
Yes, favor reorganization	45%	31%	-14%
No, oppose reorganization	45%	44%	- 1%
No opinion	10%	25%	+15%

Table 1 shows that the opposition group had held its own, despite sharp dips. The Yes group, proponents of reorganization had lost a total of 14 percentage points; the No Opinion group had risen from 10 per cent to 25 per cent; and the table shows that those who lost faith in their position did not feel powerfully enough affected to jump into the opposite camp, but that their reaction was to fall into a state of indecision. The gain for the No Opinion represents the total defection from both the Yes and No groups. In other words, the public was still not clear upon a course of action, although the number of Yes people who were growing increasingly doubtful of their position was very much larger than the respective No group. The importance of this observation lies in the assumption that members of the Senate were idling along, waiting for a popular reaction. This was not to be forthcoming, since the people were becoming increasingly indecisive. But for the next event unfolding on May 18, it is difficult to say how long this deadlock between the people and their legislators, each waiting for the other to act, might have lasted.

Phase Six. The deadlock was broken on the date mentioned with announcement of the retirement from the Supreme Court of Justice Willis Van Devanter at the age of seventy-eight. Chart 2 shows that this announcement immediately cleared the atmosphere, and both opponents and proponents of the court reorganization proposal were enabled to make up their minds definitely. Opinion had at last crystallized. The retirement of Justice Van Devanter meant that the President would be able to appoint to the Court a Justice more in sympathy with New Deal objectives. In turn, this appointment, together with the recent "liberalization" of the Court in the Adkins and Wagner Act decisions, meant that for all practical purposes the Court had been

¹ February 15 represents roughly the introduction of the proposal. May 17 is representative of the period following circulation of reports that Justices Brandeis and Van Devanter would retire in June.

reorganized. De facto reorganization apparently was satisfactory to the public, and the No vote rose quickly until on June 7 opponents of

TABLE 2

SHIFT IN VOTE ON COURT REORGANIZATION, FEBRUARY 15-JUNE 7

	<i>February 5</i>	<i>June 7</i>	<i>Difference</i>
Yes, favor reorganization	45%	35%	-10%
No, oppose reorganization	45%	50%	+ 5%
No opinion	10%	15%	+ 5%

court reorganization had 50 per cent of the public behind them, while only 35 per cent favored reorganization. The No Opinion vote sank rapidly from 25 per cent on May 17 to 15 per cent on June 7.

Table 2 shows that after the retirement of Justice Van Devanter, opinion crystallized more rapidly in the direction of opposition to the proposal than in favor of it. A total defection of 10 per cent of those originally favoring reorganization can be noted, five per cent of these people switching their vote into opposition, while five per cent were unable to come to a decision and moved into the No Opinion group.

This evident satisfaction of the people with the changed court situation came as a great relief to legislators, who were now able to deal with the delicate problem of de jure court reorganization. On June 14, with the battle of public opinion decided, and with opinion firmly behind it, the Senate Judiciary Committee reported unfavorably (ten to eight) to the Senate on the Judiciary Reorganization Bill, terming the measure "a needless, futile, and utterly dangerous abandonment of constitutional principle." Reorganization of the Court was no longer a public issue; and whatever lingering inclination there might have been on the part of the Administration to press for court reform in the face of public opposition was dissipated by the death on July 14 of Senator Joseph T. Robinson, majority leader of the Senate, who had thrown all of his strength into the fray on behalf of the proposal.

II. CONCLUSIONS

Having examined in some detail the interplay between public opinion and events in the court debate, it is now possible to form conclusions as to the general nature of the relationship between the public and its legislators as they deal jointly with a public question. In many respects, the debate on the Court is typical of the problems which present themselves for solution in our democracy. For this reason, the conclusions which follow have been cast in such a form that they may be applied to understanding the nature of any similar debate on a public question. At the same time, it must be borne in mind that so many diverse factors operate while a question runs its public course that these conclusions have applicability only in so far as the phenomena at work in a given situation are taken into consideration. Further study of the type of relationship under consideration will permit the understanding with considerable exactness of how public opinion and the legislative process affect each other. This, in turn, will enable the

public and legislators to operate together at full efficiency; for it is undeniable that national questions must be solved by the joint action of the people and their elected legislative representatives.

1. *Legislators display an inclination to "wait on" public opinion to shape itself before dealing formally with questions.* This does not mean that senators were content merely to follow the lead of public opinion, for many made an effort to mold opinion to their way of thinking through radio addresses and personal appearances. It does mean that the great majority of senators were keenly aware of the existence of public opinion and hesitant to take action so long as its final direction was not absolutely certain. Although many senators committed themselves publicly during the course of the debate, at no time did either side show determination to force a showdown on the floor of the Senate, such hesitation seeming to stem from the uncertain condition of public opinion, which never registered above 50 per cent either for or against the proposal.

The function of the Senate Judiciary Committee as a sounding board is interesting. As long as any doubt remained about public sentiment toward the bill, the committee remained in session, and only when it was perfectly plain that public support for the proposal would not be forthcoming did it make its unfavorable report. During the extended period of public hearings, an amazing array of witnesses appeared before the committee and every possible type of argument for and against the proposal was brought forth. Doubtless this varied array of witnesses gave to the senators valuable clues as to public feeling on the proposal, and it was on the basis of testimony offered before the committee that Senators Hatch, McCarran, and O'Mahoney announced their opposition to the bill. The most useful function of the committee seems to have been to hold in abeyance the necessity of making a formal decision while senators waited in the hope that public opinion would develop in a decisive direction and render unnecessary a decision on the Senate floor.

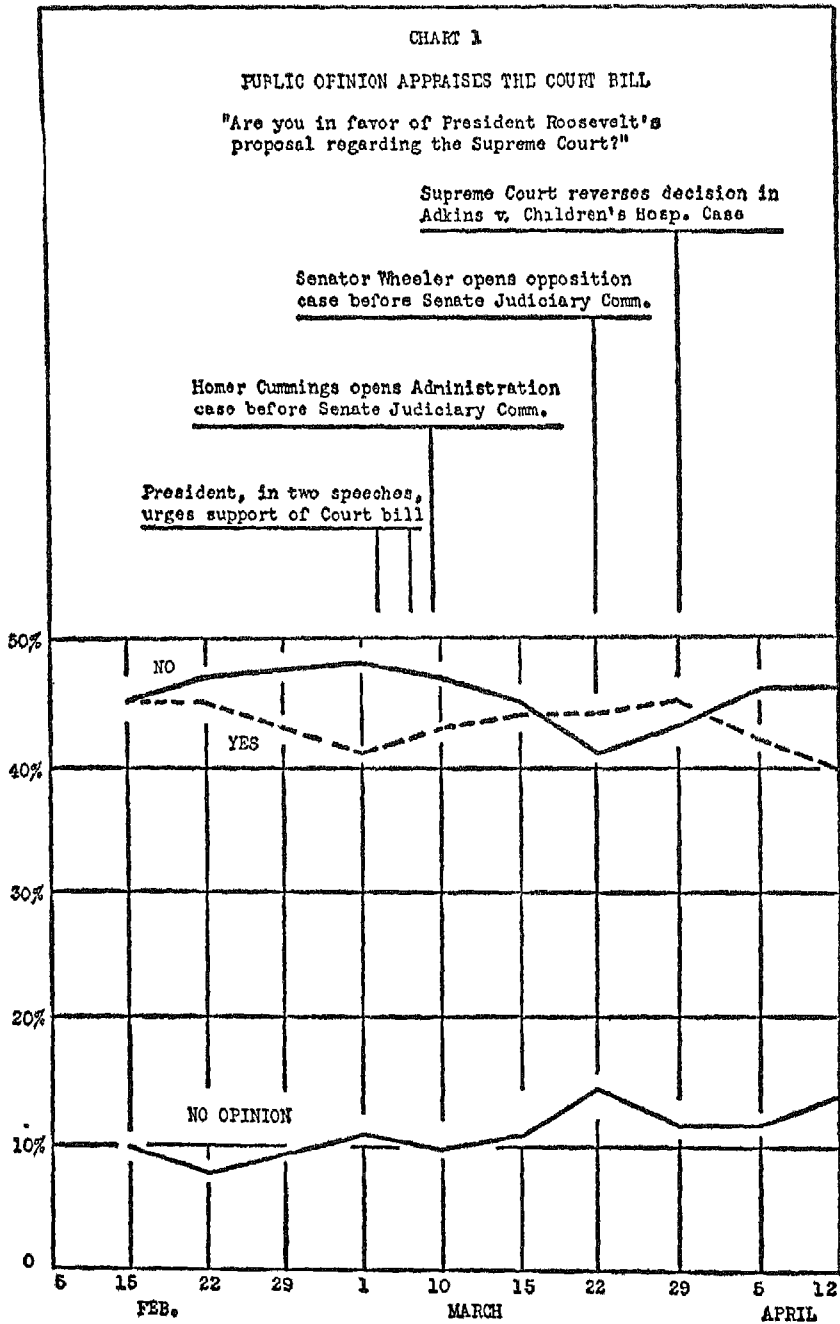
2. *Events played a more important rôle than Congress or the President in shaping the direction of public opinion.* The six leading determinants of opinion in the debate were: (1) the President's Victory Dinner speech and fireside chat on the fourth and eighth of March; (2) the opening of the Administration case before the Senate Judiciary Committee on March 9; (3) the opening of opposition arguments against the proposal before the committee on March 22; (4) the decision of the Supreme Court overruling an earlier decision in the *Adkins v. Children's Hospital* case on March 29, which paved the way for federal minimum wage legislation and broke the succession of anti-New Deal decisions handed down by the Court; (5) Washington reports, beginning on May 10, that Justices Brandeis and Van Devanter were planning to retire; and (6) the retirement on May 18 of Justice Van Devanter.

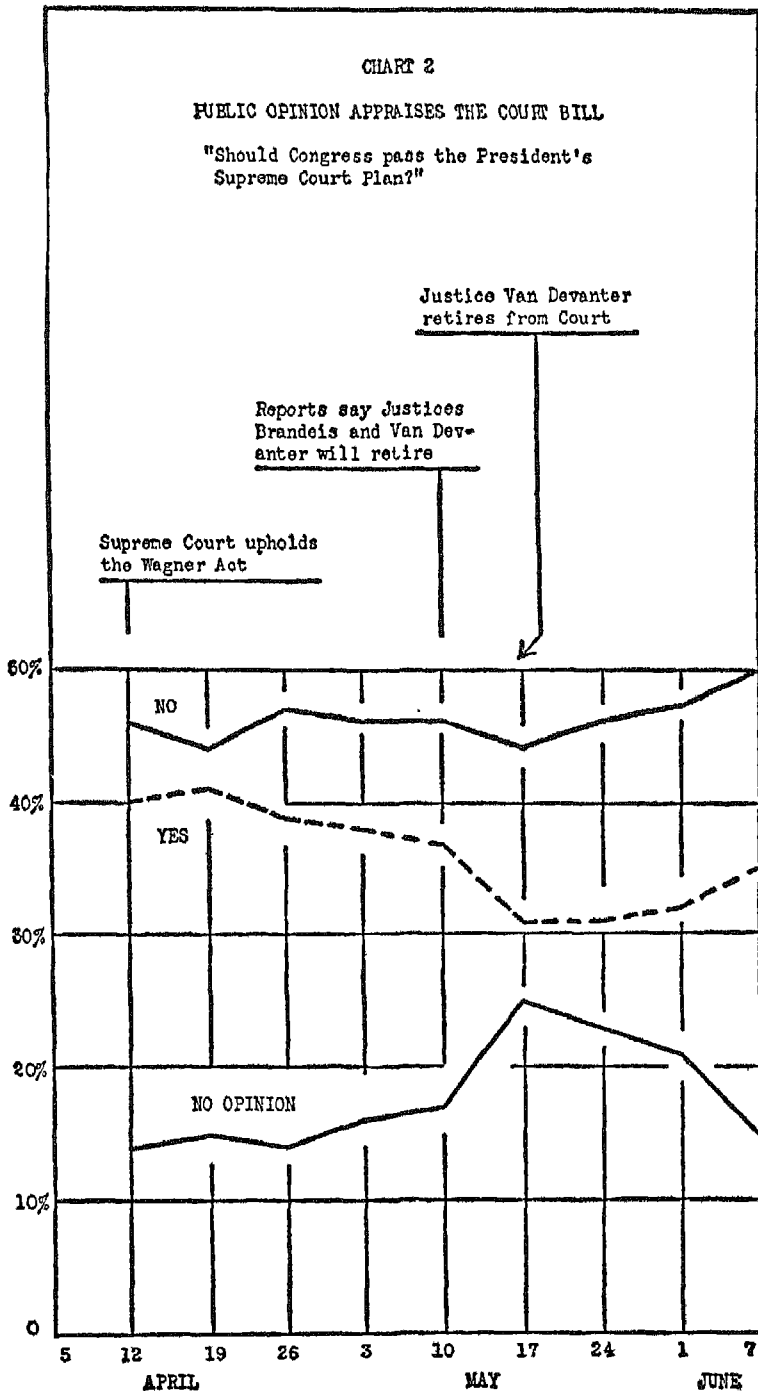
Of these six steps in the downfall of the Court proposal, three were attempts by government officials (the President and senators) to mobilize opinion in a particular direction. The other three were events

in the sense of being unanticipated happenings beyond the province of either proponents or opponents of the proposal. While the President's speeches and the arguments given before the Senate Judiciary Committee affected public opinion measurably, they were incapable of affecting it decisively. The major event in opinion-determination was the decision of the Court in the Adkins case. From the time of this decision, the public Yes vote dropped off steadily, while the No vote rose. The second most important step in opinion-determination was the retirement of Justice Van Devanter, with the effect of crystallizing opinion which had been drifting into indecision as the debate wore on. As Cantril has said, "opinion is generally determined more by events than by words—unless those words are themselves interpreted as an event."¹

3. *Public opinion cannot propose a course of action, and a healthy public opinion requires leadership.* Throughout the course of the debate, as shown by the accompanying charts, public opinion was responsive to political moves and events. At no time was there observable any great spontaneous movement of opinion in a direction which would have indicated to legislators the necessity for taking a particular course of action that would have broken the deadlock. It is characteristic of public opinion that it cannot generate a proposal or series of proposals serving to satisfy its needs. Public opinion can indicate very powerfully the general area of its needs, but it remains for an individual or group of individuals to come forward with specific proposals toward which opinion can display approval or disapproval. We have seen how, during the course of the debate, the public support that fell away from both the Yes and No sides of the discussion tended to gather in the No Opinion category, where it remained in a state of indecision awaiting some new determining factor that would move it once more into the realm of decision. Those legislators who waited in the hope that public opinion would show them the way were waiting in vain. Public opinion in a democracy responds to leadership, and needs the stimulus of leadership in order to crystallize one way or the other on specific proposals. Legislators are perfectly correct in sounding opinion so that they may determine whether or not they are moving in a direction calculated to meet popular needs. It is completely fallacious for legislators to wait on public opinion to tell them what to do, because public opinion waits on leadership to supply the grist of fact and suggestion so that it can fulfill its function, which is the acceptance or rejection of proposals. In a sentence, when faced with a specific problem, public opinion will respond to proposals, but cannot generate them; generation of proposals is the function of the legislators.

¹ Hadley Cantril, *Guaging Public Opinion* (Princeton, 1944), p. 226.





Chapter 2

LEGISLATIVE ORGANIZATION AND PROCEDURE

SECTION 1. OUTLINE OF LEGISLATIVE PROCEDURE: THE STAGES IN THE PROGRESS OF A BILL

NEW YORK LEGISLATIVE RECORD AND INDEX: A COMPLETE AND CUMULATIVE RECORD ISSUED WEEKLY

(1947) The Legislative Index Company, Albany, page 2.

The Course Followed by a Bill from Time of Introduction in the Legislature until it Becomes a Law Is Indicated Below:

IN SENATE

1. Introduction and Reference to Committee.
2. Referred to Committee of the Whole on report from Committee.
3. Ordered to Third Reading and referred to Committee on Revision.
4. Passed and transmitted to the Assembly for action by that house.
5. Transmitted to Governor.

IN ASSEMBLY

1. Introduction and Reference to Committee.
2. Ordered to Second Reading on report from Committee.
3. Ordered to Third Reading and referred to Committee on Revision.
4. Passed and transmitted to the Senate for action by that house.
5. Transmitted to Governor.

When a bill is introduced in Senate or Assembly it is referred to a standing committee or by unanimous consent may be advanced. In the Assembly, the time limit for introduction of bills is March 7th. Bills carrying out recommendations by state departments must be introduced by February 15th.

When a bill is reported by the committee in the Senate, either favorably or for consideration, it is referred to the Committee of the Whole. In the Assembly it goes to second reading.

After consideration by the Committee of the Whole or on second reading, the bill is advanced to a third reading, then examined as to language and form by the Revision Committee, after which it is engrossed and ready for final consideration.

A bill passing its own house goes to the opposite branch of the legislature, and takes the same course in that branch as though it originated there, unless it is substituted for an identical bill which is on the Calendar, or by unanimous consent it may be given immediate consideration and passed.

A bill may be reported by a committee either favorably, adversely or for consideration of the house. If reported favorably, it advances to the next order of business. If reported adversely and the house agrees to the report, the bill is dead; if the report is not agreed to, the bill is before the house for disposition and generally advances to the next order of business.

A committee may be ordered by a vote of the house to report a bill. This is done by moving to discharge a committee from further consideration of the bill.

A bill may be amended in committee, in the Committee of the Whole of the Senate or on the order of second reading in the Assembly, or while on third reading in either house. A committee may report a bill with amendments for reprinting and recommitment.

A Senate bill may be amended in the Assembly, after it has passed the Senate, and vice versa. Such amendments must be concurred in by the house in which the bill originated, before the bill can be transmitted to the Governor.

After a bill has had a third reading, an amendment thereto shall not be offered unless by unanimous consent.

In the Assembly, on a date fixed by the Speaker, Rules Committee takes over all bills not already acted on along with other matters pending; date so fixed by the Speaker, however, shall be not less than one week after the time limit set for the introduction of bills. The Committee on Rules may report a bill that has been recommitted from the floor. In the Senate, the committees have charge of all bills up to the close of the session. The Committee on Rules of either house has power to take a bill from a committee and place it immediately upon the order of final passage. It may also introduce a bill or amend a bill in any particular.

A bill must be reprinted each time it is amended and it can not be passed in final form, in either house, unless it has been upon the desks of the members for three legislative days. The Governor, however, may send a message dispensing with the three-day requirement and stating the facts in his opinion which necessitate the immediate passage, in which case the bill must be upon the desks of all members in final form, *not necessarily printed*, before final passage. A message given on a bill by the Governor does not necessarily mean the legislation has his approval as the required message is sent only to expedite passage.

A bill relating to the property, affairs or government of any *city*, which shall be special or local in its effect, shall not be passed, unless: (1) so requested by the Mayor of the city affected, concurred therein by the local legislative body, (2) or upon the request of two-thirds of the members elected to such body, declaring a necessity exists and reciting the facts thereof, and in each case a two-thirds affirmative vote of members of the Senate and Assembly is required before passage.

A bill, special or local, in terms relating to one *county*, shall not be passed, except: (1) on request of the elective governing body of each county affected, (2) and in any county having an alternative form of government providing for an elective county officer, upon request of elective governing body with the concurrence of executive officer of each county affected; by a two-thirds vote of the local governing body after the refusal or failure of approval by the executive officer, (3) or upon certificate of necessity from Governor reciting the facts of such necessity and thereupon receiving a two-thirds affirmative vote of both houses.

A bill relating to the property affairs or government of a *village* with a population of five thousand or more (first class village) shall not be passed, unless: (1) so requested by chief executive officer of the village affected, concurred in by a majority vote of the local legislative body, or (2) a message of necessity is sent to legislature by the Governor; in either case, the request must be accompanied with a message declaring a necessity exists and reciting the facts thereof; also two-thirds affirmative vote of each house is required.

Concurrent resolutions, proposing amendment to the Constitution, must be transmitted in original form and each time amended, to the Attorney-General in accordance with the Constitution, and when his opinion is received (required within twenty days) the proposal is given consideration by the legislature in the same manner as a bill. If it is passed by both houses it is sent to the Secretary of State for filing and does not require action by the Governor. After the proposed amendment is passed by two consecutive legislatures it is submitted to the people for consideration, and if accepted becomes part of the Constitution and if rejected it has no effect. Resolutions proposing or ratifying an amendment to the United States Constitution shall be considered in the same manner as a bill.

A bill may be progressed without regard to the regular order in either house, by unanimous consent or by a suspension of the rules up to the point of final passage.

During the session of the legislature the Governor has ten days, exclusive of Sundays, in which to approve or veto a bill. If he does not take action within that time the bill becomes a law. If vetoed, the bill may be passed and enacted into law over his veto by two-thirds vote of each house.

All bills passed during the last ten days of the session are treated as thirty-day bills and the Governor has thirty calendar days, after the legislature adjourns, within which to act. All bills not signed by the Governor during that period are dead.

ABBOT LOW MOFFAT, THE LEGISLATIVE PROCESS.

24 Corn.L.Q. 223 (1930).

It is quite amazing how many people are ignorant of the procedure by which our laws are made. Indeed, few understand even the nature of the legislative process which is the corner stone of representative democracy. It is particularly disturbing that so many lawyers not only are not familiar with the subject, but are inclined deliberately to ignore it. Perhaps this is the fault of the law schools, which until recently were inclined to treat statute law as an unfortunate intrusion in the reasoning process by which the common law was developed. But, whatever the cause, the result is rather similar to that of the professional chauffeur who is satisfied with driving an automobile, knowing little or nothing of the machinery under the hood.

Statute law is the basis of legal practice. There are many lawyers, however, who do not know their way around the statute books and are lost if they must go outside the various compiled and consolidated laws. Probably even more encounter difficulty in the matter of statutory interpretation—the hunt for the mythical “legislative intent”—which includes not merely interpretation of language and court decisions, but the actual background and history of a law and each phrase contained therein. It is particularly discouraging to find how few lawyers are capable of good bill drafting, which is an art in itself, and how many assume that they have ability in this field.

The emphasis of the law is constantly changing. As one field of law diminishes in importance, others arise. Some trends are obviously of comparatively short duration, while others will doubtless last through at least several generations. The automobile negligence case which in the past twenty years has become so widespread will, in my opinion, prove to be of the former type, because the present machinery is out of trend with the social necessities of the modern era. On the other hand, as government becomes more and more complex, there will be an increasing growth of administrative law. What is often overlooked is that the basis of all administrative law and practice is statute law. There is also developing a field of practice which might be described as “legislative consultant”—the lawyer who, without participation as a lobbyist, advises on legislative trends and the remote as well as the immediate economic and social consequences of legislation.

How does a law come into being? In all legislative bodies there are differences in detail, but an outline of the procedure in the New York State Assembly will cover the usual and essential steps.

It is in committee that the real work of legislative bodies is done. A legislature is too large and unwieldy a body and is too inexpert in most of the technical problems presented to it to act in the first instance as a whole. The sifting process is done, therefore, by committees. Each committee specializes in a particular field, but unlike the Congress, where committees are in session throughout the legislative term, in state legislatures the committees disband at the end of the session and,

of necessity, are not especially expert in their subjects. Seldom does a committee itself draft legislation or even undertake to improve or change a bill that comes before it. It either accepts or rejects the proposal. Occasionally a member will indicate to the introducer what objections were raised, and if he is sufficiently interested he himself will prepare amendments to overcome these objections.

It is also important to bear in mind that almost no legislation originates within a legislative body. Requests come from citizens, agencies, organized groups and administrative officials. For example, an organization of rooming-house keepers, believing that a certain statute which refers to lodging-house keepers applies also to them, brings suit in the courts and is greatly aggrieved when the court rules that the protection afforded to lodging-house keepers does not apply to them. The organization thereupon writes to a member of the legislature pointing out the injustice of this situation and urges that the protection be made uniform.

The member takes the letter to the Bill Drafting Commission, an official agency of the legislature for the preparation of legislation in proper form. The commission prepares three typewritten drafts which the member "drops in the box" as, for historical reasons, the act of introducing bills by handing them to the Clerk is called. One copy is for the Committee on Revision, one for the printer and one for the Legislative Index. The next day when the legislature convenes, after the prayer and a motion to dispense with reading the journal of the preceding day, comes usually the First Reading of Assembly bills. The Clerk reads the title of three or four of the newly introduced bills (there may be a hundred or more on the desk) and the Speaker announces to what committees they are referred for consideration. The ninety-six which have not been read are, of course, also sent to committees but reading the titles aloud and making an announcement of committees is omitted to save time. Every bill must by Constitutional requirement have three readings and this reference to the committees constitutes the First Reading. Within three or four days the bills are printed, showing at the head to what committee they have been referred, and are placed on the desks of the members. No bill, except on emergency message from the Governor, may be passed until it has been in printed form on the desks of the members for three days. For this reason copies of all bills which have been introduced in the Senate are also placed on the shelf of each member's desk as soon as printed.

The introducer of the rooming-house bill presently goes before the committee to which it has been referred at one of its meetings, explains the purpose of the bill and why he thinks it should be adopted. The committee, feeling the change desirable, by majority vote reports the bill favorably to the Assembly and it appears on the calendar on the Order of Second Reading. At the next session of the Assembly, shortly after the First Reading of bills, the titles of all bills on the Order of Second Reading are read aloud in the order they appear on the printed calendar which is on each member's desk. When the title of the rooming-house bill is read, if no one has objection to the bill it is

advanced to Third Reading and will come up for final vote a few days later. But, if some member is opposed to the bill or wants an explanation, he calls, "Strike out," an abbreviation for the expression "Strike out the enacting clause," a motion which, if carried, would defeat the bill. Bills may be struck out on both the Second and Third Reading calendars. The bill is thereupon laid aside temporarily and the reading of the calendar continued until all the bills to which there is no objection are advanced or, in the case of Third Reading, finally passed. The bills which have been laid aside are then taken up once more, the title again read and debate on the proposal is had.

In the Assembly, it is seldom that there is serious debate or opposition to a bill on Second Reading because the pending question is the advancement of the bill and if the bill fails to advance it retains its place on Second Reading and appears on the calendar again the following day. Most debate, therefore, is on the Third Reading of bills when a vote pass or defeat the proposal can be had.

There are two ways of defeating a bill. The first is on a motion to recommit the bill to committee. Once a bill is recommitted, it cannot be reported again except by majority vote of the entire Assembly. If the motion to recommit is lost, it is still possible that the bill will be defeated on the roll call, at which time a majority of all the members is required.

There are two kinds of roll call. The short roll call, used to save time when there is no serious objection to a proposal, consists of reading the first and last names and the names of the party leaders. Every member, whether present or not, is assumed to have voted in the affirmative unless he raises his hand and requests to be recorded in the negative. On the long or slow roll call, each of the one hundred fifty names is read, the member answering personally "aye" or "no". When the minority party wants to be recorded in the negative but does not wish to take the time for a slow roll call, the minority leader calls "Party vote" on a short roll call and the vote is then recorded with the majority members "aye" and the minority members "no" unless individuals indicate a contrary vote.

After a bill has passed its Second Reading it is sent to the Revision Committee where the bill is reprinted in final form, or, to use the old terminology which still obtains, is "engrossed", and the "engrossed copy" in its "jacket" is at the desk when finally passed. It is then signed officially by the Speaker and sent to the Senate where it is referred to a Senate committee.

If a bill is defeated on Third Reading and the sponsor has reason to believe that he can pass it at a later date when absent members are present, he can move to reconsider the vote, lay the motion on the table and bring the bill up for a second vote at a later date. But only one reconsideration is permitted.

In some states a bill is introduced in one house alone, but in New York it is usual to introduce the same bill in both the Senate and Assembly. If the Senate, for instance, passes a bill first, it comes over

to the Assembly and is referred to committee like any Assembly bill on First Reading. The Assembly committee may report favorably the Senate bill, but it frequently happens that the Assembly companion bill has already been reported and is on Second or Third Reading. Just before a vote is taken, therefore, the introducer of the Assembly bill moves to discharge the Assembly committee from further consideration of the Senate bill for the purpose of substitution, as the identical bill must pass both houses. If the Assembly passes the bill, the engrossed Senate copy which already bears the signature of the Senate's presiding officer (the Lieutenant-Governor) is signed by the Speaker, returned to the Senate and by the Senate transmitted to the Governor.

If a bill fails to pass both houses it is, of course, lost. But from time to time a bill will be amended in the other house before it is passed. It must in such case be returned to the first house. If that house concurs in the amendments the bill is automatically passed. But it may send the bill to committee and do nothing further, it may itself amend the amended bill, or it may decide to try to reach a compromise agreement through the appointment of a conference committee of the two houses. This is the usual procedure in Congress, but there has been only one conference committee in the New York State Legislature in over twenty years. That followed a deadlock on the budget.

Either house may, before action by the other and with the consent of the other, recall a bill which it has passed. Similarly, a bill can be recalled from the Governor. This procedure is used quite often at the informal request of the Governor who may want some amendment made to a bill or who may desire thirty days in which to consider a bill instead of ten days. A bill that goes to the Governor must be signed or vetoed by him within ten legislative days or else it will become law without his signature. However, the Governor is given thirty days to sign or veto bills which are passed within the last ten days of the session and if he does not sign these so-called "thirty day bills" they fail to become law. As in Congress, the Governor's veto power is not absolute. A bill can be passed over his veto by a two-thirds vote.

It is comparatively easy to follow legislation in the New York Assembly. The bills themselves are clearly printed with all proposed new matter in italics and existing law, proposed to be deleted, enclosed in heavy brackets. Every bill when it is introduced receives in numerical order an introductory number and by this number one can always find it without difficulty. At the same time, it also receives and there is printed on the bill itself a print number. When a bill is amended it has to be reprinted and thereupon receives an additional print number. These numbers are placed on the bill in numerical order as each bill is printed and a bill which has been amended several times will frequently carry three or four print numbers as well as its introductory number. One can, therefore, look up a bill in each stage of amendment. There is printed weekly during the session a Legislative Index which gives the introductory numbers, a brief synopsis and the exact status of each bill (i.e., what committee it is in, or if it is on Second Reading, or Third

Reading, or before the Governor, etc.), all the print numbers and their corresponding introductory numbers, and all legislation indexed both under the name of the introducer and under its subject matter. Accordingly to follow any legislation, it is only necessary to know either of its numbers, its sponsor or the subject matter.

The legislature convenes the first Wednesday of January in each year. Its term is without limit, but it usually adjourns in March or April. The first session of each week is held on Monday night at eight-thirty so that members from distant parts of the state can get to the session without traveling on Sunday. During January and the early part of February, most of the members go home on Tuesday, as there is little business before the house. The committees begin to function shortly after organization, but they are not inclined to report bills favorably until they have had an opportunity of finding what legislation will be proposed on a given subject, so that they may compare the various bills offered. Skeleton sessions are usually held at 11 A.M. each day during the balance of the week. It is not until a number of weeks have passed that these sessions are sufficiently important for most of the members to attend.

During the last few days of the session, the Assembly procedure differs very considerably from that which obtains in most states. As indicated above, all bills are referred to different committees for consideration. Towards the close of the session, however, these committees terminate their activities and all bills upon which they have not acted are referred to a committee of which the Speaker is chairman, known as the Rules Committee. When Rules Committee takes charge, the legislative body begins to function very rapidly. Bills reported by the Rules Committee are reported on the Order of Second and Third Reading at the same time, so that there is no delay between the two readings. It is this period, and especially the last day, that is the object of much, and sometimes legitimate, criticism. On the last day of the session when it may be physically impossible to have a printed calendar of the bills, members have little opportunity to secure and look over copies before they are passed. Indeed, if the bill has been recently amended or introduced, there may not even be copies available, and many votes are cast in complete ignorance of what is being voted on. Rules Committee is composed of the leaders of both parties, and the votes under these circumstances are based on political faith in such leaders. When the leadership is conscientious, no intrinsic harm results; but it is in such periods that a callous leadership "puts over" or lets "slip through" bill that would normally not withstand the cross-fire of debate.

One other matter which receives occasional publicity deserves mention. The house can always by vote of a majority of its membership take over control of legislation and discharge a committee from consideration of a bill so that the bill comes before it. Motions to discharge committees are quite frequently made towards the end of a session. The purpose of such motions, however, is generally political in order to secure a record vote for use in campaigns. It is an unwrit-

ten rule from which there are but few deviations that the majority party will support the committees which it controls so that such motions, requiring a majority of the house membership, hardly ever prevail. Where there is a sufficient number of the majority members who wish to join with the minority, the committee, even though its members may not approve the bill, will generally report it to the house for consideration, although without recommendation as to the action of the house.

The procedure in every legislative body has two purposes. Its primary purpose is to secure careful consideration of each proposal and to safeguard the right of every member to express his views as he wishes and to vote, but at the same time care is taken that the majority party control the fate of legislation, for the passage or defeat of which it must assume public responsibility.

BOOK I MCKINNEY'S STATUTES, DIVISION II (1942) *

II. Formalities of Enactment and Approval.

§ 11. Legislative procedure generally

The general outline of procedure to be followed by the Senate and Assembly in enacting laws is laid down by the Constitution, and within this framework each house of the Legislature may determine the rule of its own proceedings. Thus the Constitution provides that no laws of this state shall be enacted except by bill; that bills may originate in either house; that, having been passed by one house, they may be amended by the other; but that upon the last reading of a bill no amendments shall be allowed. After the final reading of a bill, also, the question of its passage is to be taken immediately, and the ayes and nays entered on the journal. Similarly the Constitution provides that no bill shall be passed in either house, unless it has been printed and upon the desks of the members, in its final form, for three legislative days. The Governor, however, may certify to the Legislature facts which, in his opinion, necessitate an immediate vote on a bill, in which case the bill need only be upon the desks of the members in final form, not necessarily printed, before passage. No bill can become a law except by the assent of a majority of the members elected to each branch of the Legislature, and the Constitution provides that the enacting clause of all bills shall be "The people of the State of New York, represented in Senate and Assembly, do enact as follows."

These, briefly, are the rules prescribed by the Constitution by which laws shall be enacted. Within them the Legislature has standardized its procedure so that bills in the process of enactment follow a more or less routine course. Any bill may be introduced in either house, and no preliminary finding or investigation is necessary to their introduction. . . .

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§ 14. Approval of Governor

The Constitution provides for the presentation of bills to the Governor for his approval as follows: "Every bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it shall have originated, which shall enter the objections at large on the journal, and proceed to reconsider it. If after such reconsideration, two-thirds of the members elected to that house shall agree to pass the bill, it shall be sent together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of the members elected to that house, it shall become a law notwithstanding the objections of the governor. In all such cases the votes in both houses shall be determined by yeas and nays, and the names of the members voting shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature shall, by their adjournment, prevent its return, in which case it shall not become a law without the approval of the governor. No bill shall become a law after the final adjournment of the legislature, unless approved by the governor within thirty days after such adjournment. If any bill presented to the governor contain several items of appropriation of money, he may object to one or more of such items while approving of the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects; and the appropriation so objected to shall not take effect. If the legislature be in session, he shall transmit to the house in which the bill originated a copy of such statement, and the items objected to shall be separately reconsidered. If on reconsideration one or more of such items be approved by two-thirds of the members elected to each house, the same shall be part of the law, notwithstanding the objections of the governor. All the provisions of this section, in relation to bills not approved by the governor, shall apply in cases in which he shall withhold his approval from any item or items contained in a bill appropriating money."

In objecting to items of an appropriation bill, however, the objection of the Governor is to be directed to items of money appropriated and not to limitations or conditions under which the appropriation is made. Hence a provision that an appropriation was not to be used for personal services was not an item which the Governor could veto while approving the rest of the bill.

To the requirement that all bills be submitted to the Governor for his approval before becoming a law, there is also one specific exception. An appropriation bill originally submitted to the Legislature by the Governor becomes a law immediately upon being passed by both houses of the Legislature without any further action by the Governor; except that appropriations for the Legislature and judiciary, and sep-

arate items added by the Legislature to such bills, are subject to his approval as in the case of other laws.

The Legislature, being unable to enact a law without the approval of the Governor, or by a two-thirds majority in case he disapproves, cannot repeal a statute without the same formalities. Hence a legislative enactment may not be declared inoperative by a mere concurrent resolution, and a legislative grant of immunity from prosecution on account of testimony given before a legislative committee would be ineffective unless approved by the executive of the state.

§ 15. Submission of laws to popular vote

Under the republican form of government in force in this state all legislative power is derived from the people. But when the people adopted the Constitution they surrendered the power of making laws to the Legislature and imposed it upon that body as a duty. Hence, except as they expressly reserved such power in the Constitution, the people now have no authority to ratify or adopt laws proposed by their representatives. Thus it was held in a comparatively early case that the Legislature had no power to submit to popular vote the question of whether a given enactment should become a law. While, however, this holding still reflects the general rule, the later cases have refused to extend its doctrine and have sanctioned numerous exceptions to it. A distinction has been drawn, for example, between the submission of a general law to the electors of the whole state and the submission of a local law to the voters of a particular locality; and the latter has been permitted where the former was not allowed. The reason for this distinction, it is said, rests in the manifest propriety of making local changes dependent upon the vote of the local electors, who, of all persons, could best determine their convenience. Thus it has been held that the bonding of a municipal corporation in aid of the construction of a railroad could be made contingent upon the consent of a certain percentage of the taxpayers of such municipality; the issuance of liquor licenses in a certain district could be made to depend upon the vote of the local electors; the location of a county seat could be submitted to the electorate of the county; and the voters within a proposed county could be permitted to vote on whether a law erecting such county should go into effect.

Another difference recognized in the more recent decisions with regard to the voluntary submission of laws to popular vote is between the power to determine whether an act shall become a law and the power to determine whether a law shall become operative. In the first case, it is said, the act does not purport to be a law when it leaves the Legislature. The very question of its becoming such is submitted to the electors. But in the second case the legislating is done and the statute is a completed law, its future operation being dependent on a contingency; namely, the affirmative vote of the people. In this respect statutes of the latter type are comparable to conditional statutes, and a referendum concerning them is permissible, though with reference to the former it is not. A law, therefore, which sets forth a num-

ber of forms of city government and authorizes cities to adopt them, is not of the kind which violates the provision of the Constitution vesting legislative power in the Senate and Assembly.

In addition to those cases already considered in which the Legislature may voluntarily submit a law to popular vote, it is to be observed that the Constitution requires such procedure in the enactment of certain laws. It commands a referendum in the case of legislation contracting additional state indebtedness; upon the annexation of territory to a city; upon the creation of a public utility to serve a given locality; and upon the adoption of an optional form of county government.

When a referendum law has once been passed there arises the problem as to how it may be amended. In this regard there appears, at first glance, to be some conflict in the decisions. The Attorney General has observed that such legislation ranks next to the Constitution and may not be changed or modified, in respect to basic requirements, without a resubmission as in the case of the original law, and at least one case upholds this view. Two lower courts, on the other hand, have flatly declared that the Legislature could not by voluntarily submitting a law to popular vote, deprive itself of its plenary power to amend all legislation, including referendum laws. The conflicts in these adjudications, however, can be reconciled on the ground that one line of decisions represents cases in which a referendum was required by the Constitution; while the other covers those wherein the Legislature submitted laws to the people of its own volition. Hence the true rule would seem to be that laws required by the Constitution to be submitted to popular vote may be amended only by the same formality; while laws voluntarily submitted to popular vote may be amended by the Legislature alone.

In connection with the amendment of referendum laws courts may likewise consider the object of the Legislature in submitting the original law to the people; and if a proposed amendment does not interfere with the original design, or basically change the law, a referendum is not required to make the amendment effective. Thus it has been said that the only question submitted to the people under the Constitutional provision requiring a referendum in the case of legislation contracting state debts, was the advisability of contracting the debt. Hence an amendment to a referendum law which did not affect the debt contracted was upheld. So likewise with an amendment which only corrected a defective detail in the original act.

Notwithstanding the opinion of the Attorney General that referendum laws rank next to the Constitution, the approval by the people of an act not required to be submitted to them cannot be construed to be an amendment of the fundamental law; for the Constitution can be changed only by the methods provided for therein.

§ 16. Proof of passage; time of becoming law; publication

When a bill has passed both houses of the Legislature the laws of this state prescribe certain formalities which establish the time and

manner of its passage; fix the time at which it became a law; and provide for its publication. The Legislative Law provides that upon the passage of a bill by either house, the presiding officer thereof shall append to such bill a certificate of the date of its passage by the votes of a majority of all the members elected to such house or in the presence of three-fifths of such members, if such be the case, or by the votes of two-thirds of all the members elected to such house, as the case may be. Upon the passage of a bill as to which a part becomes law immediately and a part requires further action by the governor, two copies shall be certified as above provided, one of which, upon final passage by both houses, shall be transmitted to the governor and the other to the secretary of state. Should a controversy arise as to the passage of a bill, the certificates of the presiding officers become of prime importance. The Legislative Law provides that no bill shall be deemed to have passed unless so certified and that the certificate shall be conclusive evidence of the passage of the bill in the manner specified. The journals of the Legislature, therefore, may not be received in evidence to impeach certificates which are legal in form and which, on their face, show the bill to have been duly passed. Nor is a defect in the certificate in failing to show that the requisite numbers were present or voted sufficient to overcome this conclusive presumption, but in such case, recourse may be had to the journals of the respective houses to support the validity of the enactment. The certificates to be considered in deciding controversies are the original certificates of the presiding officers and such officers may not make any substitution, alteration, or addition to them after the adjournment of the Legislature.

If a bill becomes a law by the approval of the Governor, the Legislative Law provides that his certificate shall be the evidence of the time when the bill becomes a law; but if a bill becomes a law otherwise than by the approval of the Governor, the certificate of the Secretary of State showing the time when the bill was filed in his office shall constitute such evidence.

If, after passage by both houses, a bill be approved by the Governor or passed over his veto, the Constitution commands the Legislature to provide for its speedy publication. This the Legislature has done by section 45 of the Legislative Law, which provides that the Secretary of State shall annually cause the session laws to be published as soon as possible after the adjournment of the Legislature. In the publication of every law, the certificates of the presiding officers of each house are omitted, but there is inserted immediately under the title of the law, a statement to the effect that it became a law upon the properly specified date, with or without the approval of the Governor, or notwithstanding his objections, as the case may be, and adding the words "passed by a two-thirds vote," "passed, three-fifths being present," or "passed, a majority being present," and the words "on emergency message" if passed by a two-thirds vote on an emergency message from the Governor. In the case of an appropriation law submitted by the Governor, certain provisions of which become effective

without his approval, the statement in addition to the other matter prescribed is required to state that part of it became a law upon a properly specified date by the action of both houses of the Legislature and that part of it became a law upon a properly specified date with or without the approval of the governor, or notwithstanding his objections, as the case may be.

Generally speaking, and aside from statutory provisions on the subject, an act contained in the printed session laws is presumed to have been passed in the mode prescribed by the Constitution, and the burden is on one asserting the contrary to set up his claim in his pleadings and produce evidence to overcome the presumption of regularity. But it is to be observed that this presumption attaches only to the certificates of the presiding officers which are filed in the office of the Secretary of State, and does not run to statements made by the Secretary based upon them and printed in the session laws. The Legislative Law specifically provides that such statement shall be only presumptive evidence that the original law was certified by the presiding officer of each house accordingly. Hence the courts may look beyond the printed statute book to examine whether a statute has been constitutionally passed, and a statement in the session laws that an act was passed by two-thirds vote may be rebutted by the production of the original certificate showing that such was not the case.

FINAL REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON LEGISLATIVE METHODS, PRACTICES, PROCEDURES AND EXPENDITURES

N. Y. Leg.Doc. (1946) No. 31; 23-38 *

THE NEW YORK STATE LEGISLATURE—AN OVERALL VIEW

Powers

Concern has been expressed over what is said to be the diminished powers of state legislatures today in contrast with the powers conferred upon them by original state constitutions and in relation to the growing power of the Executive and the Federal Government. Under the first New York State Constitution of 1777 the powers of the Legislature were practically limitless. Vested in the Legislature were broad residual powers restrained only by a few general rules. The trend since has been well summarized by Charles Z. Lincoln:

“ . . . subsequent Constitutions have imposed important restrictions on legislative action, and have, in some cases, reserved power to the people themselves, and in others have committed these subjects to subordinate local agencies in the political subdivisions of the state. Limitations on legislative power have also been imposed by the Federal Constitution, which has deprived the states of any authority

* [Footnotes are omitted. Ed.]

to enact laws on specified classes of subjects, including laws impairing the obligation of contracts, affecting vested rights, denying equal protection of the laws, depriving citizens of the privileges and immunities secured by the Constitution, and laws infringing upon the power of Congress to regulate commerce."

The limitations and restrictions imposed upon the Legislature have taken the following forms: The Legislature may not pass any laws in violation of any right or privilege specifically guaranteed to the people by the Constitution of the United States and of New York State. In certain cases it may not pass any private or local bills and must act only by general laws. The form of all bills and the number of votes required to pass certain bills are rigidly prescribed. The Legislature cannot audit or allow certain claims or accounts against the state. Under the Executive budget system, its power to amend, consider and act upon budget bills and other bills carrying appropriations is restricted in a number of respects. Specifically prohibited is the giving or loaning of State moneys or credit. The Legislature's power to contract indebtedness is likewise limited. Among other curbs imposed upon legislative sovereignty are the amendments safeguarding the home rule powers of villages having a population of 5,000 or more and of counties, and cities.

Despite these restrictions, it is premature to portend the dissolution of representative government in the State. Unlike the Congress of the United States which acts on the basis of well-defined and sharply limited powers specifically conferred by or implied in the Federal Constitution, the New York State Legislature is given an affirmative and omnibus grant of lawmaking power, broader in scope than that possessed by Congress. Unless the Legislature is specifically restrained by the Constitution, its latitude of action is virtually unhampered and unlimited. What is meant by legislative sovereignty, fundamentally, is the power of the representative body to determine State-wide policy and to make certain that administrative agencies conform to that policy; the power to raise revenue; the power to appropriate funds and to make certain that expenditures are made in accordance with the intent of the Legislature. Whatever the historical reasons for the various restrictions imposed upon the Legislature may be (and such discussion does not come within the scope of this report), these basic powers have not been vitiated.

The expansion of rule-making powers of administrative agencies has led to the assertion that the lawmaking powers of the Legislature have contracted over the years. The duty of making laws for the conduct of the inhabitants of the State has been entrusted by the people solely to their elected representatives. This is provided for by Art. III, Sec. 1 of the State Constitution. The courts have consistently interpreted that provision strictly. The Constitution-makers intended that those whom the people select to make their laws shall do so and no others. The duty imposed upon them may not be delegated to others. This admonition of the people through their fundamental law is restated here because it seems to have been forgotten even by legislators.

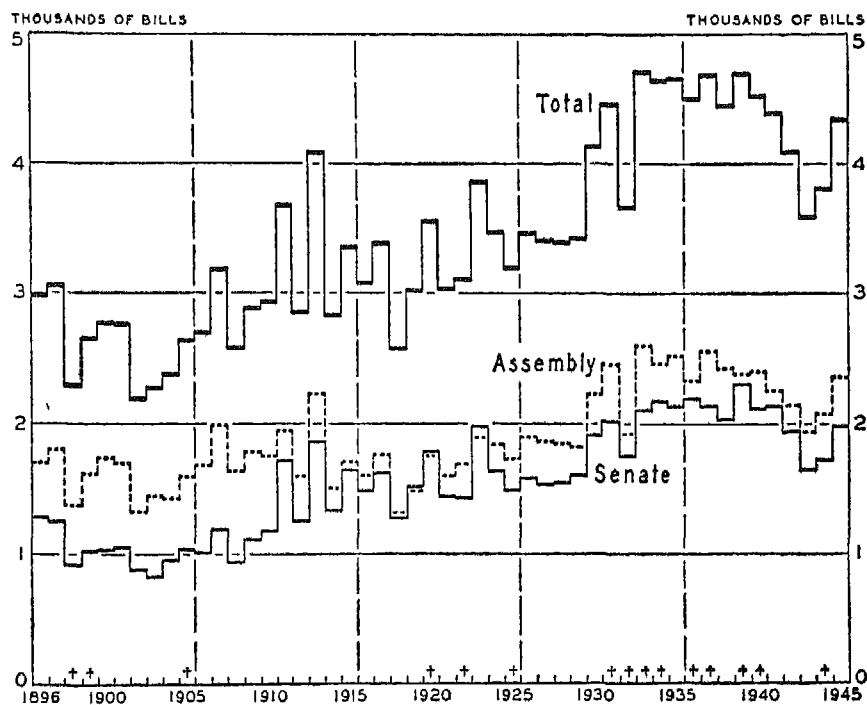
How far this doctrine has been overlooked is brought sharply to attention by an examination of statutory enactments of recent times. Such a survey reveals the fact that more and more legislatures are wont to pass on to administrative officials the duty of writing in the details of administration by conferring on them wide rule-making powers.

Scope of Legislative Operations

Volume of Bills Introduced

Although the present New York State Legislature is alleged to be overshadowed by the Federal Government and curbed in the exercise of its powers by the State Constitution, New York's fifty-six Senators and one hundred fifty Assemblymen act on more measures and on more important measures annually than were considered by earlier legislatures at a time when the national government was weaker and the State Constitution more generous in its grant of legislative powers. As the concept of the role of the State in society has changed over the years, the Legislature has been called upon to enact far-reaching measures governing education, health, social welfare and industrial and labor relations.

CHART I
BILLS INTRODUCED, NEW YORK STATE LEGISLATURE, 1896-1945*



*INCLUDES IDENTICAL SENATE AND ASSEMBLY BILLS (COMPANION BILLS).

†INCLUDES SPECIAL SESSION.

In the last fifty years alone there has been a significant increase both in the over-all volume of bills introduced and in the number of general measures of such broad scope as to affect all the citizens of the State. Although considerable fluctuation marks the number of bills introduced in the years from 1896 to 1945 as Chart 1 shows, there is yet discernible a definite upward trend. The volume of measures introduced in both houses ranged from 2,209 in 1902 to 4,698 in 1933 or twice as many. In addition, there were hundreds of amendments annually, each one of which was considered a new bill. On the average, 47 per cent more bills were filed during the 1941-1945 period than were introduced during the five years from 1896 to 1900. Increases in the total number of bills introduced are particularly evident during the war years, 1939-1945, and those immediately preceding the war.

Nature of Bills Introduced

No other state legislature contends with the staggering total of more than 4,000 bills introduced annually. In its scope of operation, the New York State Legislature is second only to Congress among the legislative bodies in the United States. Most of the bills introduced reflect the complex economic and social conditions of the State.

From 1943 to 1945, consecutively, Senators introduced 1,650, 1,723 and 1,981 bills. During the same period Assemblymen put in the hopper 1,944, 2,069 and 2,356 bills. While the bills concern almost every subject comprehended by the lawmaking power of the Legislature, the principal emphasis appears to lie on measures affecting education, labor and workmen's compensation, civil service and pensions, the Civil Practice Act, appropriations and taxation, and counties, cities, towns and villages. Approximately, four-fifths of all bills filed are general bills of State-wide concern, the remainder having local or private application.

Nature of Legislative Action . . .

Of each hundred bills introduced, twenty-one are destined to become law, to cite the experience of the last three sessions. What happens to the other bills in the course of their legislative journey is shown in Table 1. Committees in both houses have been responsible for the defeat, on the average, of 52 per cent of all bills introduced, with the mortality heaviest in the first house. As many as 558 bills, on the average, or 14.3 per cent of all bills introduced were substituted for in the first house by bills arriving from the second house. Because both houses usually support the decisions of their committees, relatively few bills failed to pass on the floor after being reported. In all, on the average, only 3.8 per cent of all bills introduced either died on the second reading or general orders calendar or were defeated on the floor of the first house. The number of bills introduced in both houses during the last three sessions ranged from 3,594 to 4,337. Of this amount, the number that survived both houses and reached the Governor ranged from 1,015 to 1,272. This represented,

TABLE 1
ACTION TAKEN ON MEASURES INTRODUCED
NEW YORK STATE LEGISLATURE, 1943-1945

Legislative action	1945		1944		1943		Average 1943-45	
	Number of bills	Per cent	Number of bills	Per cent	Number of bills	Per cent	Number of bills	Per cent
Bills introduced.....	4,337	100.0	3,792	100.0	3,594	100.0	3,908	100.0
Died in committee.....	1,891	43.6	1,682	44.4	1,655	46.0	1,743	44.6
Died on second reading calendar *.....	22	0.5	11	0.3	9	0.3	14	0.4
Failed to pass **.....	140	3.2	111	2.9	141	3.9	134	3.4
Used for substitution.....	664	15.3	556	14.7	453	12.6	558	14.3
Passed too late for transmission to second house.....	6	0.1	3	0.1	2	0.1	3	0.1
Passed by first house.....	1,614	37.2	1,429	37.7	1,336	37.2	1,460	37.4
Passed and delivered to second house.....	1,614	37.2	1,429	37.7	1,336	37.2	1,460	37.4
Died in committee.....	295	6.8	305	8.0	263	7.3	288	7.4
Died on second reading calendar *.....	4	0.1	2	0.1	3	0.1	3	0.1
Failed to pass **.....	26	0.6	25	0.7	39	1.1	80	2.1
Recalled by first house.....	2	0.0	1	0.0	1	0.1	2	0.1
Passed by second house.....	1,287	29.7	1,097	28.9	1,027	28.6	1,137	29.1
Recommitted by first house after passage in second house.....	4	0.1	6	0.2	4	0.1	5	0.1
Passed and delivered to Secretary of State ***.....	11	0.3	5	0.1	8	0.2	8	0.2
Action by Governor								
Passed and delivered to Governor.....	1,272	29.3	1,086	28.6	1,015	28.2	1,124	28.8
Recalled and recommittees by first house.....	15	0.3	7	0.2	4	0.1	9	0.2
Approved by Governor.....	911	21.0	796	21.0	712	19.8	806	20.6
Vetoed by Governor.....	346	8.0	283	7.5	299	8.3	309	7.9

Note: Percentages in this and in the following tables have been rounded off to one decimal place and therefore may not add to 100.0. Data showing legislative action in first house pertain to action on combined Senate and Assembly bills after introduction.

* General orders calendar in the Senate.

** Bills that failed to pass were either stricken from the third reading calendar, recommitted to committee, defeated on a final passage roll call or had their enacting clause stricken out.

*** Constitutional amendments.

TABLE 2
NUMBER AND PER CENT OF AMENDMENTS, BY TYPE
NEW YORK STATE LEGISLATURE, 1943-1945

Type of amendment	1945		1944		1943	
	Number	Per cent	Number	Per cent	Number	Per cent
<i>Senate</i>						
Total.....	417	100.0	391	100.0	411	100.0
Amendments printed and recommitted....	243	58.3	235	60.1	268	65.2
Amendments reported by committee.....	95	22.8	58	14.8	60	12.2
Second reading amendments *.....	25	6.0	25	6.4	19	4.6
Third reading amendments.....	54	12.9	73	18.7	74	18.0
<i>Assembly</i>						
Total.....	486	100.0	457	100.0	465	100.0
Amendments printed and recommitted....	295	60.7	283	61.9	293	63.0
Amendments reported by committee.....	107	22.0	76	16.6	81	17.4
Second reading amendments.....	12	2.5	10	2.2	8	1.7
Third reading amendments.....	72	14.8	88	19.3	83	17.8

* Amendments on the general orders calendar in the Senate.

on the average, 28.8 per cent of the aggregate number of bills introduced. After reaching the Governor, a few bills were recalled and recommitted by the first house. Vetoes by the Governor averaged only 7.9 per cent of all bills introduced.

Analysis of legislative action would be incomplete without reference to the number and type of amendments made to Senate and Assembly bills during the 1943-1945 period. This is shown in Table 2. The number of Senate amendments ranged from 391 to 417 and the number of Assembly amendments from 457 to 486, constituting approximately one-fifth of all bills introduced in each house. More than three-fifths of all amendments, on the average, were bills that were amended and recommitted to committee, usually upon the initiative of the introducers to meet objections. Senate amendments made on the floor on general orders or third reading averaged slightly more than one-fifth of all amendments. Less than one-fifth of all Assembly amendments, on the average, were made after the bills were reported by committees.

Additional insight into the nature of legislative action may also be gained by an analysis of the time consumed at various stages of the legislative process. This is particularly important with reference to state legislatures which, unlike Congress, hold brief sessions—for the most part biennially—lasting rarely more than three months. During the 1945 session the Senate was in session sixty-one legislative days and the Assembly fifty-nine. Table 3 shows that, on the average, it took twenty-seven legislative days for Senate bills and twenty-five legislative days for Assembly bills to be passed by both houses. Committee action in the first house averaged ap-

TABLE 3
AVERAGE NUMBER OF LEGISLATIVE DAYS¹ INVOLVED
IN PASSAGE OF BILLS BY BOTH HOUSES
NEW YORK STATE LEGISLATURE, 1945

Action on legislation	Average number of legislative days	
	Senate bills ²	Assembly bills ³
Completed action in both houses	27.3	25.2
Completed action in first house	20.1	19.3
Committee consideration	15.5	14.5
Calendar action	4.6	4.8
Completed action in second house	7.2	5.9

¹ Actual session days.

² Action on 484 Senate bills that passed both houses. Not included in this analysis are 24 Senate bills that were either recalled from the Governor after final passage or reconsidered by the Senate after being amended by the Assembly.

³ Action on 755 Assembly bills that passed both houses.

proximately fifteen legislative days and calendar action approximately five legislative days. Completed action in the second house averaged seven legislative days for Senate bills and approximately six legislative days for Assembly bills. The use of companion bills accounts for the fact that relatively few days are required by the second house to complete action on measures sent to it for concurrence or rejection by the first house. Most measures introduced in one house duplicate companion measures introduced in the other house under separate sponsorship. Under this system most of the committee work in both houses is completed by the time the first house approves the bill, making it possible for the bill to receive prompt consideration on the calendar of the second house without reference to committee.

The Legislative Product

As has been pointed out earlier, slightly more than one-fifth of all bills introduced during the last three sessions reached the statute books. Contrary to popular impression, most of these statutes were not new sections, articles or chapters, but rather amendments to the various existing consolidated and unconsolidated laws and separate acts. In a comprehensive article on legislative procedure in New York, a former chairman of the Assembly Ways and Means Committee has stressed this phase of the legislative process:

“Frequently, criticism is voiced of the “vast quantities of new laws turned out by our legislative mills.” This is an easy crit-

icism, but it is seldom based on more than a superficial glance at the number of session laws enacted. The repeal of an old law involves enactment of a new law to effect such repeal. Appropriations for the support of government require one or more statutes. A very large percentage of laws are the result of what might well be thought of as petition in equity—the private individual who seeks the right to bring suit against the state for an alleged grievance; the municipality which to strengthen its credit, seeks to have validated by the state its action in authorizing a local bond issue. The great majority of the other statutes are those which adjust or correct some comparatively minor situation perhaps of administration, perhaps of relationships between citizens which have been called to the attention of the legislature by those who found themselves affected adversely. It is a rare occurrence when as many as three or four really new laws affecting the people of the state are enacted at any single session of the legislature.”

The data shown in Table 4 support this view. The various amendments to existing statutes accounted, on the average, for nearly three-fifths of all measures approved by the Governor from 1943 to 1945. An amendment, of course, may be more important than the statute amended. It can also be a complete revision of the law. Less than one-fifth of all the bills approved were special local acts. Appropriation and revenue measures represented more than 5 per cent of the to-

TABLE 4
LEGISLATIVE MEASURES THAT BECAME LAW, BY TYPE
NEW YORK STATE LEGISLATURE, 1943-1945

Type of law	1945		1944		1943	
	Number	Per cent	Number	Per cent	Number	Per cent
Total.....	911	100.0	796	100.0	712	100.0
Amendments ¹	539	59.2	490	61.6	416	58.4
Local laws.....	172	18.9	141	17.7	140	19.7
Temporary laws ²	72	7.9	55	6.9	42	5.9
Appropriations.....	36	4.0	33	4.1	24	3.4
Revenue measures.....	13	1.4	14	1.8	17	2.4
Repeals.....	20	2.2	10	1.3	8	1.1
New laws ³	22	2.4	19	2.4	19	2.7
Private laws.....	18	2.0	20	2.5	34	4.8
Claims ⁴	5	0.5	2	0.3	14	2.0
Corporations ⁵	13	1.4	18	2.3	20	2.8
Revision measures ⁶	15	1.6	12	1.5	9	1.3
Validations.....	4	0.4	2	0.3	3	0.4

¹ Laws amending consolidated and unconsolidated laws or separate acts.

² Including time extensions of temporary measures.

³ New articles or sections.

⁴ Authorizing Court of Claims to determine private claims against the State after the expiration of the Statute of Limitations.

⁵ Reviving, extending, changing or creating corporations.

⁶ Clarifying and modernizing form and language of law.

^{*} Includes four war emergency acts.

^{*} Includes seven war emergency acts.

^{*} Includes twelve war emergency acts.

tal number of laws during the last three sessions. Only twenty-two laws approved in 1945 and nineteen in 1943 and 1944 involved the addition of a new article or section to the statute books.

Problems Concerning Legislative Procedure and Methods

The review of the nature and scope of legislative action in New York indicates that the New York State Legislature is discharging ever-increasing responsibilities on a scale hardly anticipated decades ago. Despite the great growth of Federal power, nationally, and of Executive power within the State, the Legislature remains the main policy-determining body on countless varied and complex social, economic and political problems. Its strength and prestige depend on its ability to come to grips with these problems and to become a more efficient agent of the people's will in determining State policy.

To achieve these ends, the Legislature has recognized from time to time that it cannot afford to perpetuate obsolete methods, antiquated practices and cumbersome procedures that were adequate in the eighteenth and nineteenth centuries. Until the organization of the Committee, it has, however, not called for a sweeping, comprehensive inquiry into legislative problems. Instead, over the years there has been a steady, evolutionary improvement in legislative machinery. That a more systematic approach to the problem of legislative reorganization has been lacking until recently may be explained by two factors: (1) Crowded, brief annual sessions have left no time for a consideration of the mechanics of law-making. Concerned with administering to the needs of others, legislators have overlooked their own problems, except when some specific defect in the legislative process became patent. (2) Only during the last decade has public emphasis begun to shift from the reorganization of the Executive branch to the strengthening of the Legislative branch, explained perhaps by the heightened importance that depression and war have lent to representative government.

Legislative Improvements Effected

The net effect of the legislative improvements accomplished over the years, however, is that procedure in the New York State Legislature is simpler and easier to follow than in most other states and that legislators enjoy more technical assistance than is available in other state legislative bodies. Thanks to a detailed recordkeeping system open to the public, it is possible at any time to determine the exact status of the bill, and the records of individual members and committees. Not even in Congress are the record-keeping facilities more comprehensive. Every bill is readily identifiable by an introductory number which remains unchanged regardless of the number of amendments made. When a bill is originally printed, it also receives a print number. Every amendment necessitates reprinting and a new print number which is added to the old one. Consequently, a bill amended several times carries several print numbers but retains its original in-

introductory number. This makes it easy to compare the amended bill with its original provisions.

Aware of the importance of expert bill drafting, the New York State Legislature was the first legislative body in the United States to establish a bill drafting agency. Similarly, it pioneered in creating a law revision agency responsible for examining the substantive statutory law with a view to scientific revision and for correcting the form and language of statutes. In 1891 the establishment of a Legislative Reference Section by the State Library led to the national movement for independent legislative research facilities.

Considerable improvements have been effected in the holding of committee hearings. In the last few years all hearings without exception have been joint meetings, sponsored by the corresponding committees in both houses. Advance notice has generally been adequate and has averaged two weeks. The hearings have covered series of integrated bills rather than isolated pieces of legislation.

Both houses have taken a long step forward in the direction of expediting procedure by limiting the introduction of bills to a definite date some weeks before adjournment. In the Assembly department bills must be introduced by February 15 and all other bills by March 7, except those introduced by the Rules Committee. In the Senate, the Temporary President who has the power to set a final date for the introduction of bills usually designates a day to correspond with the Assembly rule. To eliminate the unnecessary reading of the titles of bills, the rules provide that upon introduction and reference to committees, bills in the Senate are deemed to have their first and second reading and in the Assembly their first reading.

The Assembly has eased congestion of business toward the end of the session by providing that at least one week elapse from the final date for the introduction of bills to the date Assembly committees cease functioning and the Rules Committee takes charge of all bills undisposed of at that time. This rule enables standing committees to consider more effectively all bills referred to them and greatly reduces the number of bills considered by the Rules Committee toward the end of the session.

In both houses revision clerks attempt to read as many bills as possible before introduction with the result that there has been a reduction in the number of technical amendments to correct the form, style or language of bills. When bills are returned from the printer, they are checked by the revision department against the original manuscript and the present law. If "revision" amendments have to be made, they are incorporated whenever possible with substantive amendments, thus saving the time and cost involved in additional amendments.

Under Article IX of the New York State Constitution, certain bills affecting counties, cities and villages require "home rule requests" from the executive concurred in by the local legislative body or by such body upon its own initiative. Much delay, difficulty and litigation

have been avoided by determining in advance of the reporting of the bill by committee whether a home rule request is required by the Constitution. All bills of that nature are stamped with the words "message required" and cannot be reported out of committee until the requests are actually received. Procedures have been perfected to notify the introducer that a bill requires a home rule request or the committee that a request has arrived from the locality. Without such precautions, calendars would become clogged, vexatious delays would be encountered and utter confusion would ensue.

Additional evolutionary improvements are highly technical for the most part and require no elaboration here. They have tended to insure accuracy and expedition in committee reports, roll calls, substitution of bills, engrossing of bills, discharge motions, amendments, journal entries, the printing of bills and the recall of bills. There is insufficient awareness on the part of the public of the complexity of the legislative process and of the fidelity and painstaking care with which bills must be processed.

NOTES

1. See Lederle, "New York's Legislature under the Microscope," 40 *Am.Pol.Sci. Rev.* 521 (1946).

2. See generally, Dodds, "Procedure in State Legislatures", a supplement to *Annals of the American Political Science Association* (1918).

3. For periodical literature on the legislative process, see Henry, *The Desirability of Change in Colorado's Legislative Organization and Procedure*, 23 *Dicta* 119 (1946); Kennedy, *Legislative Bill Drafting*, 30 *Minn.L.Rev.* 103 (1946); Kennedy, *The Legislative Process With Particular Reference to Minnesota*, 30 *Minn.L.Rev.* 653 (1946); Perkins, *State Legislative Reorganization*, 40 *Am.Pol.Sci.Rev.* 510 (1946); Schwartz, *Address on Legislative Reform*, 69 *N.Y.S.B.A.* 88 (1946); Smith, *A Memorandum Concerning Sessions of the General Assembly*, 20 *Conn.B.J.* 332 (1946); Smith, *How Bills Become Laws in Texas*, 10 *Tex.B.J.* 14 (1947); Tilson, *Legislative Procedure in Connecticut*, 17 *Conn.B.J.* 104 (1943); Tilson, *Recent Changes in Legislative Procedure*, 19 *Conn.B.J.* 54 (1945); Orfield, *Improving State Legislative Processes*, 31 *Minn.L.Rev.* 161 (1947).

SECTION 2. THE SPEAKER

"MISTER SPEAKER"

42 *Time Magazine* 19-20 (1943).*

. . . On the eve of election year, with politics weighing more day by day, in a House almost equally divided between Democrats and Republicans, anything can happen. To prevent anything disastrous happening to the Democrats is one job of Texas' Samuel Taliaferro Rayburn, 42nd Speaker of the U. S. House of Representatives.

But Sam Rayburn has a greater responsibility: to guide, shepherd and rule the sometimes unruly 435 Representatives of the U. S. people.

*(Courtesy of *TIME*, Copyright Time Inc. 1943.)

Powerful Sam Rayburn's job has often been called the "second most powerful job in the nation." From the days of Frederick Augustus Muhlenberg, the German Lutheran pastor who presided over Congress' first sessions in New York, Speakers of the House have written their will and words into U. S. history. Some of the mighty:

Gaunt Henry Clay, only man who ever stepped into the Speakership the day he entered Congress, was the first to crack the whip over the House, the first to organize it firmly.

James Knox Polk, who guided the House in the hectic Jacksonian era, took more abuse and needling than any other Speaker, before or since. Polk put his, and Jackson's, program through Congress and graduated to the Presidency.

Bearded James Gillespie Blaine rose to the Speakership in 1869, in a year when only two-fifths of the House members were holdovers. He organized the House on strict party lines, held unquestioned leadership.

Of "Uncle Joe" Cannon, who held the Speakership from 1903-10, a minority member truly said: "I have seen him wield more power than the President." Uncle Joe owed much of his power to Maine's resolute Tom Reed, who had so rigged House procedure (the famed Reed's Rules) that the Speaker became, in effect, a dictator, Uncle Joe reaped the whirlwind in the spirited "revolution of 1910," when the House, under the prodding of a young Representative from Nebraska named George Norris, rewrote the rules.

Once the rigid rules were broken, Speakers were forced to wield power by tact, persuasion and favors. "Nick" Longworth kept a firm grip on the House through shrewd committee maneuvers; Texas' Jack Garner held sway by means of his long seniority and experience.

The Compromiser. No one, in the whole 155-year history of the Speakership, held it in a more difficult time than Sam Rayburn. Some Washington observers have called him "the greatest compromiser since Henry Clay." But Henry Clay compromised on issues; Sam Rayburn works to bring about compromise among factions. His technique is something to watch.

A short, stocky man with an almost evanescent fringe of white hair around his bald head, he spends much time leaning on the railing in the rear of the House. There, and in the cloakrooms and offices, he buttonholes his colleagues, lobbying for legislation which he feels must pass, sympathizing, advising, counseling. Sam's approach is disarmingly personal; when all other arguments fail, he says to a recalcitrant legislator: "You will be doing me a big personal favor if you vote for this." His difficulties are immense. The White House has been taking on more and more power for a decade. Sam Rayburn's job is to translate into Congressional action the will of a President who has frequently regarded Congress with cheerful contempt.

Most notable piece of Rayburn generalship occurred in the summer of 1941, when Congress wrestled over extending the one-year life

of the draft. For weeks it seemed certain Congress would defeat the bill. Sam Rayburn sweated day and night, persuading, cajoling, pleading with the members. Congressmen worried desperately over the political effect of the bill on mothers and fathers. But Sam Rayburn was convinced that defeat of the bill would be disastrous to the United States. When the day for the vote arrived, Sam Rayburn was in a state of honest mental anguish; neither he nor anyone else knew for certain how the votes would go. As the clerk called the roll, Sam kept accurate count: the final tally showed the bill passed 203-202. Before any coward could switch his vote, Sam Rayburn, in a shrewd tactical move, announced the total, gaveled down all moves for reconsideration. He had won; and the U. S. Army was not disbanded four months before Pearl Harbor.

The leadership that brought Sam Rayburn through that crisis was grounded in experience: 31 years in the House (only two have served longer: Illinois's Sabath and North Carolina's Doughton); 25 years on the Interstate Commerce Committee (five as its chairman); and four years as majority leader before he ascended to the Speakership in 1940. . . .

NOTE

On function and powers of the lieutenant governor as presiding officer of state senates, see Isom, "The Office of Lieutenant Governor", 32 Am.Pol.Sci.Rev. 921 (1938).

SECTION 3. THE COMMITTEE SYSTEM AND LEGISLATIVE FACT FINDING

A. Introductory Note

The types of committees most commonly used in legislatures in the United States today are (1) standing committees, (2) select or special committees, and (3) conference committees. By means of standing or "permanent" committees of both houses, to each of which is assigned specific subject matter, a division of the labor of considering proposed measures after their introduction is accomplished. It is in these committees that the fact finding and policy forming functions of the legislatures are actually performed, rather than on the floor of the houses. So important have the standing committees become that President Wilson described the government of the United States as "a government by the chairmen of the Standing Committees of Congress." The same is true of state legislatures. The select or special committee, as the name indicates, is usually created ad hoc to conduct an investigation of a particularly searching nature or to attend to some temporary non-legislative matter. A conference committee is really two committees, one from each house, appointed to reconcile points of difference between the bills or resolutions passed on the same subject by the respective houses.

The so-called "committee of the whole" is really a stage in the order of legislative procedure at which immediately after second reading of bills, the entire membership is constituted into an informal body for the

detailed consideration of proposed legislation. Since the system of standing committees became established the committee of the whole has, except in a few states, been rarely used. Minnesota is one of the exceptions.

The committees mentioned above and others, such as joint and interim, are discussed in this and other sections of this book.

NOTE

Although the standing committee system originated in the English Parliament, it died out with the rise of cabinet government. It was adopted in the seventeenth century by the assemblies of the southern and New England colonies, and has become a characteristic feature of the congressional system which has prevailed in the state and federal governments of the United States since the establishment of the republic. See Jameson, "Origin of the Standing Committee System", *Pol.Sci.Q.* (1894) 246-247; Harlow, "The History of Legislative Methods in the Period Before 1825", (1917), Ch. 1.

B. Committees of the Congress

REPORT OF THE JOINT COMMITTEE ON THE ORGANIZATION OF THE CONGRESS OF THE UNITED STATES PURSUANT TO H. CON. RES. 18

79th Congress, 2nd Session, Pages 1-14; 34-35 *
Senate Report No. 1011 (1946).

REORGANIZATION OF CONGRESS

INTRODUCTION

The Joint Committee on the Organization of Congress submits herewith its report of recommended changes in the two Houses of Congress.

This joint committee was directed:

"To make a full and complete study of the organization and operation of the Congress of the United States"—

and to—

"recommend improvements in such organization and operation with a view toward strengthening the Congress, simplifying its operations, improving its relationships with other branches of the United States Government and enabling it better to meet its responsibilities under the Constitution."

Our committee was created in response to a widespread congressional and public belief that a grave constitutional crisis exists in which the fate of representative government itself is at stake. Public affairs are now handled by a host of administrative agencies headed by non-

* [Footnotes are omitted. Ed.]

ected officials with only casual oversight by Congress. The course of events has created a breach between government and the people. Behind our inherited constitutional pattern a new political order has arisen which constitutes a basic change in the Federal design. Meanwhile, government by administration is the object of group pressures which weaken its protection of the public interest. Under these conditions, it was believed, the time is ripe for Congress to reconsider its role in the American scheme of government and to modernize its organization and procedures.

The committee held 39 public hearings and 4 executive sessions between March 13 and June 29, 1945. The testimony of 102 witnesses was taken, 45 of whom were Members of Congress. In addition, 37 Members and many interested private citizens submitted written statements. A review of all the testimony received reveals a wide area of agreement among the witnesses with respect both to the conditions that handicap Congress in the efficient performance of its proper functions and as to many appropriate remedies for these defects.

In evaluating the suggestions, we have been guided by what Justice Holmes called "the felt necessities of the time." To all these proposals we have applied the simple test: Will they strengthen Congress and enable it to do a better job?

Under the Constitution the framers vested primary powers in the National Legislature. They gave it the power of the purse, the right to declare war, the power to legislate and impeach, to regulate commerce and promote science and the arts. They also authorized Congress to determine the structure of the executive department and the powers of all administrative officers, the number of the Supreme Court Justices and its appellate jurisdiction, and the form and jurisdiction of inferior tribunals.

In strengthening the Congress through proper organization and procedure, your committee believes that the first mandate of the Constitution will be carried out.

I. COMMITTEE STRUCTURE AND OPERATION

Your committee believes that no adequate improvement in the organization of Congress can be undertaken or effected unless Congress first reorganizes its present obsolete and overlapping committee structure. This is the first and most important test of whether Congress is willing to strengthen itself and its organization to carry the tremendous work load that present-day governmental problems place upon it.

About 90 percent of all the work of the Congress on legislative matters is carried on in these committees. Most bills recommended by congressional committees become laws of the land and the content of legislation finally passed is largely determined in the committees.

We feel that there is nothing sacrosanct in the present arrangement of our committees. A study of the committee system of both Houses reveals that since the First Congress the committees have undergone many realignments and changes as conditions demanded.

As "the workshop of Congress" the committee structure, more than any other arm of the legislative branch, needs frequent modernization to bring its efficiency up to the requirements of the day.

However, because of obvious difficulties attendant upon the reduction of standing committees, Congress for many years past has neglected to survey its over-all needs for a more effective system. New committees have been established to do particular jobs, but little attention has been paid to realignment of committees and their jurisdictions on an over-all basis.

Congress can no longer afford the luxury and waste of manpower and time in maintaining a total of 33 standing committees of the Senate and 48 standing committees of the House. We recognize the difficulties inherent in simplifying this old system of 81 standing committees. We realize that loyalties to these present committees, certain perquisites of membership upon them, established seniority rights, and a desire to maintain these traditional rights make reorganization of our committee structure the No. 1 problem to be faced in any attempt to modernize and strengthen the Congress.

Only by untangling the existing overlapping jurisdictional lines and merging standing committees which today have almost concurrent jurisdiction can present-day legislation be adequately handled. We have attempted in the following recommendation to merge closely related committees into one where their jurisdictions overlap or where they deal with similar subjects.

By limiting Members of Congress to service on a few committees, they can become more familiar with their committee work. By consolidating many minor committees, a system of major committees for both houses will be created and members will have time properly to weigh and consider legislative matters referred to these consolidated committees. Many Members of the Senate now serve on as many as 10, 9, 8, and 7 special and standing committees, while some House Members serve on as many as 6 or more. By reducing this scattered work load through reorganization, Members will be relieved of many unrelated lines of legislation on their present hodgepodge of committee assignments in exchange for positions on one or two committees of greater responsibility and related legislative subject matter.

1. Reorganization of Senate Committees

Recommendation: That the 33 standing committees of the Senate be reorganized into 16, substantially as proposed by Senator La Follette.

Your committee, after studying many proposals for committee consolidation, believes that the recommendation for consolidating the 33 standing Senate committees into 16, based on Senator La Follette's proposal, offers the best chance for improving the committee structure of the upper House.

Under this plan, each Senator would be limited to membership on two standing committees. By permitting concentration on two

major committee activities, much of the present waste of time and scattered attention would be avoided. Each committee would have work of sufficient importance to justify specialization in its particular lines of activity. Each standing committee should have power to act jointly with the corresponding committee of the House of Representatives.

Therefore, your committee recommends consolidation of existing Senate standing committees as follows:

<i>Existing committees</i>	<i>Reorganized committees</i>
Agriculture and Forestry	Agriculture.
Appropriations	Appropriations.
Audit and Control	Rules and Administration of the Senate.
Enrolled Bills	
Library	
Printing	
Privileges and Elections	
Rules	Banking and Currency, Finance.
Banking and Currency	
Finance	Labor and Public Welfare.
Education and Labor	
Finance (social-security jurisdiction)	Claims.
Claims	
Commerce	Interior, Natural Resources, and Public Works.
Indian Affairs	
Interoceanic Canals	
Irrigation and Reclamation	
Mines and Mining	
Public Buildings and Grounds	
Public Lands and Surveys	
Territories and Insular Affairs	Civil Service.
Civil Service	
Post Offices and Post Roads	District of Columbia.
District of Columbia	
Expenditures in the Executive Departments	Expenditures in the Executive De- partments.
Military Affairs	Armed Services.
Naval Affairs	
Pensions	Veterans' Affairs.
Finance (veterans' jurisdiction)	
Foreign Relations	Foreign Relations.
Interstate Commerce	Interstate Commerce.
Manufactures	
Patents	Judiciary.
Judiciary	
Immigration	

2. Reorganization of House Committees

Recommendation: That the 48 standing committees of the House be reorganized into 18, substantially as proposed by Representative Wadsworth.

After considering many committee consolidation proposals made for the House, your committee believes that the proposal made by Representative Wadsworth offers, with one or two minor changes, the most practical and feasible arrangement. It would limit each of the Members of the House to one major committee assignment, and would

regroup, and redistribute the work-load so as to justify giving each reorganized committee the status of a major committee.

This regrouping would further permit an average membership of 23 on all major standing committees of the House, keeping the important Appropriations Committee at its present size of 43 members.

Your committee therefore recommends consolidating the existing committees of the House of Representatives as follows:

<i>Existing committees</i>	<i>Reorganized committees</i>
Agriculture	Agriculture.
Appropriations	Appropriations.
Expenditures in the Executive Departments	Expenditures in the Executive Departments.
Banking and Currency	Banking and Currency.
Coinage, Weights, and Measures	
Civil Service	Civil Service.
Census	
Post Office and Post Roads	Public Works.
District of Columbia	
Flood Control	Interstate and Foreign Commerce.
Public Buildings and Grounds	
Rivers and Harbors	Judiciary.
Roads	
Interstate and Foreign Commerce	Foreign Affairs.
Judiciary	
Patents	Labor.
Revision of the Laws	
Immigration and Naturalization	Merchant Marine and Fisheries.
Foreign Affairs	
Labor	Armed Services.
Education	
Merchant Marine and Fisheries	Veterans' Affairs.
Military Affairs	
Naval Affairs	Public Lands.
Pensions	
Invalid Pensions	Ways and Means.
World War Veterans' Legislation	
Public Lands	Rules.
Territories	
Irrigation and Reclamation	House Administration.
Mines and Mining	
Insular Affairs	Would abolish these and transfer the jurisdiction of the Elections committees to the Committee on House Administration, and the functions of the Claims committees to the courts.
Indian Affairs	
Ways and Means	Un-American Activities.
Rules	
Accounts	Un-American Activities.
Disposition of Executive Papers	
Enrolled Bills	Un-American Activities.
Library	
Memorials	Un-American Activities.
Printing	
Election of President, Vice President, and Representatives in Congress.	Un-American Activities.
Elections No. 1	
Elections No. 2	Un-American Activities.
Elections No. 3	
Claims	Un-American Activities.
War Claims	
Un-American Activities	Un-American Activities.

3. Jurisdiction of Committees

Recommendation: That House and Senate Rules be amended to define clearly the jurisdiction of each reorganized committee so as to avoid overlapping and duplication and conflicts of jurisdiction.

Reorganization of the committees as recommended above will require a revision of the rules of the two Houses so as clearly to define the jurisdiction of the new standing committees. It is recommended that as this is done, the jurisdiction of each reorganized committee be clearly defined so that overlapping and duplication will be eliminated. The definitions should enumerate the activities covered and describe their scope in terms of subject matter of legislation as well as the administrative organization of the Federal Government so that disputes over jurisdiction will be minimized or eliminated.

The major objective or predominant character of a bill, in the opinion of the presiding officers of the Senate and the House, should be controlling in determining the reference of bills to committees. We recommend the exercise of more care in the reference of Senate bills. A bill should be referred without regard to the author's service on any particular committee seeking jurisdiction when its subject matter does not normally lie in the defined province of that committee.

In redefining the jurisdiction of committees, great care should be taken clearly to resolve existing conflicts by specifying which committee shall have jurisdiction.

4. Legislative Oversight by Standing Committees

Recommendation: That the standing committees of both Houses be directed and empowered to carry on continuing review and oversight of legislation and agencies within their jurisdiction; that the power of subpoena be given them; and that the practice of creating special investigating committees be abandoned.

One of the most difficult problems studied by your committee was that of improving the relationship between Congress and the executive departments of Government. This was ordered in the joint resolution under which we have been operating and appears to your committee to be one of the important phases of our study.

While the Constitution directed the separation of powers between the executive and legislative branches, it did not intend them to go separate ways and in opposite directions. Each year the gulf between Capital Hill and the departments widens. And without effective legislative oversight of the activities of the vast executive branch, the line of democracy wears thin. Only 1 man out of the 3,000,000 Federal employees is elected by and is responsible directly to the people.

Composed of the directly elected representatives of the people, Congress needs to improve its lines of communication, its relationships, its understanding of the departments. At present there is no regular machinery of cooperation between them, aside from inadequate informal conversations or correspondence or a full-dress investigation, by which the common problems of governmental policy can be surveyed.

Vast powers are often necessarily delegated to governmental agencies. Sometimes the laws are not clear or specific and sometimes a problem defies specific legal description and adequate limitation. A clear and continuing understanding of the objectives and methods of the departments should be achieved.

We feel that this oversight problem can be handled best by directing the regular standing committees of the Senate and House, which have such matters in their jurisdiction, to conduct a continuous review of the agencies administering laws originally reported by the committees. Frequent consultation with and reporting to the committees would greatly improve relationships between the executive and legislative branches.

Such review might well include a question period by the committee arranged with the help of a greatly improved committee staff. By this method an open channel of complaints of agency shortcomings or abuses of authority could be maintained so as to furnish all Members of Congress with a clearinghouse for bringing complaints to the attention of administrators through the proper legislative committees.

Directing the regular standing committees to carry on this supervisory function appeals to your committee as a better method than the appointment of numerous select investigating committees when situations have grown so difficult as to arouse public demand for correction or special study. We recommend that the practice of creating special committees of investigation be abandoned.

Each of the reorganized standing committees should be given the power of subpoena and should be authorized to undertake studies of matters within its jurisdiction either by full or subcommittee action. By directing its standing committees to perform this oversight function, Congress can help to overcome the unfortunate cleavage between the personnel of the legislative and the executive branches.

5. Committee Hearings and Records

Recommendation: That all committees set aside monthly docket days for the public hearing of Members who have bills pending before them; that committees set regular meeting days for the consideration of such business as the committee determines; that complete records of all committee proceedings (except executive sessions) be kept; that attendance records be kept; and that a record of the votes of all Members on bills and amendments when a record vote is demanded be printed in the Congressional Record.

Criticism of conditions that handicap the individual Member of Congress as well as committee members was voiced in our hearings. These include the frequent inability of a Member of Congress to obtain a hearing on legislation which he has introduced.

Hundreds of bills introduced by Members of Congress are never considered even for a brief period by the committees to which they are referred. In order to get a hearing by the committee having their legislation in charge, members must informally solicit committeemen for the privilege of even a brief cursory appearance. This tends to bottle up legislation originating in Congress itself, while the right-of-way is generally given to legislation originating in the executive departments.

To correct this sometimes arbitrary discrimination against the bills of Members of Congress and committeemen themselves, we propose that a regular period each month be set aside by the standing committees when Members who have introduced bills may appear and publicly explain them, outline their support, and ask the full committee to decide whether extended hearings shall be held.

In order further to facilitate self-rule by the committees, it is recommended that each standing committee fix regular weekly, bi-weekly, or monthly meeting days when the committee will be in session at stated hours for the transaction of any business that committee members themselves may determine. Extra meetings in addition to the regularly stated sessions would be called by the chairman.

All committees should be required to keep a complete record of all committee proceedings, except executive sessions. Such records would include the attendance of Members at committee sessions and the votes of all members of the committee on bills and amendments on which a record vote is demanded. Such record votes should be printed in the Congressional Record.

6. Reporting of Bills

Recommendation: That committee chairmen be required to report promptly all bills approved by the committee and seek a rule to bring them to the floor for consideration.

In order to insure the carrying out of the will of the standing committees having jurisdiction of legislation, some change in the rules governing the reorganized committees is necessary.

We consider that each committee is a creature of the Congress and will have coequal standing with the other committees under the recommended reorganization plan. Each chairman, even though he is the executive of the committee, should be bound by the decisions of its members as expressed in regular committee session. The withholding of legislation from the floor, through failure to report it to the Chamber or failure to obtain a rule making it in order for

consideration by the Chamber, is not consistent with the authority and rights of the committee as expressed by its action and status.

We therefore recommend that, in the revision of the rules governing the reorganized committees, a chairman be required to report promptly to the Chamber any bill approved by his committee and to take such steps as will give the Chamber a chance to vote on it. But no committee should report out a bill unless a majority of the committee members actually are present and vote in favor of a report.

7. Limitation of Conference Reports

Recommendation: That conferees of the two Houses be limited to adjustment only of actual differences in fact between the two Houses and that matters on which both Houses are in agreement be not subject to change in conference.

Considerable testimony regarding the introduction by conferees of new material into conference reports, and the elimination or substantial change of legislation agreed to by both Houses, was presented during our committee's hearings. While the standing rules are clear regarding the limitation of conferees to the disagreements between the two Houses, parliamentary procedures makes it possible for conferees completely to rewrite legislation substantially agreed upon in both Chambers.

This is done by one House striking everything after the enacting clause, substituting one over-all amendment, and thus technically placing everything in the bill in disagreement and therefore making it subject to complete revision by the conferees. This is clearly not the intent of the rule on conferences.

Therefore, your committee recommends that rules governing conferences be clarified and enforced so as to permit consideration only of sections or parts of a bill on which the Houses have, in fact, disagreed and to forbid conferees to change those parts of legislation agreed to by both Houses.

8. Digest of Bills in Reports

Recommendation: That a complete and understandable digest of a bill, together with legislative changes made by the bill, written in nontechnical language, accompany the committee report on each bill; and that this digest include a supporting statement of reasons for its passage, of the national interest involved, its cost, and the distribution of any benefits.

Complaint was received by the committee that much of the legislation now considered by Congress is so complex as to render difficult a complete understanding of its subject matter. Not only Members of Congress, but the press, the radio, and the interested public are entitled to clear and concise explanations of legislation being con-

sidered by Congress. A clear outline of proposed legislation should be incorporated in the committee report accompanying a bill in nontechnical digest form. The report should also include supporting arguments for the passage of the bill as determined by the committee and a statement of the national interest involved in its passage. The report should also include estimates of the cost of carrying out the legislation and the distribution of the resulting burdens and benefits.

9. Expert Staffs for Committees

Recommendation: (1) That each reorganized legislative committee be authorized to employ four staff experts in its particular province; that employment be limited to persons qualifying under prescribed standards; that staff employees be not dismissed for political reasons; that staff employees serve on committee work only; and that all committee records and files be separately maintained by staff employees. (2) That present clerical personnel of committees be retained up to six per committee to serve as clerks and stenographers for the committee staff, two each to be available for committee-connected work in the offices of the chairman and ranking minority member.

The lack of skilled staffs for the committee work-shops of Congress was more complained of than perhaps any other matter before your committee. Such complaints came not only from Congress itself, but also were mentioned by almost every student of governmental affairs who appeared.

The shocking lack of adequate congressional fact-finding services and skilled staffs sometimes reaches such ridiculous proportions as to make Congress dependent upon "hand-outs" from Government departments and private groups or newspaper stories for its basis fund of information on which to base legislative decisions. Many comparisons could be drawn to illustrate the sad state of committee staffing and the lack of attention hitherto paid by Congress to this very important facility.

Your committee feels that, by considerably increasing the number and greatly improving the technical competence of committee staffs, Congress can make a great contribution to sound legislative decisions on matters involving the security and future welfare of the Nation. Just as the committee system is the most important arm of the National Legislature, so the committee staff and its competence will substantially determine the strength of this arm.

Aside from the appropriation committees (which will be considered below), we feel that each of the reorganized committees should be given at least four highly skilled professional staff members in addition to their present clerical staffs.

The four professional staff members should be paid salaries ranging between \$6,000 and \$8,000 a year, large enough to command a high

level of technical skill, and appointment to these positions should be so restricted that only persons with adequate experience and understanding of the committee's work can qualify.

We recommend that such personnel be eligible for appointment solely on merit and have qualifications to be determined by the director of congressional personnel (proposed later in this report). They should be appointed without regard to political affiliation and only persons whose qualifications are approved by the director of congressional personnel should be eligible for appointment by the committee. The staff members would be considered permanent employees of the Congress and should not be dismissed for political reasons.

Your committee realizes the difficulty in presenting a blueprint of the specific positions on each of the reorganized committees. Some committees will need two skilled attorneys and two economists; others will require a different division of skill and training. We feel that that is a matter of committee policy that must be made to fit the individual needs of the committees. The success of the addition of staff personnel will be determined by the planning of the job to be done by each staff member, and by the qualifications of the men chosen.

We further recommend that present clerical and stenographic personnel attached to the standing committees be retained for each reorganized committee up to a maximum of six clerks, but that the position of committee janitor be abolished. Two of these clerks, or others to be employed, should be attached to the office of the chairman, two to the ranking minority member, and two to the professional staff. They will be available to handle the committee correspondence and stenographic work, both for the committee staff and for the chairman and ranking minority member on matters related to committee work. It is suggested that the clerical staffs of committees be paid salaries ranging between \$2,000 and \$6,000 a year.

Professional staff members, as distinguished from clerical and stenographic personnel, should work only on matters of strictly committee business and the assignment to them of other congressional office duties should not be permitted.

All committee records, data, charts, and files should be kept distinct and separate from the congressional office records of the member serving as chairman of the committee. Committee records should be the property of the Congress and continuing access to them should be given to all members of the committee and Congress.

In addition to the staff employees authorized, committees at any time should be able to draw on the Legislative Reference Service for additional skilled assistance for limited periods of time when committee work is heavy. It is contemplated that skilled personnel will be employed by the Reference Service in order to provide for these part-time aides to assist the standing committees. (A later section

of this report deals with the improved staffing of the Legislative Reference Service.)

No committee should be allowed to borrow personnel or experts from executive agencies without the express permission of the Committee on Administration. We feel that the current custom of borrowing personnel is neither economically sound nor politically wise. Whatever staff Congress needs should be employed by Congress itself with qualifications meeting our specifications and they should work for Congress alone. We do not see the sense of appropriating money to Government agencies and asking them to hire the personnel we need.

Once the standing committees have been reorganized and expertly staffed, it will be possible to plan and conduct committee hearings more efficiently. At present hearings are often held with little advance preparation and are largely occupied by the reading of prepared statements by the witnesses. This procedure consumes precious committee time and leaves little for questions and answers. We suggest that the practice be adopted of requiring all witnesses before congressional committees to file statements of their testimony in advance and to limit their oral presentations to brief summaries of their main points. Part of the job of the expert committee staff would be to prepare digests of these statements in advance of the hearing and to brief the committeemen on the questions to be asked each witness. In this way the tedious oral repetition of written testimony could be avoided, much valuable time would be saved, and the conduct of committee hearings could be greatly expedited. Moreover, the record as presented to Congress, the press, and the public would be greatly improved.

10. Expansion of Legislative Counsel

Recommendation: That present appropriations to the Office of Legislative Counsel be expanded from \$90,000 per year to \$150,000 per year for the next 2 years; with further expansion later.

Testimony generally agreed that the work done by the Office of Legislative Counsel, within its present limitations, is very valuable and constructive. So successful has this work been in furnishing expert legal talent to the standing committees and to the conferees that many Members have asked for its expansion so as to make these bill-drafting services available to all the committees and Members of Congress. At present only 12 attorneys and law clerks compose the combined staff of the office at a total annual cost of \$90,000.

Much of the testimony heard by your committee dealt with the origins of legislation. It is well known that the formulation of legislation is no longer exclusively a congressional concern. For most bills introduced Members are merely conduits for the executive departments, private organizations, and individual constituents. More than half of the bills dropped into the "hopper" originate in the Federal

departments and bureaus and are later revised in committee to accord with congressional views. Executive initiative in law making finds its fundamental warrant in the constitutional provision that the President—

“shall from time to time give to the Congress information on the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient.”

Although comparatively little legislation originates in Congress today, that body is still responsible for sifting, testing, and debating all legislative proposals wherever they come from and for determining the final shape of public policy. Congress must decide what bills are to be considered and approved and what the legislative policies of the Nation are to be. The executive branch formulates and executes. The legislature determines policy and evaluates its performance. We feel that Congress should play a larger part in preparing legislation and determining national policy, and that it should place less reliance on bills drafted by interested departments and other groups seeking legislation.

By the progressive expansion of the Office of Legislative Counsel this will become possible. Skilled bill draftsmen, understanding legislative methods and procedures, can add much to clarity of expression, standardization of form and style, and proper construction of proposed legislation. We recommend that for the next 2 years the appropriation to this Office should be increased to \$150,000 and that provision be made for further expansion for the 2 years following. Part of this increase could well be used to expedite the revision and codification of the permanent statutes as recommended by many Federal judges and bar associations.

II. MAJORITY AND MINORITY POLICY COMMITTEES

Strong recommendations were made to your committee concerning the need for the formal expression within the Congress of the main policies of the majority and minority parties. These representations called for some mechanism which could bring about more party accountability for policies and pledges announced and made in the national platforms of the major political parties.

These recommendations were based on the theory that in a democracy national problems must be handled on a national basis. Only through the expression of the will of the people by their support of political parties on the basis of their platform pledges can the majority will be determined. Likewise the minority viewpoint is also expressed in support of the minority platform.

No one would claim that representative democracy as we know it today could exist without majority and minority parties. The 435 voices of the House and the 96 of the Senate would be a confused babel of conflicting tongues without party machinery. Instead of unorganized mob rule where the strength of varying viewpoints cannot be measured or determined, party government furnishes a tug-of-

war in which the direction and strength of opposing viewpoints can be more or less accurately measured and weighed.

Under the American party system there are always two main groups, each checking the other and offering the choice of alternative courses of action. Around these two groups Congressmen can rally and express themselves, helping in party caucuses to determine the policy for their group.

Your committee recognizes the need for freedom of action on the part of the individual Member of Congress and his right to vote at any time against the announced policy of his party. But we feel that if party accountability for policies and pledges is to be achieved, stronger and more formal mechanisms are necessary. The present steering committees, an informal and little-used device, seldom meet and never steer.

We recommend that these be replaced with the formal establishment in the House and the Senate of majority and minority policy committees. The majority policy committees of the two Houses would meet jointly at frequent intervals, as would those of the minority, to formulate the over-all legislative policy of the two parties. The majority policy committee of each House would also hold frequent meetings to consider its role in expediting consideration and passage of matters pledged to the people by their party.

On issues where party policy is involved the decisions of these policy committees would be formally announced in the proceedings of Congress and formal records would be kept of such decisions. No member of either party would be required to follow such announced party policy except as he chose to do so. Each member would be free to vote as he saw fit, but the record of his action would be available to the public as a means of holding both the party and the individual accountable.

1. Creation of Policy Committees

Recommendation: That both the House and the Senate establish formal committees for the determination and expression of majority policy and minority policy. Each of these four committees would be composed of seven members appointed in its entirety at the opening of each new Congress. The majority and minority policy committees in both Houses would be appointed by their respective majority and minority conferences.

We feel that, in the establishment of such policy committees, the Congress chosen at the last general election should be controlling and that the policy-committee membership should therefore be chosen at the beginning of each new Congress. Membership on all policy committees would automatically expire at the close of each Congress.

2. Joint Legislative-Executive Council

Recommendation: That the majority policy committees of the Senate and House serve as a formal council to meet regularly with the Executive, to facilitate the formulation and carrying out of national policy, and to improve relationships between the executive and legislative branches of the Government.

In order to narrow the widening gap between the executive and the legislative branches, we recommend that the Senate and House majority policy committees serve also on a formal council to meet at regular intervals with the Executive and with such members of his Cabinet as may be desirable, to consult and collaborate in the formulation and carrying out of national policy and to improve relationships between the two branches of the Government.

Improved understanding of each other's problems will be promoted by consultation before legislation is introduced to carry out pledged party promises and on matters of high administration policy. By giving congressional leaders a part in the formulation of policy, instead of calling upon them to enact programs prepared without their participation, better cooperation can be obtained.

It would also be desirable, we think, to include the minority policy committee from time to time in these joint conferences on broad questions of foreign and domestic policy as a further means of promoting mutual understanding and harmony between the legislature and the Executive.

The Legislative-Executive Council also would enable Congress to approach more directly the solution of difficulties and complaints resulting from administrative action. Formalizing the relationships between these two great branches of the Government, we believe, will improve and strengthen the performance of each.

3. Staffing of Policy Committees

Recommendation: That the majority and minority policy committees of each House receive \$30,000 per year each for the maintenance of a high-grade secretariat to assist in study, analysis, and research on problems involved in policy determination.

With the formal recognition of the policy committees and of their part in formulating majority and minority policy, adequate staffs should be provided by the Congress for their use.

Careful study and research will be needed in order to arrive at sound decisions. To strengthen party machinery without giving it the tools to aid in policy making would be an idle gesture. The better equipped each party is adequately to survey the issues before making its decisions, the better these decisions will be.

Therefore, your committee recommends that the majority and minority policy committees of each House receive \$30,000 per year each for the maintenance of their secretariats. Freedom of choice should be given the policy committees to select their own staffs, but no salary should be paid to any policy committee employee, we think, in excess of \$8,000 per year.

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In addition to the matters discussed above, the joint committee heard testimony from Members of Congress and others in support of, and in opposition to, other changes in the organization and operation of Congress. The more noteworthy of these suggestions pertained to—

1. Selection of committee chairmen by some method other than seniority.
2. The powers of the Committee on Rules of the House of Representatives.
3. Experimentation with periods for questioning executive-department heads.
4. Limitation of debate in the Senate.

These proposals relate to problems that have long perplexed observers of the legislative process. In each case there is much to be said on both sides. The third and fourth topics listed above, however, deal with aspects of floor procedure upon which we are not at liberty to make any recommendations under the terms of House Concurrent Resolution 18.

On the seniority system and the powers of the House Rules Committee, we heard testimony and deliberated in executive session. But we are not now prepared to submit positive recommendations with regard to them because of a lack of agreement within the committee as to workable changes in existing practices.

Representations were also made to your committee in support of broadcasting the proceedings of the Houses and committees of Congress. We investigated the technical feasibility and cost of this proposal, but make no recommendation with regard to it, owing to differences of opinion within the committee as to its desirability.

ROBERT M. LA FOLLETTE, Jr., *Chairman.*

A. S. MIKE MONRONEY, *Vice Chairman.*

ELBERT D. THOMAS.

CLAUDE PEPPER.

RICHARD B. RUSSELL.

WALLACE H. WHITE, Jr.

C. WAYLAND BROOKS.

E. E. COX.

THOMAS J. LANE.

EARL C. MICHENER.

EVERETT M. DIRKSEN.

CHARLES A. PLUMLEY.

NOTE

For discussion of the differences between committee work of Congress and of state legislatures, see Chamberlain, "Legislative Processes, National and State", (1936) 88 et seq.

CHARLES W. SHULL, THE LEGISLATIVE REORGANIZATION ACT OF 1946

20 Temple L.Q. 375, 379-381 (1947).

Passed in the closing days of the Seventy-Ninth Congress, the so-called Congressional Reorganization Act came into a somewhat belated being. Signed by President Truman on August 2, 1946 the measure became law to be operative upon the convening of the Eightieth Congress on January 3, 1947. A number of subjects, loosely related to legislative procedure, are conjoined within the one statute, giving it the appearance of an omnibus measure. All of the proposed changes in congressional procedure have been urged, jointly and severally, for a number of years, and the Legislative Reorganization Act¹ comes as the first step towards the fruition of these suggestions—some of which have become gray with age. . . .

First of all, the number of standing Committees in the Senate is reduced to *fifteen*. These are defined in the statute as the committees on Agriculture and Forestry, Appropriations, Armed Services, Banking, Civil Service and Currency, District of Columbia, Expenditures in the Executive Departments, Finance, Foreign Relations, Interstate and Foreign Commerce, Judiciary, Labor and Public Welfare, Public Lands, Public Works, and Rules. With the sole exception of the Appropriations Committee, which is allowed twenty-one members, all of the remaining bodies are given a fixed membership of thirteen. There are then 203 committee assignments possible under the new provisions of the Reorganization Act. Each Senator may serve on two standing committees and no more; except that Senators of the majority party who are members of the Committee on the District of Columbia and of the Committee on Expenditures in the Executive Departments may serve on three standing committees and no more.

In the House of Representatives there also occurs a severe revision of the committee system. The forty-eight House committees on Agriculture, Appropriations, Armed Services, Banking and Currency, Post Office and Civil Service, District of Columbia, Education and Labor, Expenditures in the Executive Departments, Foreign Affairs, House Administration, Interstate and Foreign Commerce, Judiciary, Merchant Marine and Fisheries, Public Lands, Public Works, Rules, Un-American Activities, Veterans' Affairs, and Ways and Means. Nine members comprise the Committee on Un-American Activities; twelve

¹ Legislative Reorganization Act, Public Law 601. Seventy-ninth Congress. (Chapter 753, 2d Session).

compose the Rules Committee. Nine Committees, Post Office and Civil Service, District of Columbia, Education and Labor, Expenditures in the Executive Departments, Foreign Affairs, House Administration, Merchant Marine and Fisheries, Public Lands, and Ways and Means, have twenty-five members each. The Committees on Agriculture, Banking and Currency, Interstate and Foreign Commerce, Judiciary, Public Works, and Veterans' Affairs will have a membership of twenty-seven. Armed Services as a committee consists of thirty-three members, and the Appropriations Committee has forty-three. The grand total of committee seats under the new organization will be 484. Each member shall be elected to serve on one standing committee and no more with the following exceptions. Members of the District of Columbia Committee or of the Un-American Activities Committee may be selected to serve on two standing committees, while members of the majority party on the Committee on Expenditures in the Executive Departments or House Administration Committee are also limited to two posts.

The jurisdiction of each of these newer House and Senate Committees is carefully defined in the body of the statute with a view of eliminating the conflicts and overlappings which have marred the orderly process of congressional legislation. As far as it was possible, previous allocations of the fields of specialization of the individual committees were preserved. Much of the chance for confusion of effort and controversy within the congressional committee system was eliminated by the device of the statutory definition of the field of endeavor and jurisdictional scope of each such body. Senate provisions mention the *appointment* of committees; the word election appears in those which have to do with the choice of the personnel of these bodies in the House. Presumably there will be no great change in the methods by which committees are actually chosen within each chamber, at the present time.

At the commencement of each Congress, says the statute, the House shall elect a chairman of each standing committee; temporary vacancies are to be filled according to seniority and rank within the group, but any permanent vacancy reverts to election by the whole House of Representatives.

Aside from the reduction in the number and volume of committees and committee positions, the effect of the statute upon the procedure and modes of establishing committee personnel will be scant. Seniority and specializations will still have to be considered in determining the personnel of the committees within each branch. Some members—for instance Senators O'Mahoney and Lucas—will have to descend from their lofty pinnacle of an impossible number of committee assignments.

Many individual critics of the measure will be disappointed that the reorganization of the committee system was not more thorough. Perhaps they are right, but a good half loaf is often better than a painful of mouldy loaves. Should there be an installation of this newer

system, some difficulties, some dilemmas, some defects and demerits of congressional committee procedure and organization will certainly vanish and disappear.

LEGISLATIVE REORGANIZATION ACT OF 1946

Chapter 753, Public Law 601, Laws of 79th Congress, 2nd Session.

TITLE I—CHANGES IN RULES OF SENATE AND HOUSE

RULE-MAKING POWER OF THE SENATE AND HOUSE

Sec. 101. The following sections of this title are enacted by the Congress:

(a) As an exercise of the rule-making power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply; and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(b) With full recognition of the constitutional right of either House to change such rules (so far as relating to the procedure in such House) at any time, in the same manner and to the same extent as in the case of any other rule of such House.

PART 3—PROVISIONS APPLICABLE TO BOTH HOUSES

PRIVATE BILLS BANNED

Sec. 131. No private bill or resolution (including so-called omnibus claims or pension bills), and no amendment to any bill or resolution, authorizing or directing (1) the payment of money for property damages, for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act, or for a pension (other than to carry out a provision of law or treaty stipulation); (2) the construction of a bridge across a navigable stream; or (3) the correction of a military or naval record, shall be received or considered in either the Senate or the House of Representatives.

CONGRESSIONAL ADJOURNMENT

Sec. 132. Except in time of war or during a national emergency proclaimed by the President, the two Houses shall adjourn sine die not later than the last day (Sundays excepted) in the month of July in each year unless otherwise provided by the Congress.

COMMITTEE PROCEDURE

Sec. 133. (a) Each standing committee of the Senate and the House of Representatives (except the Committees on Appropriations) shall fix regular weekly, biweekly, or monthly meeting days for the

transaction of business before the committee, and additional meetings may be called by the chairman as he may deem necessary.

(b) Each such committee shall keep a complete record of all committee action. Such record shall include a record of the votes on any question on which a record vote is demanded.

(c) It shall be the duty of the chairman of each such committee to report or cause to be reported promptly to the Senate or House of Representatives, as the case may be, any measure approved by his committee and to take or cause to be taken necessary steps to bring the matter to a vote.

(d) No measure or recommendation shall be reported from any such committee unless a majority of the committee were actually present.

(e) Each such standing committee shall, so far as practicable, require all witnesses appearing before it to file in advance written statements of their proposed testimony, and to limit their oral presentations to brief summaries of their argument. The staff of each committee shall prepare digests of such statements for the use of committee members.

(f) All hearings conducted by standing committees or their subcommittees shall be open to the public, except executive sessions for marking up bills or for voting or where the committee by a majority vote orders an executive session.

COMMITTEE POWERS

Sec. 134. (a) Each standing committee of the senate, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures (not in excess of \$10,000 for each committee during any Congress) as it deems advisable. Each such committee may make investigations into any matter within its jurisdiction, may report such hearings as may be had by it, and may employ stenographic assistance at a cost not exceeding 25 cents per hundred words. The expenses of the committee shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman.

(b) Every committee and subcommittee serving the Senate and House of Representatives shall report the name, profession and total salary of each staff member employed by it, and shall make an accounting of funds appropriated to it and expended by it to the Secretary of the Senate and Clerk of the House of Representatives, as the case may be, at least once every six months, and such information shall be published periodically in the Congressional Directory when and as the same is issued and as Senate and House documents, respectively, every three months.

(c) No standing committee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session.

CONFERENCE RULES ON AMENDMENTS IN NATURE OF SUBSTITUTE

Sec. 135. (a) In any case in which a disagreement to an amendment in the nature of a substitute has been referred to conferees, it shall be in order for the conferees to report a substitute on the same subject matter; but they may not include in the report matter not committed to them by either House. They may, however, include in their report in any such case matter which is a germane modification of subjects in disagreement.

(b) In any case in which the conferees violate subsection (a), the conference report shall be subject to a point of order.

LEGISLATIVE OVERSIGHT BY STANDING COMMITTEES

Sec. 136. To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee; and, for that purpose, shall study all pertinent reports and data submitted to the Congress by the agencies in the executive branch of the Government.

DECISIONS ON QUESTIONS OF COMMITTEE JURISDICTION

Sec. 137. In any case in which a controversy arises as to the jurisdiction of any standing committee of the Senate with respect to any proposed legislation, the question of jurisdiction shall be decided by the presiding officer of the Senate, without debate, in favor of that committee which has jurisdiction over the subject matter which predominates in such proposed legislation; but such decision shall be subject to an appeal. . . .

PRESERVATION OF COMMITTEE HEARINGS

Sec. 141. The Librarian of the Library of Congress is authorized and directed to have bound at the end of each session of Congress the printed hearings of testimony taken by each committee of the Congress at the preceding session.

REMODELED CONGRESS AT WORK

Reprinted from the United States News, Vol. 22, pp. 42-43 (1947).*

From committees to subcommittees. Streamlining trimmed off about three fifths of the old committees and gave the rest broader fields of jurisdiction, more power and better-paid staffs. Each committee was expected to do whatever investigating was needed in its own field.

But the streamlining left 47 Senators and Representatives who otherwise would have been committee chairmen without any committees to head. The first breaks in the reorganization plan came with the creation of special investigation committees: for national defense and small business in the Senate; for supply of newsprint and small business in the House.

After the committees were organized, the dam broke. The new committees were large, and dealt with many subjects. And there were about 40 chairless would-be chairmen. The committees broke into huddles of subcommittees. In the House, some committees have 10 or 12 subcommittees. Members who used to go from one committee meeting to another now go from one subcommittee meeting to another.

This new technique in some cases is tending to add another layer of red tape to congressional procedure. Under the old system, the committee that prepared a bill brought the measure to the floor, directly. Now the first group to handle a bill usually is a subcommittee, and the product has to be approved by the full committee before going to the floor.

If the chairman insists upon a meticulous study by the full committee before approval, the work of the subcommittee is gone over from end to end, amounting to a double job.

WALTER P. ARMSTRONG, SPECIFIC STEPS FOR IMPROVING LEGISLATION

(A review of Kefauver and Levin, "A Twentieth Century Congress")
33 A.B.A.Jour. 674, 675-676 (1947).

. . . This study was published some four months after the effective date of the LaFollette-Monroney Act and takes into account the limited experience under that statute. While appreciating the progress made under this Act, the authors point out that the Resolution creating the Joint Committee tied its hands by forbidding consideration of "certain basic matters that go to the heart of any thorough repairing of ancient Congressional machinery. Equally important, due to the wide divergencies of viewpoint existing among

* (An independent weekly magazine on national affairs published at Washington. Copyright 1947, United States News Pub. Corp.)

the members of the Joint Committee, only a part of the worthwhile suggestions that were made found a way into their Report to Congress. Finally, even the recommendations of this diluted Report were whittled down drastically by the political compromises that were essential if any reorganization bill was to pass at all. Consequently, the real job still remains." . . . It was by reducing and paralleling the committees of the House and Senate that the proponents of the Reorganization Act hoped to accomplish the greatest reform. There has been improvement but the goal is far from attained either in theory or practice. It was a major accomplishment of the Reorganization Act to reduce Senate committees from thirty-three to fifteen and House committees from forty-eight to nineteen. Moreover, some of the Senate and House Committees are matched so as to have identical functions. Mr. Kefauver and Dr. Levin endorse the proposal of Dr. George B. Galloway⁶ for thirteen committees in each House, with identic functions. They do not suggest, however, how the evil of sub-committees⁷ and special committees is to be eliminated. Riders to appropriation bills are prohibited by the Reorganization Act; they should not be permitted to be attached to any bill.

The Act provides that the House taxing and spending committees shall meet jointly at the beginning of each session and prepare a legislative budget fixing the maximum amount to be appropriated. "But these well-intentioned provisions are of little value because there are no means of enforcing them. The only effective way that receipts and expenditures can be balanced is to vest the money-raising and spending powers in . . . one Committee . . ."

C. Methods and Powers of Investigation

NEBBIA v. PEOPLE OF THE STATE OF NEW YORK

Supreme Court of the United States, 1933.

291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469.

ROBERTS, J. The Legislature of New York established, by Chapter 158 of the Laws of 1933, a Milk Control Board with power, among other things, to "fix minimum and maximum . . . retail prices to be charged by . . . stores to consumers for consumption off the premises where sold." The Board fixed nine cents as the price to be charged by a store for a quart of milk. Nebbia, the proprietor of a grocery store in Rochester, sold two quarts and a five cent loaf of bread for eighteen cents; and was convicted for violating the Board's order. At his trial he asserted the statute and order

⁶ See *Congress at the Crossroads*, by George B. Galloway (Thomas Y. Crowell Co., New York, 1946).

⁷ In the *New York Times* of April 14, 1947, is a list of 146 sub-committees. See also *United States Code Congressional Service*, 1947, Advance Sheet 4 (page 23 et seq.).

contravene the equal protection clause and the due process clause of the Fourteenth Amendment, and renewed the contention in successive appeals to the county court and the Court of Appeals. Both overruled his claim and affirmed the conviction.

The question for decision is whether the Federal Constitution prohibits a state from so fixing the selling price of milk. We first inquire as to the occasion for the legislation and its history.

During 1932 the prices received by farmers for milk were much below the cost of production. The decline in prices during 1931 and 1932 was much greater than that of prices generally. The situation of the families of dairy producers had become desperate and called for state aid similar to that afforded the unemployed, if conditions should not improve.

On March 10, 1932, the senate and assembly resolved "That a joint Legislative committee is hereby created . . . to investigate the causes of the decline of the price of milk to producers and the resultant effect of the low prices upon the dairy industry and the future supply of milk to the cities of the States; to investigate the cost of distribution of milk and its relation to prices paid to milk producers, to the end that the consumer may be assured of an adequate supply of milk at a reasonable price both to producer and consumer." The committee organized May 6, 1932, and its activities lasted nearly a year. It held 13 public hearings at which 254 witnesses testified and 2350 typewritten pages of testimony were taken. Numerous exhibits were submitted. Under its direction an extensive research program was prosecuted by experts and official bodies and employees of the state and municipalities, which resulted in the assembling of much pertinent information. Detailed reports were received from over 100 distributors of milk, and these were collated and the information obtained analyzed. As a result of the study of this material, a report covering 473 closely printed pages, embracing the conclusions and recommendations of the committee, was presented to the legislature April 10, 1933. This document included detailed findings with copious references to the supporting evidence; appendices outlining the nature and results of prior investigations of the milk industry of the state, briefs upon the legal questions involved, and forms of bills recommended for passage. The conscientious effort and thoroughness exhibited by the report lend weight to the committee's conclusions.

In part those conclusions are:

Milk is an essential item of diet. It cannot long be stored. It is an excellent medium for growth of bacteria. These facts necessitate safeguards in its production and handling for human consumption which greatly increase the cost of the business. Failure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination.

The production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people. Dairying yields fully one-half of the total income from all farm products. Dairy farm investment amounts to approximately \$1,000,000,000. Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the state.

In addition to the general price decline, other causes for the low price of milk include: a periodic increase in the number of cows and in milk production; the prevalence of unfair and destructive trade practices in the distribution of milk, leading to a demoralization of prices in the metropolitan area and other markets; and the failure of transportation and distribution charges to be reduced in proportion to the reduction in retail prices for milk and cream.

The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 per cent., because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk-shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i. e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price, to his own and the producer's detriment.

Various remedies were suggested, amongst them united action by producers, the fixing of minimum prices for milk and cream by state authority, and the imposition of certain graded taxes on milk dealers proportioned so as to equalize the cost of milk and cream to all dealers and so remove the cause of price-cutting.

The legislature adopted Chapter 158 as a method of correcting the evils, which the report of the committee showed could not be expected to right themselves through the ordinary play of the forces of supply and demand, owing to the peculiar and uncontrollable factors affecting the industry. The provisions of the statute are summarized in the margin.

Section 312(e), on which the prosecution in the present case is founded, provides: "After the board shall have fixed prices to be charged or paid for milk in any form . . . it shall be unlawful for a milk dealer to sell or buy or offer to sell or buy milk at any price less or more than such price . . . , and no method or device shall be lawful whereby milk is bought or sold . . . at a price less or more than such price . . . whether by any discount, or rebate, or free service, or advertising allowance, or a combined price for such milk together with another commodity or commodities, or service or services, which is less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, or service or services, when sold or offered for sale separately or otherwise. . . ."

. . . The more serious question is whether, in the light of the conditions disclosed, the enforcement of section 312 (e) denied the appellant the due process secured to him by the Fourteenth Amendment.

. . . The milk industry in New York has been the subject of long-standing and drastic regulation in the public interest. The legislative investigation of 1932 was persuasive of the fact that for this and other reasons unrestricted competition aggravated existing evils, and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community. The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price-cutting and reduced the income of the farmer below the cost of production. We do not understand the appellant to deny that in these circumstances the legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and to sell without incurring the delivery costs of the latter. In the order of which complaint is made the Milk Control Board fixed a price of ten cents per quart for sales by a distributor to a consumer, and nine cents by a store to a consumer, thus recognizing the lower costs of the store, and endeavoring to establish a differential which would be just to both. In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk. . . .

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative

purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine." *Northern Securities Co. v. United States*, 193 U.S. 197, 337-8, 24 S.Ct. 436, 48 L.Ed. 679. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

The law-making bodies have in the past endeavored to promote free competition by laws aimed at trusts and monopolies. The consequent interference with private property and freedom of contract has not availed with the courts to set these enactments aside as denying due process. Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

Tested by these considerations we find no basis in the due process clause of the Fourteenth Amendment for condemning the provisions of the Agriculture and Markets Law here drawn into question.

The judgment is

Affirmed.

EXCERPT FROM BRIEF FOR APPELLEE IN *NEBBIA v. PEOPLE OF THE STATE OF NEW YORK*

LEGISLATIVE FINDINGS OF FACT

This 1933 statute received a great deal of attention from the Legislature during the eight weeks it was pending and before that the entire matter had been carefully investigated and considered by a special legislative committee. This committee, which became known as the Pitcher Committee from the name of its chairman, acted under a joint resolution of March 10, 1932, which instructed it:

“ . . . to investigate the causes of the decline of the price of milk to producers and the resultant effect of the low prices upon the dairy industry and the future supply of milk to the cities of the State . . . ” (Report, 9).

The Report, copies of which will be submitted to the Court, vouches for the intelligence, thoroughness and sincerity with which the Committee conducted its investigation. A preliminary report, consisting of the “Conclusions and Recommendations” (see Report, 13-23) and some other material, was filed February 13, 1933, and printed as N. Y. Legis.Doc. No. 59 of 1933. The final report in mimeographed form was available somewhat later, and is now in print consisting of 473 pages. It is probably the most thorough and best organized report ever presented of the actual functioning of a great milk market. The following findings are main headings among its Conclusions and Recommendations:

“1. The production and distribution of milk in this state as a paramount industry and affects in a large measure the health and prosperity of the people of the state. It is the duty of the state to take such measures as are necessary and reasonable to preserve this vital industry.”

“2. The financial situation of dairy farmers in the state is desperate and has grown increasingly critical during the period of the Committee's investigation.”

“3. The principal causes of the extremely low prices paid to producers for milk are: The unprecedented decline in the general level of prices; a periodic increase in the number of cows and in milk production; the prevalence of unfair and destructive trade practices in the distribution of milk leading to a demoralization of prices in the metropolitan area and other markets and the failure of charges for transportation and distribution to be reduced in proportion to the reduction in retail prices of milk and cream.”

“4. The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control.”

“5. Among the remedies which might be applied to mitigate the evil of price-cutting are: Universal application of the classified price plan with uniform prices to all milk dealers for milk utilized in each classification; the fixing of minimum prices to be charged by milk dealers for milk and cream sold to consumers and other customers;

the imposition of a graduated tax to be paid by milk dealers on their sales of milk and cream in excess of the normal or average proportion of the milk supply of the entire milk shed which is sold by the dealers in fluid form."

"6. Universal application of the classified price plan and control of surplus milk by the producers through effective cooperative organization appears to offer the best prospect for permanent stabilization of the dairy industry in the New York milk shed."

"7. As an emergency measure, a temporary milk control board should be created, with broad powers to regulate and stabilize the milk industry as well as may be done under the circumstances. This board should also foster and promote the more complete organization of the producers as outlined above."

Each one of those seven conclusions is supported by subheadings indicating the reasoning and data which justify it. The remainder of the printed Report is a careful analysis of the evidence (2350 type-written pages besides the exhibits) which was before the Pitcher Committee. This leads up to the Bill (Report, 367-379) which became the statute now involved. The opening section of that statute is as follows:

"Section 300. Legislative finding; statement of policy. This article is enacted in the exercise of the police power of the state, and its purposes generally are to protect the public health and public welfare. It is hereby declared that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production sale and distribution of milk and milk products in this state, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled. That such conditions constitute a menace to the health, welfare and reasonable comfort of the inhabitants of the state. That in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk in the state of New York is hereby declared to be a business affecting the public health and interest. That the production and distribution of milk is a paramount industry upon which the prosperity of the state in large measure depends. That the present acute economic emergency, being in part the consequence of a severe and increasing disparity between the prices of milk and other commodities, which disparity has largely destroyed the purchasing power of milk producers for industrial products, has broken down the orderly production and marketing of milk and has seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper standards of production, sanitation and marketing. The foregoing statements of fact, policy and application of this article are hereby declared as a matter of legislative determination."

For present purposes a legislative finding is not unlike the verdict of a jury. It is entitled to respect, and will stand if it is bottomed upon evidence and not clearly against the weight of it.

We submit that the New York Legislature was justified in enacting the particular statutory provision now involved, the minimum-price-to-the-consumer provision, if it had before it evidence which established the probability of three things. First, that a serious condition existed affecting the production and distribution of milk, and amounting to a public emergency. Second, that the milk business is affected by conditions peculiar to itself so that it could not be cured by operation of the law of supply and demand. Third, that price-cutting in the sale of milk from stores to consumers was a substantial contributing factor to the serious situation in the milk business.

MCGRAIN v. DAUGHERTY

Supreme Court of the United States, 1926.

273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is an appeal from the final order in a proceeding in habeas corpus discharging a recusant witness held in custody under process of attachment issued from the United States Senate in the course of an investigation which it was making of the administration of the Department of Justice. A full statement of the case is necessary.

The Department of Justice is one of the great executive departments established by congressional enactment and has charge, among other things, of the initiation and prosecution of all suits, civil and criminal, which may be brought in the right and name of the United States to compel obedience or punish disobedience to its laws, to recover property obtained from it by unlawful or fraudulent means, or to safeguard its rights in other respects; and also of the assertion and protection of its interests when it or its officers are sued by others. The Attorney General is the head of the department, and its functions are all to be exercised under his supervision and direction.

Harry M. Daugherty became the Attorney General March 5, 1921, and held that office until March 28, 1924, when he resigned. Late in that period various charges of misfeasance and nonfeasance in the Department of Justice after he became its supervising head were brought to the attention of the Senate by individual senators and made the basis of an insistent demand that the department be investigated to the end that the practices and deficiencies which, according to the charges, were operating to prevent or impair its right administration might be definitely ascertained and that appropriate and effective measures might be taken to remedy or eliminate the evil. The Senate regarded the charges as grave and requiring legislative attention and action. Accordingly it formulated, passed and invited the House of Representatives to pass (and that body did pass) two measures taking important litigation then in immediate contemplation out of the control

of the Department of Justice and placing the same in charge of special counsel to be appointed by the President; and also adopted a resolution authorizing and directing a select committee of five senators—"to investigate circumstances and facts, and report the same to the Senate, concerning the alleged failure of Harry M. Daugherty, Attorney General of the United States, to prosecute properly violators of the Sherman Anti-trust Act and the Clayton Act against monopolies and unlawful restraint of trade; the alleged neglect and failure of the said Harry M. Daugherty, Attorney General of the United States, to arrest and prosecute Albert B. Fall, Harry F. Sinclair, E. L. Doheny, C. R. Forbes, and their co-conspirators in defrauding the Government, as well as the alleged neglect and failure of the said Attorney General to arrest and prosecute many others for violations of Federal statutes and his alleged failure to prosecute properly, efficiently, and promptly, and to defend, all manner of civil and criminal actions wherein the Government of the United States is interested as a party plaintiff or defendant. And said committee is further directed to inquire into, investigate and report to the Senate the activities of the said Harry M. Daugherty, Attorney General, and any of his assistants in the Department of Justice which would in any manner tend to impair their efficiency or influence as representatives of the Government of the United States."

The resolution also authorized the committee to send for books and papers, to subpoena witnesses, to administer oaths, and to sit at such times and places as it might deem advisable.

In the course of the investigation the committee issued and caused to be duly served on Mally S. Daugherty—who was a brother of Harry M. Daugherty and president of the Midland National Bank of Washington Court House, Ohio,—a subpoena commanding him to appear before the committee for the purpose of giving testimony bearing on the subject under investigation, and to bring with him the "deposit ledgers of the Midland National Bank since November 1, 1920; also note files and transcript of owners of every safety vault; also records of income drafts; also records of any individual account or accounts showing withdrawals of amounts of \$25,000 or over during above period." The witness failed to appear.

A little later in the course of the investigation the committee issued and caused to be duly served on the same witness another subpoena commanding him to appear before it for the purpose of giving testimony relating to the subject under consideration—nothing being said in this subpoena about bringing records, books or papers. The witness again failed to appear; and no excuse was offered by him for either failure.

The committee then made a report to the Senate stating that the subpoenas had been issued, that according to the officer's returns—copies of which accompanied the report—the witness was personally served; and that he had failed and refused to appear. After a reading of the report, the Senate adopted a resolution reciting these facts and proceeding as follows:

"Whereas the appearance and testimony of the said M. S. Daugherty is material and necessary in order that the committee may properly execute the functions imposed upon it and may obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper: Therefore be it

"Resolved, That the President of the Senate pro tempore issue his warrant commanding the Sergeant at Arms or his deputy to take into custody the body of the said M. S. Daugherty wherever found, and to bring the said M. S. Daugherty before the bar of the Senate, then and there to answer such questions pertinent to the matter under inquiry as the Senate may order the President of the Senate pro tempore to propound; and to keep the said M. S. Daugherty in custody to await the further order of the Senate."

It will be observed from the terms of the resolution that the warrant was to be issued in furtherance of the effort to obtain the personal testimony of the witness, and, like the second subpoena, was not intended to exact from him the production of the various records, books and papers named in the first subpoena.

The warrant was issued agreeable to the resolution and was addressed simply to the Sergeant at Arms. That officer on receiving the warrant endorsed thereon a direction that it be executed by John J. McGrain, already his deputy, and delivered it to him for execution.

The deputy, proceeding under the warrant, took the witness into custody at Cincinnati, Ohio with the purpose of bringing him before the bar of the Senate as commanded; whereupon the witness petitioned the federal district court in Cincinnati for a writ of habeas corpus. The writ was granted and the deputy made due return setting forth the warrant and the cause of the detention. After a hearing the court held the attachment and detention unlawful and discharged the witness, the decision being put on the ground that the Senate in directing the investigation and in ordering the attachment exceeded its powers under the Constitution, 299 F. 620. The deputy prayed and was allowed a direct appeal to this Court under sec. 238 of the Judicial Code as then existing.

We have given the case earnest and prolonged consideration because the principal questions involved are of unusual importance and delicacy. They are (a) whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution, and (b) whether it sufficiently appears that the process was being employed in this instance to obtain testimony for that purpose.

The first of the principal questions—the one which the witness particularly presses on our attention—is, as before shown, whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony

needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.

The Constitution provides for a Congress consisting of a Senate and House of Representatives and invests it with "all legislative laws which shall be necessary and proper" for carrying into execution these powers and "all other powers" vested by the Constitution in the United States or in any department or officer thereof. Art. I, secs. 1, 8. Other provisions show that, while bills can become laws only after being considered and passed by both houses of Congress, each house is to be distinct from the other, to have its own officers and rules, and to exercise its legislative function independently. Art. I, secs. 2, 3, 5, 7. But there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively. So the question arises whether this power is so far incidental to the legislative function as to be implied.

In actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution; and a like view has prevailed and has been carried into effect in both houses of Congress and in most of the state legislatures. . . .

We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action—and both houses have employed the power accordingly up to the present time. The acts of 1798 and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both houses and to enable them to employ it "more effectually" than before. So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

We are further of opinion that the provisions are not of doubtful meaning, but, as was held by this Court in the cases we have reviewed, are intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experi-

once has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised. . . .

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable. In the Chapman case, where the resolution contained no avowal, this Court pointed out that it plainly related to a subject-matter of which the Senate had jurisdiction, and said "We cannot assume on this record that the action of the Senate was without a legitimate object"; and also that "it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded." 166 U.S. 669–670, 17 S.Ct. 681. In *People v. Keller*, 99 N.Y. 463, 2 N.E. 615, 52 Am.Rep. 49, where the Court of Appeals of New York sustained an investigation ordered by the Senate of that state where the resolution contained no avowal, but disclosed that it definitely related to the administration of a public office the duties of which were subject to legislative regulation, the court said (pp. 485–487 [2 N.E. 627]): "Where public institutions under the control of the State are ordered to be investigated it is generally with the view of some legislative action respecting them, and the same may be said in respect of public officers." And again: "We are bound to presume that the action of the legislative body was with a legitimate object if it is capable of being so construed, and we have no right to assume that the contrary was intended." . . .

We think the resolution and proceedings give no warrant for thinking the Senate was attempting or intending to try the Attorney General at its bar or before its committee for any crime or wrongdoing. Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrong-doing on his part.

The second resolution—the one directing that the witness be attached—declares that his testimony is sought with the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of "other action" if deemed "necessary or proper" is of course open to criticism in that there is

no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed.

We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have him give testimony pertinent to the inquiry, either at its bar or before the committee; and that the district court erred in discharging him from custody under the attachment.

Another question has arisen which should be noticed. It is whether the case has become moot. The investigation was ordered and the committee appointed during the Sixty-eighth Congress. That Congress expired March 4, 1925. The resolution ordering the investigation in terms limited the committee's authority to the period of the Sixty-eighth Congress; but this apparently was changed by a later and amendatory resolution authorizing the committee to sit at such times and places as it might deem advisable or necessary. It is said in Jefferson's Manual: "Neither House can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two branches. When done, it is by a bill constituting them commissioners for the particular purpose." But the context shows that the reference is to the two houses of Parliament when adjourned by prorogation or dissolution by the King. The rule may be the same with the House of Representatives whose members are all elected for the period of a single Congress; but it cannot well be the same with the Senate, which is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation.

Mr. Hinds in his collection of precedents says: "The Senate, as a continuing body, may continue its committees through the recess following the expiration of a Congress"; and, after quoting the above statement from Jefferson's Manual, he says: "The Senate, however, being a continuing body, gives authority to its committees during the recess after the expiration of a Congress." So far as we are advised the select committee having this investigation in charge has neither made a final report nor been discharged; nor has it been continued by an affirmative order. Apparently its activities have been suspended pending the decision of this case. But, be this as it may, it is certain that the committee may be continued or revived now by motion to that effect, and, if continued or revived, will have all its original powers. This being so, and the Senate being a continuing body, the case cannot be said to have become moot in the ordinary sense. . . .

Final order reversed.

DOYLE v. HOFSTADER

Court of Appeals of New York, 1931.
257 N.Y. 244, 177 N.E. 489, 87 A.L.R. 418.

CARDOZO, C. J. By a joint resolution of the Senate and the Assembly of the state of New York, adopted March 23, 1931, it was resolved that a joint legislative committee be constituted to investigate the administration and conduct of the various departments of the city of New York.

The appellant, William F. Doyle, was subpoenaed to attend before the committee, and, upon appearing, was directed to answer a series of questions relating to his practice before the board of standards and appeals. There had been preliminary testimony from the lips of other witnesses that fees of extraordinary magnitude had been paid for his services during a period of years. The questions put to the appellant were designed to inform the committee whether he had divided these fees with a political leader, or with some one else, in furtherance of a concerted plan of bribery and corruption, and whether he had paid any part of them as a bribe to any public officer.

The appellant has been adjudged in contempt, first by a majority of the joint legislative committee, and then by the Supreme Court, for his refusal to answer the questions propounded. Typical questions are these:

"Question: When you practiced before this board, did you split your fees? Answer: Do you mean with the Board of Standards and Appeals?"

"Question: I mean did you split them with anybody? Answer: I never split a nickel with the Board of Standards and Appeals."

"Question: I asked you whether you split them with anybody, whether they were on the Board of Standards and Appeals or whether they were not? Answer: I refuse to answer on the ground that it might tend to incriminate me."

Again: "Question: Dr. Doyle, did you, in reference to cases pending before the Board of Standards and Appeals, bribe any public official? Answer: You are alluding to the Board of Standards and Appeals? No."

"Question: Now you did not bribe any member of the Board of Standards and Appeals? Answer: No."

"Question: Did you bribe any other public official? Answer: I refuse to answer on the ground that it might tend to incriminate me."

"Question: Did you give any of the proceeds of those fees to any political leader in the County of New York? Answer: I refuse to answer that question on the ground that answering might tend to incriminate me."

We are to determine whether the refusal was contumacious or privileged.

The Constitution of the state provides that no person shall "be compelled in any criminal case to be a witness against himself." Const. art. 1, § 6. . . .

By the terms of the joint resolution creating the legislative committee, the Legislature has said: "Whenever in its judgment the public interest demands, the committee may determine that a person shall not be excused from attending and testifying before said committee . . . on the ground that the testimony . . . required of him may tend to incriminate him or to subject him to a penalty or forfeiture; but no person so attending and testifying . . . who has duly claimed excuse or privilege, which would be sufficient except for this provision of this resolution and which said excuse or privilege has been expressly denied by the committee, shall be subject to prosecution or to any penalty or forfeiture for or on account of the transaction, matter or thing concerning which he may as aforesaid testify . . . in obedience to its subpoena."

This resolution, if valid, is in effect an act of amnesty. It wipes out as to the witness whose claim of privilege has been denied the criminal statutes of the state with all their pains and penalties, and, like a pardon, makes him a new man. A pardon may be granted by the Governor after conviction of the crime. Const. art. 4, § 5. An act of amnesty may be passed, like any other bill, by the Legislature, acting separately in its two houses (article 3, § 15), with the approval of the Governor, or, in the event of his veto, by a two-thirds vote thereafter (article 4, § 9). "Every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it shall have originated." Const. art. 4, § 9. *This resolution was never presented to the Governor. It never received his approval or his veto. It is not an act of amnesty; it is not an "act" at all. People ex rel. Argus Co. v. Palmer, 12 Misc. 392, 33 N.Y.S. 1088; Id., 146 N.Y. 406, 42 N.E. 543.*

There are precedents in the books for what is sometimes styled a legislative pardon. If they are scrutinized, they will be found in every instance to have been statutes in the usual form. They were acts of amnesty or indemnity adopted by the Legislature with the Governor's approval. *United States v. Hughes (D.C.) 175 F. 238; United States v. Hall (D.C.) 53 F. 352; State ex rel. Anheuser-Busch Brewing Ass'n v. Eby, 170 Mo. 497, 71 S.W. 52; State v. Applewhite, 75 N.C. 229; cf. Brown v. Walker, 161 U.S. 591, 601, 16 S.Ct. 644, 40 L.Ed. 819; Matter of Garland, 4 Wall. 333, 18 L.Ed. 366; 4 Wigmore on Evidence, § 2281, and statutes and cases there collated. Never has it been held that a Legislature alone may suspend the criminal law as to a person or a class of persons. In the Constitution of that country from whose polity our own institutions derive to a large extent their origin and meaning, the rule is said to be that a resolution of the House of Commons is invalid and of no effect if in conflict with existing law. Anson, Law and Custom of the Con-*

stitution, vol. 1, pp. 182, 185, 186, 192. We cannot bring ourselves to believe that the efficacy of resolutions is any greater in New York.

The argument is made that a legislative body has inherent power to conduct an investigation for the discovery of abuses in the operations of government (*People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 478, 162 N.E. 487, 60 A.L.R. 851; *People ex rel. McDonald v. Keeler*, 99 N.Y. 463, 2 N.E. 615, 52 Am.Rep. 49; *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1; *Sinclair v. United States*, 279 U.S. 263, 49 S.Ct. 268, 73 L.Ed. 692; *Landis*, *Constitutional Limitations on the Congressional Power of Investigation*, 40 *Harvard Law Review* 153), and that the power to give immunity to witnesses, and to suspend to that extent the general laws of the state, must be deemed to be a necessary incident of the power to investigate. But it is not such an incident. It may at times be a useful incident, but it is not a necessary one, necessary, that is to say, in the sense of being a power so indispensable to the ordinary exercise of the investigating function that it must be taken as implied. . . . It may be necessary for fruitful results in a particular instance, but it is not so generally indispensable as to attach itself automatically to the mere power to inquire. Whether the good to be attained by procuring the testimony of criminals is greater or less than the evil to be wrought by exempting them forever from prosecution for their crimes is a question of high policy as to which the lawmaking department of the government is entitled to be heard. In the state of New York that department is not the Legislature alone, but the Legislature and the Governor, the one as much as the other an essential factor in the process. *People v. Bowen*, 21 N.Y. 517, 519, 521; *Matter of City of Long Beach v. Public Service Commission*, 249 N.Y. 480, 489, 490, 164 N.E. 553. We beg the question when we argue that the Legislature may give immunity because the Legislature is the sole custodian of the legislative power. It is not the sole custodian of that power. The power is divided between the Legislature and the Governor. Cf. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 36 S.Ct. 708, 60 L.Ed. 1172; *Hawke v. Smith*, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871, 10 A.L.R. 1504. Article 3, § 1, of the Constitution, must be read in conjunction with article 4, § 9. *People v. Bowen*, *supra*; *Matter of City of Long Beach v. Public Service Commission*, *supra*. The Legislature can initiate, but without the action of the Governor it is powerless to complete. Not only do we beg the question when we infer the validity of the immunity from the possession by the Legislature of the full legislative power; we concede by implication that, unless the legislative power has been thus committed without division, the immunity must fail. The argument, reduced to that basis, is seen to be self-destructive. The grant of an immunity is in very truth the assumption of a legislative power, and that is why the Legislature, acting alone, is incompetent to declare it. It is the assumption of a power to annul as to individuals or classes the statutory law of crimes, to stem the course of justice, to absolve the grand jurors of the county from the performance of their duties,

and the prosecuting officer from his. All these changes may be wrought through the enactment of a statute. They may be wrought in no other way while the legislative structure of our government continues what it is.

The argument is made that the jurisdiction to grant immunity is an incident of the jurisdiction to punish for contempt. It is no more such an incident for a committee of the Legislature (Legislative Law [Consol.Laws, c. 32], § 4, subd. 5; *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377; *People ex rel. McDonald v. Keeler*, 99 N.Y. 463, 2 N.E. 615, 52 Am.Rep. 49; *Matter of Barnes*, 204 N.Y. 108, 97 N.E. 508; *Sinclair v. United States*, 279 U.S. 263, 49 S.Ct. 268, 73 L.Ed. 692; *Landis*, op. cit., pp. 153, 219) than it is for a court or judge. The punishment for contempt may be imposed for disobedience of a lawful mandate. The power thus to punish may not be used as an excuse for the issue of an unlawful mandate and the remission of the pains and penalties of crimes in consideration of obedience. . . . The subject is not clarified by reference to the practice of the Congress, whatever it may be. Under the Federal Constitution, "every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)" must be submitted to the President for approval or veto in the same manner as a bill. Const.U.S. art. 1, § 7, subd. 3; cf. *Hinds*, *Precedents of the House of Representatives*, vol. 4, §§ 3483, 3484. A resolution so approved has all the authority of a statute. . . .

The way to compel disclosure as to conspiracies and attempts is not obscure or devious. A grant of immunity similar to the one contained in the resolution may be embodied in a statute. The Legislature, when it convenes, may pass an act of amnesty with the approval of the Governor, an act of amnesty coextensive with the privilege destroyed. The appellant as well as other witnesses will then be under a duty to declare the whole truth, irrespective of the number or the nature of the crimes exposed to view. Even if we were able to read a different meaning into the statutes now existing, the time in all likelihood would not be distant when there would be need of supplemental legislation to give immunity for other crimes, for crimes not covered by the sections dealing with conspiracy and bribery. A witness exposed to prosecution for larceny or extortion would be wholly without the pale of the immunity provisions in any statutes now existing, however liberally construed.

We are not unmindful of the public interests, of the insistent hope and need that the ways of bribers and corruptionists shall be exposed to an indignant world. Commanding as those interests are, they do not supply us with a license to palter with the truth or to twist what has been written in the statutes into something else that we should like to see. Historic liberties and privileges are not to bend from day to day "because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment" (*Holmes, J.*, in *Northern Securities Co. v. United States*, 193 U.S.

197, 400, 24 S.Ct. 436, 468, 48 L.Ed. 679), are not to change their form and content in response to the "hydraulic pressure" (Holmes, J., *supra*) exerted by great causes. A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price for relieving itself of the bother of awaiting a session of the Legislature and the enactment of a statute in accordance with established forms.

The order of the Appellate Division and that of the Special Term should be modified by directing that the appellant stand committed until he answers the question whether he has bribed any public officer, such imprisonment not to exceed the period of thirty days, and as so modified affirmed.

NOTES

1. In *United States v. Barsky*, (D.C.D.C.) 72 F.Supp. 165 (1947), Keech, D.J., construed the federal statute (28 U.S.C.A., sec. 634), which prohibits the use against him in a criminal proceeding of testimony given by a witness before a Congressional committee, as not barring the use of that testimony in a prosecution for contempt of Congress or conspiracy leading to such contempt.

2. Legislatures have attempted by statute to secure uncolored testimony before legislative committees. The following are illustrations:

OATH TO WITNESSES—2 U.S.C.A. § 191. *Oaths to witnesses.* The President of the Senate, the Speaker of the House of Representatives, or a chairman of the Committee of the Whole, or of any committee of either House of Congress, is empowered to administer oaths to witnesses in any case under their examination. Any member of either House of Congress may administer oaths to witnesses in any matter depending in either House of Congress of which he is a Member, or an committee thereof.

LOBBYISTS' OATHS—Florida Statutes (1927), § 96. *Oath by lobbyist.*—Whenever any person or persons shall appear before any committee of the Legislature of the State of Florida for the purpose of advocating or opposing, proposing changes or amendments, or in any wise discussing, a measure or matter being considered by such committee, such committee, or any member thereof, may require such person or persons to state upon oath in writing whether or not he appears in his own individual interest or in the interest of some other person or persons, firm, corporation or corporations, and if so, the name or names of such person or persons, firm, corporation or corporations, and if he has been or is to be paid a fee or any compensation, directly or indirectly, for such service, or as expenses or otherwise to so appear before such committee, and when such oath is required by a committee or any member thereof it shall be the duty of the chairman of the committee to file the written oath with the secretary of the Senate and the chief clerk of the House, and said oath shall be at once spread upon the journal of each House for the information of the members of the Legislature.

3. Concerning the extent of the contempt power of Congressional investigating committees, see Note, 14 U. of Chicago L.Rev. 256 (1947).

NOTE—LEGISLATION—LEGISLATIVE INQUIRIES—VALIDITY
OF SUBPENA ISSUED BY SENATE COMMITTEE FOR ALL
TELEGRAPHIC CORRESPONDENCE OVER NAMED PERIOD

36 Colum.L.R. 841 (1936)

Prompted by disclosures that members of Congress had been bombarded by faked telegrams,¹ and that various utilities companies had spent tremendous sums of money² in an effort to defeat the so-called public utilities company "death sentence" clause of the Wheeler-Rayburn bill, on July 11, 1935, the Senate adopted a resolution³ providing for a committee of five senators to conduct an inquiry into lobbying activities and to make recommendations to the Senate. Pursuant to the power therein vested in it "To require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers and documents . . . as it deems advisable," the committee issued a subpoena ordering the Western Union Telegraph Company to produce before it all telegrams charged to the account of Winston, Strawn and Shaw, a Chicago law firm, during the eleven month period from Feb. 1 to Dec. 1, 1935. In a suit to enjoin the telegraph company from turning over the telegrams, held, injunction granted. The subpoena amounts to an unlawful search and seizure and is violative of the Fourth Amendment. *Strawn v. Western Union Tel. Co.*, N.Y. Herald Tribune, March 12, 1936 at 1 (Sup.Ct.D. C.).⁴

In the absence of any adjudication of the permissible scope of a Congressional fact-finding inquiry for admittedly legislative purposes, the editorial indignation⁵ expressed at the means used by the Black committee to acquire information is based, at least ostensibly, upon the unwarranted lay conclusion that the general subpoena used is unconstitutional. Even on the doubtful assumption that the Fourth Amendment imposes the same limitation on Congress as it does on law-enforcing agencies, there is precedent for the committee's actions in a number of cases where the Supreme Court upheld extremely broad subpoenas for papers and correspondence, although issued by federal grand juries.⁶ But the practical necessity for an adequate fact basis

¹ N. Y. Times, Mar. 8, 1936, Section IV at 7.

² N.Y. Times, Mar. 15, 1936, Section IV at 10.

³ 79 Cong Rec. 11003 (1935).

⁴ An injunction against the Western Union to prevent delivery of one telegram ordering an editorial written was denied W. R. Hearst on the grounds that the subpoena was sufficiently specific. N. Y. Herald-Tribune, March 13, 1936 at 1. The injunction which Hearst sought against the Black committee was denied on the grounds that freedom of the press was not involved, the Bill of Rights not infringed since the subpoena was sufficiently specific, and the court has no jurisdiction to issue process against a Senate committee. See N. Y. Herald-Tribune, April 9, 1936, at 12.

⁵ See N.Y. Herald Tribune, March 12, 1936, at 18; N. Y. World Telegram, March 12, 1936, at 22; N. Y. Sun, March 12, 1936, at 24; N. Y. American, March 12, 1936 at 15.

⁶ *Brown v. United States*, 276 U.S. 184 (1928) (subpoena by grand jury commanding production by association of manufacturers of all correspondence between it and its

for the intelligent preparation of legislation, which may further serve to save the constitutionality of statutes regulating individual conduct⁷ cannot be satisfied by the previously acquired knowledge of individual legislators plus voluntarily supplied data of interested parties. Hence a number of cases have recognized an "inherent" legislative power to investigate with the aid of compulsory process;⁸ the limiting requirement imposed has been that a proper legislative purpose be served by the investigation.⁹ The need for the further presumption that a valid legislative purpose does exist¹⁰ is obviated in the instant case by the introduction of two bills regulating lobbying activities.¹¹ The nature of the practices which the Black committee is investigating, carried on in secluded conferences and through a long chain of correspondence between groups who frequently are not revealed to be the sponsors of the activities, makes it impossible to acquire the necessary information without the use of fairly broad subpoenas. Any requirement of a particularized identification of the documents desired may completely tie the hands of Congress.¹² The opprobrious connotation of "fishing expedition," as used in cases condemning administrative inquiries, derives from their quality of having no permissible end in mind¹³ but the Senate having, in aid of a definite legislative purpose, made the not unreasonable determination that investigation of plaintiff's papers will reveal the nature of lobbying activities carried on by it and its clients, the search no longer has the objectionable meddlesome quality which might invalidate it. The claim that the restrictions established by the commission cases protect against revelation of possibly incriminating material for the use of law-enforcing agencies, and are circumvented by the Black committee's practices, is answered by the statement in

predecessors and between the members of the association for five and one-half months); *Wilson v. United States*, 221 U.S. 361 (1911) (grand jury subpoena of all letters and telegrams signed by president of company for two months); *Wheeler v. United States*, 226 U.S. 478 (1913) (grand jury subpoena of all cash books, ledgers, and journals of Wheeler & Shaw, Inc., and of all letters and telegrams signed by the company or by its president and treasurer for three months).

⁷ See Note, *The Consideration of Facts in "Due Process" Cases* (1930) 30 Columbia Law Rev. 360.

⁸ *Anderson v. Dunn*, 6 Wheat. 204 (U.S. 1821); *In re Chapman*, 166 U.S. 661 (1897); *Sinclair v. United States*, 279 U.S. 263 (1929).

⁹ *Kilbourn v. Thompson*, 103 U.S. 168 (1881), as construed in *McGrain v. Daugherty*, 273 U.S. 135 (1927).

¹⁰ See *In re Chapman*, 166 U.S. 661, 669 (1897); *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

¹¹ See *supra* note 2, S. 2512, H. R. 11663 (1936). The House has already passed a bill requiring lobbyists to register. See N. Y. Herald Tribune, Mar. 28, 1936, at 4. That Congress should be able to ascertain the public sentiment on controversial matters is supported by cases holding lobbying contracts void as against public policy. *Oscanyan v. Arms Co.*, 103 U.S. 261 (1880); *Hazelton v. Scheckells*, 202 U.S. 71, 76 (1906).

¹² Note that the Black committee has pledged that only those papers found to be relevant will be in any way used or published. See N. Y. Times, March 8, 1936, IV at 3. And it would seem that the Senate committee should be able to determine relevancy for itself. Cf. *Consolidated Rendering Co. v. Vermont*, 207 U.S. 541 (1908).

¹³ See *Fed. Trade Comm. v. American Tobacco Co.*, 264 U.S. 298, 306 (1923) *United States v. Louisville & Nashville R. R.*, 236 U.S. 318, 335 (1914).

McGrain v. Daugherty that it is no valid objection to the investigation that it might possibly disclose crime or wrongdoing which would be punishable by the courts.¹⁴ Although it has been suggested in dicta that the Congressional power in this respect is not all-embracing, the Supreme Court has made no mention of the Fourth Amendment;¹⁵ the exclusively fact-finding nature of the inquiry by the Senate body might even exempt it from requirements imposed to prevent inquisitorial or tyrannical administration and enforcement of the law.¹⁶ It is submitted that the two requirements of a possible legislative purpose, and rational connection with the subject matter of the inquiry¹⁷ should be the only limitation on Congressional investigations. Any possible invasion of a constitutional "right of privacy" erected by the Supreme Court dicta would seem to be outweighed by considerations of social interest in making possible such legislation.¹⁸ An additional consideration is a long line of legislative precedent¹⁹ for this broad type of inquiry; the "practical construction" of the legislature was regarded as significant in the judicial recognition of the power to investigate.²⁰ Further, the present federal rule which may be invoked to deny admission in court of evidence obtained in contravention of the Fourth Amendment,²¹ and which has been used to prevent the otherwise valid subpoena by the Attorney General of papers of which he had gained knowledge through an unlawful search and seizure,²² might be extended to prevent the use in a criminal action of any information gathered by means not available to the Attorney General under the Amendment, so that the use of the information so gathered would be restricted to purely legislative purposes.

¹⁴ 273 U.S. 135, 179 (1927).

¹⁵ Cf. *Harriman v. I. C. C.*, 211 U.S. 407 (1908); *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

¹⁶ This seems to have been the reason for the adoption of the Fourth Amendment. Cf. *Fraenkel, Concerning Searches and Seizures* (1921) 34 *Harv.L.Rev.* 361, 364; *Handler, The Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 *Columbia Law Rev.* 905, 909 et seq.

¹⁷ See *McGrain v. Daugherty*, 273 U.S. 135, 161 et seq. (1927); *Sinclair v. United States*, 279 U.S. 263, 291 (1929).

¹⁸ See *Landis, Constitutional Limitations on the Congressional Power of Investigation* (1926) 40 *Harv.L.Rev.* 153, 219.

¹⁹ There are a number of such examples given in 3 *Hinds, Precedents*, c. LII, LIV (1907); *Landis, supra* note 18; *Potts, Power of Legislative Bodies to Punish for Contempt* (1926) 74 *U. of Pa.L.Rev.* 691, 780; see also material presented by Senator Black, 80 *Cong.Rec.*, March 20, 1936, at 4274 et seq.

²⁰ See e. g., *McGrain v. Daugherty*, 273 U.S. 135, 161 et seq.

²¹ *Byars v. United States*, 273 U.S. 28 (1926).

²² *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

D. The Conference Committee

GEORGE W. NORRIS, ONE HOUSE LEGISLATURES

17 *Philippine L J* 356-358 (1938).

There is no more reason for a government to have two branches of its legislature than there is for a wagon to have five wheels, or for a bank to have two boards of directors or a State two Governors. The two-house or bicameral legislature is leftover from medieval times, a vestigial member of the body politic which can be as well dispensed with as can the vermiform appendix from the human body.

Let us look about the world. Great Britain, for all practical purposes, is operating under a unicameral or one-house legislature. The little country of Finland, noteworthy for its financial stability, has had a unicameral legislature for 17 years. Eight of nine Canadian Provinces operate with the unicameral system. The Philippines, upon the advice of students of government, chose a one-house legislature. Alaska has asked and gained Congressional consent to hold a referendum in 1938 on changing to the unicameral plan. And the one-year-old one-house legislature of the State of Nebraska is working out successfully.

What are the advantages of such a law-making body over the two-house type?

To begin with, the two-house legislature is a magnificent example of what is called in America "passing the buck." Because in effect it becomes a three-house legislature, with the Conference Committee as the third house. Let us see how this works in the United States.

When a bill passes one branch of the legislature and passes the other branch in a different form, the matter is referred to the Conference Committee consisting usually of three men from each house. This Conference Committee, arbitrarily selected by the presiding officers of the different branches, arbitrates the dispute and drafts a law. It then reports to the House and to the Senate. The Conference Committee report cannot be amended by either branch. It must be voted up or voted down, as a whole. Members must take what they believe to be bad in order to get what they believe to be good. If it is rejected entirely, it may mean, and often does mean, the entire defeat of the legislation. If the Conference Committee does not agree upon a bill, then it must necessarily fail in its entirety. As a practical proposition, we have legislation then, not by the voice of the members of the Senate, not by the members of the House of Representatives, but by the voice of six men, two of whom, the majority from either branch, can defeat any legislation they oppose.

If we are to have a legislature composed of two branches, the Conference Committee is an absolute necessity. No man has ever suggested a plan, so far as I know, which would do away with this third branch of the legislature. Yet this third branch, meeting in secret, with no record of its proceedings, no roll call, and, for prac-

tical purposes, not answerable to the electorate for what it does, is undemocratic.

It would be much better to provide by a constitutional amendment that the people themselves should elect a third branch of the legislature to perform the duties of the Conference Committee, but no one has proposed this. Such a plan would add greatly to the expense and the delay now existing.

It is necessary that the people of a State make it impossible for any member of a legislature to shift responsibility. I can point to an instance in recent history in the United States when a majority of both branches were pledged in writing to vote for a bill embodying a particular principle of legislation. Notwithstanding the pledge, the legislature adjourned without enacting any such law. It does not follow from this that any member of this legislature was necessarily dishonest in making this pledge. But whether he was honest about it or not, he could go back to his people and tell them truthfully that he voted for a bill embodying this particular item of legislation.

The difficulty in such cases is that when the upper house passes a bill on a subject, and the lower house passes a different bill on the same subject, if the Conference Committee fails to agree upon a report the legislation is dead. The bill has died the death that many bills must die in this third branch of the legislature.

A one-house legislature makes this impossible. It often occurs in the two-house legislature that the Senate bill and the House bill are intentionally made different. They die the death in the Conference Committee that special interests desire them to die. The lobby, composed of experts hired by machine politicians and special interests, is successful in killing legislation before these five or six men who hold their deliberations in secret, and who make no record of their proceedings. The bicameral system affords an opportunity to a dishonest legislator which he cannot possess in a one-house legislature. It is, therefore, an open invitation to the disreputable man to seek office in the legislature. Such a legislator sometimes introduces bills which he expects to be killed; he wants to be paid for helping to kill them; and he kills them by getting them into a parliamentary tangle where his own record may appear on the surface as perfect. His constituents will therefore perhaps reelect him, without knowing his real record.

Nebraska's unicameral Legislature, which met for the first time in January, 1937, was composed of 43 members. The old House alone had 100 members and the old Senate, 33. I believe most people will agree that these 43 men served the State more efficiently than the 133 were ever able to do.

Compare the 1937 session with that of 1935. Although this was the only unicameral legislature in the United States and several weeks were devoted to working out new legislative procedures, the session was 12 days shorter than in 1935. Only about half as many bills were introduced, but more were passed in 1937.

There was no Conference Committee to thwart the majority's will. Committees were small and meetings were arranged so that no Senator had more than one committee meeting a day. Public hearings were held on all bills before committees, with notice of the hearing posted five days in advance. Any member could demand and get a roll call on any measure before the Legislature.

NOTE

See Buidette, "Legislative Conference Committees", 11 State Govt. 103 (1938), discussing lessons learned from Nebraska's experience with a bicameral legislature.

E. The Legislative Research Committee or Council

AN ACT CREATING A LEGISLATIVE RESEARCH COMMITTEE, PRESCRIBING ITS POWERS AND DUTIES, AND APPROPRIATING MONEY THEREFOR

Minn Laws, 1947, c. 306; M.S.A. Secs. 3.31-3.38, 3.42.

3.31 Legislative research committee created; selection of members; vacancies

There is hereby created a legislative committee, which is hereinafter referred to as the "Legislative Research Committee" or the "Committee". The committee shall consist of one senator and one representative from each of the Congressional Districts in the State to be chosen before the close of each regular session of the Legislature to serve until the opening day of the next succeeding regular session of the Legislature. The House members shall be appointed by the Speaker of the House of Representatives and the Senate members shall be selected at a caucus by a majority of the Senators from the several Congressional Districts. In case of failure to make such selection at the time and manner herein provided for or upon a vacancy occurring after the selection has been made, the vacancy shall be filled by the selection of another member from the Congressional District in which the vacancy occurred, such selection to be made by the remaining Senate or House members of the committee, depending upon which body has the vacancy. c. 306, § 1.

3.32 Policy; powers; restrictions; rights of legislators

In addition to the other applicable provisions of this act,¹ the committee shall have the power and right to study, consider, accumulate, compile and assemble information on any subject upon which the Legislature may legislate, and upon such subjects as the Legislature may by concurrent or joint resolution authorize or direct, or upon any subject requested by a member of the Legislature; to collect information concerning the government and general welfare of the

¹ Sections 3.31-3.42.

State and of its political subdivisions; to study and consider important issues of public policy and questions of general interest. The prime motive of the committee shall be to gather information and provide material to be used by the Legislature in its work while in session. The director and his assistants shall neither oppose nor urge legislation. The committee may as it deems advisable call to its assistance other members of the Legislature and it may create committees consisting of its own members, or one or more of its own members and one or more members of the Legislature and delegate by written resolution to such committees such of its powers and rights as it may deem advisable. Any member of the Legislature shall have the right to attend any meeting of the committee, and may present his views on any subject which the committee may at any particular time be considering. Any member shall have the right to attend and participate in the discussion but shall not have a vote, and upon request any member of the Legislature shall be notified of the dates and places of meetings. c. 306, § 2.

3.33 Assign subjects for research

The committee may assign the research director and staff to the various standing committees during each regular legislative session for the purpose of explaining the work of the committee and developing additional data with reference thereto. Each department, board, commission, agency, officer, and employee, in the state government, and those in local governments, shall furnish such information and render such assistance to the committee as it may from time to time request. c. 306, § 3.

3.34 Meetings; quorum

The committee, or any sub-committee appointed by it, may sit at such time and place as it may deem advisable, but the committee shall meet at least once in each quarter year and shall meet at any time upon the call of the chairman or a call signed by nine members of the committee. At any meeting of the committee ten members shall constitute a quorum and a majority of such quorum shall have authority to act in any matter falling within the jurisdiction of the committee. c. 306, § 4.

3.35 Officers; research director; employees; budget

The committee shall select a chairman and a vice-chairman from its own members and may prescribe its own rules of procedure. It may appoint a secretary who need not be a member, and shall appoint a research director who shall be paid such salary as the committee may determine. The committee may employ such other persons and obtain the assistance of such research agencies as it may deem necessary. The secretary, the director and all employees of the Legislative Research Committee shall be deemed to be legislative employees and shall be in the unclassified service of the state civil service. For the purpose of budgeting, expenses of the Legislative

Research Committee shall be deemed to be legislative expense. Expenditures of funds made available to the committee by legislative appropriation shall be made only upon the authority of resolutions duly passed by the committee. c. 306, § 5.

3.36 Minutes of meetings; periodic and biennial reports

The committee shall keep minutes of its meetings, which shall be open to the public. It shall make periodic reports to all members of the legislature and shall keep them fully informed of all matters which may come before it, the action taken thereon, and the progress made in relation thereto. At least 30 days prior to each biennial legislative session the committee shall make a written report summarizing its activities, investigations, surveys, and findings of facts to the members of the Legislature, to the Governor, and to the public. c. 306, § 6.

3.37 Certain subjects presented 60 days in advance of regular session

The committee may require that any suggested legislation that is to be presented by any department, board, commission, agency, officer, official or employee of the State, except the Governor, desiring the consideration of the committee, be presented to it at least 60 days in advance of any regular session. c. 306, § 7.

3.38 Expense of members

The members of the committee and the members of any sub-committee of the committee, shall be compensated for their actual expenses necessarily incurred in attending said meetings and in the performance of their official duties. c. 306, § 8.

3.42 Termination of act

The provisions of this act¹ shall terminate as of July 1, 1951. c. 306, § 12.

NOTES

1. In Weeks, "Recent Developments in the State Legislative Process", 16 State Govt. 162, 164 (1943), the author states: "The present year marks the tenth anniversary of the legislative council movement, the first purely legislative council having been created in Kansas in 1933. The idea was first suggested by the Committee on State Government of the National Municipal League and is embodied in the Model State Constitution. Twelve states in all have created councils and only two have abandoned them. . . . From the standpoint of results, legislative councils have proved to be the most important innovation in legislative machinery in many years.

"In most states the personnel of the council is entirely legislative with equal representation given to each house. All councils are employed in collecting information and in preparing programs for the legislature through the aid of research staffs, and thus have served to make legislation more of a continuous operation.

¹ Sections 3.31-3.42.

They have subjected the administration to observation, and yet they have not attempted to interfere; rather, they have succeeded in bringing the administration and the legislature closer together. Most of them make use of other state agencies and have been given full powers to summon witnesses and acquire information. Four meet on call; three quarterly; the rest more or less frequently. . . . The trend has been to increase their appropriation allowances. While different councils have been successful in varying degrees, it is generally conceded that they all have provided much needed legislative leadership by way of preparing legislative programs in advance of sessions. Their success depends upon the adequacy of their research facilities."

2. Kennedy, "The Legislative Process, With Particular Reference to Minnesota," 30 Minn.L.Rev. 653, 672, (1946), states, with reference to legislative research committees:

"The over-all functions of a permanent fact-finding agency might be summarized as follows:

"(1) Upon the request of legislators or of legislative standing and special committees, to prepare factual objective reports without recommendations on important issues of public policy and on questions of state-wide interest.

"(2) Upon the request of legislators or standing committees, to analyze and appraise objectively legislative proposals pending before either house, or any data or memoranda submitted in support of or in opposition to these proposals, without making recommendations as to legislative action.

"(3) To collect systematically data and information concerning the government and general welfare of the state.

"(4) Upon request of a member or committee of the legislature, to make impartial reports on any problem or question raising from the operation or administration of the laws or constitution of the state.

"(5) Upon request, to assist standing and special committees in acquiring and analyzing data, preparing reports, and summarizing public hearings.

"(6) To receive, classify, file and preserve for future use the published and unpublished research materials of joint legislative committees and temporary commissions.

"(7) Upon request, to assist the clerk of each house or any other legislative officer in the preparation of manuals, reports, directories and other legislative publications.

"(8) To abstract and analyze for legislators the reports of state departments and other administrative agencies.

"(9) At the request of the President of the Senate and the Speaker of the House to cooperate with administrative agencies in gathering and evaluating data as a basis for legislation."

SECTION 4. CONSTITUTIONAL LIMITATIONS ON LEGISLATIVE PROCEDURE

BOARD OF SUPERVISORS v. HEENAN

Supreme Court of Minnesota, 1858. 2 Minn. 330, 2 Gil. 281.

FLANDRAU, J. The defendant is the register of deeds of Ramsey county, and this is an application for a peremptory writ of mandamus to compel him to deliver to the board of supervisors certain books and papers relating to the taxes of the county. The application is made under § 9 of the act of August 13, 1858, p. 206, Laws 1858. Against the issuing of the writ, it is urged that the act of August 13, 1858, is unconstitutional, in not having been read on three different

days in each house of the legislature, and twice at length; in not having been voted for by a majority of all the members elected to each house; . . . (Sections 13, 20, of art. 4, State Constitution.) The question is for the first time presented for judicial determination as to the force and effect of section 13 and section 20 of art. 4 of the constitution. Section 13 provides that "No law shall be passed unless voted for by a majority of all the members elected to each branch of the legislature, and the vote entered upon the journal of each house." Section 20 provides that "Every bill shall be read on three different days in each separate house, unless, in case of urgency, two-thirds of the house where each bill is depending shall deem it expedient to dispense with this rule; and no bill shall be passed by either house until it shall have been read twice at length." The subject is one of great importance in its effect upon the state, and I approach it with the sole aim of faithfully ascertaining the intention of the framers of the instrument; the consequences of their action are with them, and not with the courts. There are many provisions in constitutions and statutes which, though explicit in terms, are construed to be only directory; but this results from the nature of the particular provision, being confined to the regulation of the time or manner in which an act is to be performed, and where it is apparent that it was not designed to be operative as a condition, limitation or restriction upon the performance of the act enjoined or permitted, and must be generally governed by the nature of the subject treated of, more than by the language of the law. Clauses which are directory merely, must, in the nature of things, be much more frequent in statutes than in constitutions; because, to the former is committed the *modus operandi*, in minute detail, of the whole working system of the government, while the latter is confined to the more general establishment of the fundamental principles upon which, and the conditions and limitations under which, the system is to operate. Statutes command acts to be done, impose duties and obligations, and point out the road to their performance; to insure certainty and regularity throughout the country, the time when, the place where, and the manner in which the command is to be obeyed are generally particularized; but as the execution of the mandate is the principal object and aim of the law, a departure from the mode provided is often, where the public good demands it, and private rights are not interfered with in consequence of it, held not to invalidate the act, or, in other words, the provisions are declared to be directory only.

There is a very material difference between provisions of apparently similar import in statutes and constitutions, and their meaning must be determined by the application of different rules and reasons. A constitution, and especially the legislative branch of our constitution, is not a creative instrument. Beyond the establishment of the legislature, it is but a system of limitations and restrictions upon the power of that body. It commands the performance of no act by the legislature, but declares that if they do act, that action shall be in a certain manner, and within prescribed boundaries.

The general power to legislate upon all subjects within the proper province of such a body is presumed by the constitution, and it is only such matters as are designed to be withdrawn from their jurisdiction that the constitution takes especial care of. It will be conceded at once, that should a law violate any of the restrictions in the constitution pertaining to the subject matter, as by restraining the liberty of the press, denying the right of trial by jury, introducing slavery, or otherwise, it would be void; this result would, however, be solely because the legislature had exceeded its jurisdiction; if, therefore, there is no instance in which the legislature can transcend the constitutional boundaries in regard to the subject matter of a law, it can only be permitted to do so in relation to the prescribed mode of its enactment, on the supposition that the same reasons did not exist for limiting its action in this respect as obtained in the other.

I will examine whether the framers of the constitution intended the provisions of sections 13, 20, . . . of art. 4, or any of them above cited, to be merely directory upon the legislature. This investigation will lead me to a review of the legislation as practiced previously in the territory. Such changes as are instituted by the constitution, and departures from established practices when we were acting without any constitution but that of the United States and the Organic Act, must be considered as providing for some deficiency or intended to check some abuse which existed previously in the legislative department. The courts may have recourse to legislative proceedings, rules, journals and statutes, also to contemporaneous debates and undisputed history, to enlighten themselves on these points. Previous to the constitution, a majority of either house of the legislature was a quorum to transact business; and laws could be passed by a single member voting in the affirmative, if no one voted against him; however objectionable this may have been, it was less liable to abuse in bodies composed of a small number of members than in more numerous assemblies. Each house made its own rules, and could alter them at pleasure by such vote as they should by rule provide. The power to determine the rules of proceeding in the separate houses is continued by sec. 4, art. 4, but with exceptions which are specially enumerated, among which is that "no law shall be passed unless voted for by a majority of all the members elected to each branch of the legislature, and the vote entered upon the journal of each house." Sec. 13, art. 4. This is particularly directed at the practice under the former system which would be more liable to abuse by the contemplated increase of the number of the legislators, and its observance is essential to the validity of a law. If an act fails to receive the requisite number of affirmative votes, to be evidenced by the journal, it is as fatally defective as if it had failed to receive the sanction of the executive. The effect of the provision is to count every member of the body that does not vote affirmatively as voting against the passage of the act.

The next exception to the general power to pass rules is by sec. 20, of art. 4. "Every bill shall be read on three different days in each

separate house, unless in case of urgency two-thirds of the house where such bill is depending shall deem it expedient to dispense with such rule. And no bill shall be passed by either house until it shall have been previously read twice at length."

The requirement to read in each house on three different days is not imperative, but is qualified by the permission granted to change the rule by a two-third vote in cases of urgency. The houses are left free to change their rules by such vote as they may adopt on other matters, but in this respect a two-third vote is required; it is clear, therefore, that the makers of the constitution attached great importance to the provision, and greater force is given to this view from the latter clause of the section which permits no bill to pass unless read twice at length, and no power is given to the legislature to change this rule under any circumstances; we would be led to the conclusion, by these provisions standing alone, that although a case of urgency might allow a departure from the former by a two-third vote, yet no circumstances could justify a failure to read the bill twice at length, and that to give effect to a law it must be done. Secs. 21 and 11, of art. 4, place it beyond doubt that a compliance with these rules is essential to the passage of a law, and not merely directory. Sec. 21 declares that every bill shall be signed by the presiding officer of each house, and provides a punishment for refusing so to sign; and then to prevent a failure of the law in consequence of an officer not signing, which would have been the effect of the provision standing alone, it provides that "in case of such refusal, each house shall by rule provide the manner in which such bill shall be properly certified for presentation to the governor." Sec. 11, in harmony with the other provisions, declares that "every bill which shall have passed the senate and house of representatives, in conformity to the rules of each house, and the joint rules of the two houses, shall, before it becomes a law, be presented to the governor," &c. It would seem by this recognition, that the rules of the houses were designed to be placed upon the same footing with the rules incorporated in the constitution; but we will not decide anything but what is strictly within the case at bar.

From the constitution alone, I think sufficient can be gathered to show that these provisions were intended to be absolute, and that the validity of legislation should depend upon a compliance with them, as much as upon that of any other limitation or restriction contained in the instrument. Experience has proved the necessity, from the loose and dangerous manner in which legislation had been conducted, of imposing some checks upon it, and although I may be of opinion that the constitution has erred on the other extreme, still, being satisfied that such was the intention of the framers of the instrument, I have but to expound, and not change or question that intention. The debates of the convention, presided over by Governor Sibley, show an energetic effort on the part of several members to defeat the passage of several of the provisions which we have been discussing, for the reason that the effect of them would be to make

the validity of laws dependent upon their fulfillment, which resulted in the convention rejecting all amendments and adopting them substantially as reported from the committee, except in the case of section 21, of art. 4, where the qualifying clause at the end of the section was adopted, or the presiding officer of each house would in effect have possessed a veto power superior to that of the executive, as there would have been no possible relief except in expulsion, and that would have been, in most cases, ineffectual to prevent the mischief. No member, in the debate, took the ground that the effect of these provisions would be only directory, but all regarded them as intended to impose an unqualified obligation upon the legislature. Debates, pp. 231-271.

In the convention presided over by Mr. Balcombe, the report from the legislative committee contained only the provision that a majority should vote for each bill, in order to pass it—§ 22, p. 86 of Report of Debates. In the debate, this provision was considered as imperative, and was stricken out for that reason—Debates, pp. 201, 202, one member only taking a different view. There can be no doubt that the convention meant these provisions to be more than directory, and we must so decide.

A knowledge of the character of the legislation which preceded the forming of a state constitution, will show that a very vicious system prevailed of inserting matter in acts which was entirely foreign to that expressed in the title, and by this means securing the passage of laws which would never have received the sanction of the legislature, had the members known the contents of the act; it was to prevent frauds of this nature that section 27 of article 4 was passed, and it has, and was intended to have, the effect of defeating the action of the legislature, even if the members are so inattentive as to overlook such extraneous matter after the bill has been read twice at length, under section 20. The system is thorough, and means to secure to the people fair and intelligible legislation, free from all the tricks and *finesse* which have heretofore disgraced it. A similar provision is in the constitution of California, New Jersey, New York, Ohio, and perhaps other states; in some, it has been held to be directory, in others, essential. If it is only directory, it is senseless, but if held to mean what it imports, it is an advance in the science of government worthy of imitation by all states and countries whose legislatures are not absolute. . . .

If my solution of the difficulty presented by the journal entries is the correct one, then the bill which was passed in the house was read a sufficient number of times and passed that body by a constitutional majority; and in the senate it was read three times on the same day under a suspension of the rules, and received a sufficient number of votes to pass it. Where journals are kept as loosely as these seem to be, the court will endeavor to sustain a law, if its constitutional passage can be spelled out of them; but in this case the difficulty seems susceptible of explanation quite satisfactorily. . . .

The writ of mandamus should issue.

NOTES

(1) *People v. Supervisors of Chenango*, 8 N.Y. 317 (1853): A further provision of present Article 3, § 14 of the Constitution of New York, that "upon the last reading of a bill . . . the question upon its final passage shall be taken immediately thereafter, and the ayes and nays entered on the journal" was construed, so far as it requires the entering of ayes and nays on the journal, to be directory and not mandatory. But see *Rumsey v. N. Y. & N. E. R. R. Co.*, 130 N.Y. 88, 28 N.E. 763 (1891).

(2) *Frazier v. Board of Com'rs, Guilford County*, 194 N.C. 49, 52, 138 S.E. 433, 435 (1927): "The signatures of the presiding officers of both houses of the General Assembly, affixed to said bill, certifying that same was duly ratified in each house, is conclusive, not only of its ratification, but also of its passage by the General Assembly of North Carolina, in accordance with the provisions of article 2, § 23 of the Constitution of North Carolina; i.e., that the bill . . . was read three times in each house and duly passed and ratified by both houses." The court held further, however, that such certificate is not sufficient to show that the bill was passed in accordance with other constitutional requirements which it described as mandatory.

STATE ex rel. KOHLMAN v. WAGNER

Supreme Court of Minnesota, 1915. 130 Minn. 424, 153 N.W. 749.

HALLAM, J. Petitioner was prosecuted in the St. Paul municipal court for selling intoxicating liquors without a license, on May 10, 1915, at a place outside of any city, village or borough. He justified under a license issued by the board of county commissioners of Ramsey county, May 3, 1915. The state invokes chapter 147, Laws 1915, which forbids the issuance of any license to sell intoxicating liquors except in cities, villages and boroughs. The municipal court held petitioner to the grand jury and committed him to the custody of defendant sheriff. Petitioner procured a writ of habeas corpus to test the legality of the commitment. The trial court discharged him, and the state appealed. The case turns on the validity of chapter 147, Laws 1915. If that statute is valid, petitioner was properly committed. It is conceded that the statute was within the power of the Legislature to enact. The contention is that it was not properly enacted. It is conceded that the statute was passed by a majority of both houses of the Legislature and signed by the Governor. It is claimed that it was not read before its passage in the House of Representatives at the times required by the state Constitution.

1. Article 4, § 20, of the Constitution provides that:

"Every bill shall be read on three different days in each separate house, unless, in case of urgency, two-thirds of the house where such bill is depending shall deem it expedient to dispense with this rule."

We are of the opinion that the constitutional requirement as to reading on different days is mandatory and must be complied with unless dispensed with as therein provided. It was so held in *Supervisors Ramsey County v. Heenan*, 2 Minn. 330 (Gil. 281). We be-

lieve the reasons given in the Heenan Case for this construction are sound, and we follow the rule of that case.

2. We are also of the opinion that "two-thirds of the house," as used in section 20, means two-thirds of the whole membership of the house, and not two-thirds of a quorum of the house. Otherwise this constitutional rule might in some cases be suspended by less than the number required to pass a bill. We cannot think that this was intended. The construction given to similar provisions in other parts of the Constitution has always been in accordance with the construction which we here adopt. *State v. Gould*, 31 Minn. 189, 17 N.W. 276; *Palmer v. Bank of Zumbrota*, 72 Minn. 266, 75 N.W. 380.

3. In the house this bill was read the first time on March 31st, and the second time on April 10th. These two readings were on different days and were in strict accordance with the constitutional rule. The third reading alone is in question. The bill was read the third time on April 10th, that is, on the same day as the second reading. The third reading was irregular unless two-thirds of the house did as it had power to do, "dispense with this rule." We approach consideration of this question with the fact before us that this bill was duly enrolled, authenticated by the presiding officer of each house, signed by the Governor of the state, and filed with the Secretary of State, all in compliance with the Constitution of the state.

It is the rule of many courts that this is conclusive of the regular passage of the bill, and the tendency of recent judicial opinion is against the right of the courts to go back of the enrolled act to determine by extrinsic evidence whether the bill was regularly enacted into law. *Sutherland*, Stat.Const., p. 72; 2 *Wigmore*, Evidence, § 1350; *Atchison, T. & S. F. Ry. Co. v. State*, 28 Okl. 94, 113 Pac. 921, 40 L.R.A.N.S., 1; *State ex rel. Hoover v. Chester*, 39 S.C. 307, 17 S.E. 752; *Field v. Clark*, 143 U.S. 649, 12 Sup.Ct. 495, 36 L.Ed. 294; 24 *Harv. Law Rev.* 49. See, also, *Webster v. City of Little Rock*, 44 Ark. 536, and *State v. Frank*, 60 Neb. 327, 83 N.W. 74.

This court, however, in accord with the greater number of decisions, at an early date held that the courts have power to go back of the enrolled bill and look to the legislative journals to ascertain the manner in which the bill was passed, and if it appears from the journal that some requirement of the Constitution was violated in the manner of its passage, then to declare that the bill never became a law. *Supervisors Ramsey County v. Heenan*, 2 Minn. 330 (Gil. 281); *State v. City of Hastings*, 24 Minn. 78; *Burt v. Winona & St. Peter R. Co.*, 31 Minn. 472, 18 N.W. 285, 289; *State v. Peterson*, 38 Minn. 143, 36 N.W. 443; *Lincoln v. Haugan*, 45 Minn. 451, 48 N.W. 196. See *In re Drainage District No. 1*, 26 Idaho, 311, 143 Pac. 299, L.R.A. 1915A, 1210. The authority of these decisions may have been shaken by *Miesen v. Canfield*, 64 Minn. 513, 67 N.W. 632, but we are not disposed at this time to overrule them.

4. This much, however, is clear: There is a presumption that an enrolled bill, duly authenticated, was passed in a constitutional man-

ner, this presumption is very strong; the evidence to overcome this presumption must be very strong and clear. It is not too much to say that the presumption in favor of regular enactment of a law is as great as the presumption in favor of the constitutionality of the subject-matter of a law, and the rule in such cases is that the law is to be upheld unless its unconstitutionality is made to appear beyond a reasonable doubt. *Ogden v. Saunders*, 12 Wheat. 213, 270, 6 L. Ed. 606; *Curryer v. Merrill*, 25 Minn. 1, 4, 33 Am.Rep. 450; *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 208, 68 N.W. 53, 33 L.R.A. 437, 60 Am.St.Rep. 450. This presumption of regularity in the passage of an act is not overcome by the failure of the legislative journals to show that the constitutional requirements as to procedure were followed. The enrolled bill stands as law unless it affirmatively appears on the face of the journal that some constitutional requirement was not followed. Mere silence of the journal will not "convict the Legislature of having violated the Constitution." *State v. Frank*, 60 Neb. 327, 333, 83 N.W. 74, 75; *State v. City of Hastings*, 24 Minn. 78; *State v. Peterson*, 38 Minn. 143, 36 N.W. 443; *In re Ellis' Estate*, 55 Minn. 401, 56 N.W. 1056, 23 L.R.A. 287, 43 Am.St.Rep. 514; *Miesen v. Canfield*, 64 Minn. 513, 67 N.W. 632; *In re Drainage Dist. No. 1*, 26 Idaho, 311, 143 Pac. 299, L.R.A.1915A, 1210; *Cooley*, Const. Lim. (7th Ed.) p. 195.

5. The next question then is, Does it affirmatively appear on the face of the journal that the house acted without dispensing with this rule? We think it does not. Unfortunately it is with some difficulty that we are able to determine what journal the house really made. G.S.1913, § 41, provides that:

"A journal of the daily proceedings in each house shall be printed and laid before each member at the beginning of the next day's session. After it has been publicly read and corrected, a copy of such journal, kept by the secretary and chief clerk, respectively, and a transcript thereof as approved, shall be certified by such secretary or clerk to the printer, who shall print the corrected sheets for the permanent journal."

The statute thus provides for a printed daily journal, and a permanent journal, complete, for the whole session, compiled from the daily journal. Another statute in terms makes both "the printed journals of said houses, respectively, published by authority of law," and the "journals of the Senate and House of Representatives kept by the respective clerks thereof as provided by law, and deposited in the office of the Secretary of State" evidence thereof in all cases whatsoever. G.S.1913, § 8414. This plainly makes both the daily printed journal and the permanent journal evidence in any court. See *Lincoln v. Haugan*, 45 Minn. 451, 48 N.W. 196.

The bill which resulted in the act in question was introduced in the Senate as house file No. 719. The printed daily journal and the permanent journal of the house for April 10th, the sixty-seventh legislative day, are both before us, and they are in conflict. The permanent journal shows:

S. F. 719 reported by a majority of the temperance committee with the recommendation that it be amended, and that when so amended it be reported without recommendation. A minority report recommended that the bill pass without amendment.

The minority report was adopted.

"Mr. Bjornson moved the rule be suspended and that S. F. No. 719 * * * be read the second and third times and placed upon its final passage. . . ."

"The question being taken on the motion to suspend the rules, and the roll being called, there were yeas 77 and nays 29."

The journal then reads, "So the motion prevailed," but in fact it did not receive the affirmative vote of two-thirds of the entire membership of the house and it did not prevail.

"S. F. No. 719 was read the second time."

Some amendments were offered and voted down.

"Mr. Bjornson moved the previous question. Which motion prevailed."

"S. F. 719 . . . was read the third time and placed upon its final passage."

"The question being taken on the passage of the bill, and the roll being called, there were yeas 94 and nays 10."

There is much more than this in the journal, but nothing more that is important here.

The printed daily journal differs from the permanent journal in this: In the place where appears the motion to suspend the rules the language in the daily journal is as follows:

"Mr. Bjornson moved the rule be suspended, and that H. F. 719 [an entirely different bill, relating to the subject of intoxicating liquors] . . . be read the second and third times and placed upon its final passage."

This condition of the house records emphasizes the necessity of the exercise of great caution in setting aside a law passed by a majority of both houses and signed by the Governor on the evidence of legislative journals.

We are of the opinion that this law must be sustained, whichever may be the authorized journal of the house.

6. We have this situation: The printed daily journal is wholly silent as to what motions were made dispensing with the constitutional rule against a third reading of the bill on this day. If we accept this as the authorized journal of the house we are compelled, by giving force to the presumption of regularity, to sustain the law.

7. If we accept the permanent journal as the authorized journal of the house, the same result must be reached. The contention of the petitioner is that the failure of the motion that the rules be suspended and the bill "be read the second and third times and placed upon its final passage" to receive the requisite two-thirds vote is an affirmative

showing that the house did not dispense with the constitutional rule as to two readings in one day. We cannot so hold. If a vote had been taken upon the question of dispensing with the constitutional rule, and upon that question alone, and the vote had been adverse, we should consider that such a vote was an affirmative showing that the house refused to dispense with the rule, for it would not be presumed in such a case that the house took action contrary to that affirmatively shown upon the journal. But this is not the situation here. At the time the vote to suspend the rules was taken the bill had not been read a second time. There was nothing in the constitutional rule that forbade a second reading at once. A house rule did forbid a second reading of the bill until another order of business was reached. Another house rule required that after the second reading the bill go to the committee of the whole. It was the apparent purpose of the motion to suspend both these rules. A motion to suspend these rules would have presented no constitutional question. But it was desired also that the bill be read a third time after its second reading and during that day. So in order to accomplish the double purpose of suspending the house rules as to *order of business*, and the *constitutional rule as to time of reading of bills*, the motion was put in the form above given, a form in common use in such cases. But it is quite manifest that an adverse vote upon the question of suspending the house rules prescribing order of business would not be tantamount to an adverse vote upon the question of dispensing with the constitutional rule prescribing the time for the reading of bills. A member might be of a mind to suspend either but not the other. Equally certain is it that when a motion to suspend the constitutional rule as to reading of bills is combined with a motion to suspend the house rules as to order of business, and such combined motion is made and voted on before the occasion for suspension of the constitutional rule has yet arisen, no presumption arises that members voting against such combined motion are opposed to two readings of the bill on the same day, nor is there any presumption that they did not at a proper time dispense with the constitutional rule.

8. There was affirmative action by the house of still greater force as evidence than these presumptions. It appears to us that both the permanent and the daily journals show affirmatively a manifest purpose on the part of the house to dispense with the constitutional rule. We must not lose sight of the fact that the constitutional rule against the second and third readings of a bill on the same day is one which two-thirds of the house might dispense with at pleasure. It was not necessary to dispense with this rule in any formal manner. All that is required is that the house in some unequivocal manner manifest its purpose to dispense with the rule. A motion that the bill be read a third time on the same day as its second reading, or a motion that the bill be placed upon its final passage on the day of its second reading, would unquestionably operate as a suspension of the rule against third reading on the same day. *State v. Peterson*, 38 Minn. 143, 36 N.W. 443, illustrates this. In that case the question arose as to whether this same constitutional rule was suspended. The journal showed

that the bill "was read the first time, and on motion of Mr. Potter the bill was read the second time." The court said:

"It will be presumed, in support of the action of the Legislature, that the motion for the second reading was adopted by the requisite two-thirds vote, and that the house deemed it a proper case to dispense with the rule, and to proceed with the second reading out of its regular order. The rule must therefore necessarily have been suspended, and the procedure regular."

See *Worthen v. Badgett*, 32 Ark. 496, 516. In the case at bar, after the bill had been read the second time, and after all proposed amendments had been disposed of, "Mr. Bjornson moved the previous question, which motion prevailed." The previous question was then the third reading of the bill and the passage of the bill. The effect of an affirmative vote upon this motion was to order a third reading and to bring the house to a direct vote upon the bill. The number voting upon the motion for the previous question does not appear. It is presumed the vote was sufficient for all purposes. As far as appears it may have been unanimous. The question being then taken upon the passage of the bill, there were yeas 94 and nays 10. There can be no doubt upon this record that the house intended to dispense with the rule which would forbid a third reading of the bill or a vote upon the bill upon the sixty-seventh legislative day, and that it manifested such intent. It would be difficult to give reasons which would convince a mind unaccustomed to legal quiddities, that those who in effect voted to put this bill upon its final passage on the sixty-seventh legislative day, and who, when the bill was put upon its final passage, voted for the bill, could all the time have been withholding their consent to the indispensable third reading of the bill on that day. We are of the opinion that when the house on the sixty-seventh day, by a vote sufficient for all purposes, adopted a motion, the necessary effect of which was to order a third reading of the bill and to place the bill upon its final passage, and then passed the bill by a vote of 72 per cent. of all the members of the house, it must be said that two-thirds of the membership of the house manifested a purpose to dispense with the constitutional rule forbidding the third reading of the bill on that day.

9. In view of these considerations, it is not of vital importance whether the daily printed journal or the permanent journal was the authorized journal of the house. We are of the opinion, however, that the only authorized journal of the house was the daily printed journal. On the sixty-eighth day, upon convening of the house, the reading of the journal of the preceding day was dispensed with and the journal "approved as corrected." What, if any, corrections had been made do not appear. Thereupon the Speaker made an oral statement that he had been in error in ruling on the preceding day that the motion to suspend the rules had been carried, and expressed the opinion that the action of the house in passing the bill was not in accordance with the Constitution. Thereupon motion was made for the approval "of the journal of the sixty-seventh day as printed." This motion prevailed. The action of the house clearly made the daily printed journal of the

proceedings of the sixty-seventh day the only authorized journal of that day's proceedings. No officer of the house, nor any other person, had thereafter any authority to change the printed journal. The Speaker doubtless took this view when he later affixed his signature to the bill and transmitted it to the Governor as a bill passed by the house.

Judgment reversed.

NOTE

For discussions of constitutional requirements for valid enactments in other states, see Fry, *Constitutional Regulation of Legislative Procedure in Colorado*, 3 *Rocky Mt.L.Rev.* 38 (1930); Horack, *Constitutional Limitations on Legislative Procedure in West Virginia*, 39 *W.Va.L.Q.* 294 (1933); Luce, *Judicial Regulation of Legislative Procedure in Wisconsin*, 1941 *Wisc.L.Rev.* 439 (1941).

PHILIP STERLING, SOME PRACTICAL ASPECTS OF LEGISLATION

38 *Rep.Pa.B.A.* 381, 414-417 (1932).

The question is often asked by laymen and uninformed lawyers, as well, why are three readings of bills required? What purpose is thereby served? Does not the practice unduly delay the procedure of the Legislature? A word concerning the history of the practice will at once be informative and responsive to the questions. The constitutional provision that every bill must be given three readings before it is considered for final passage is not singular with us. When the practice took its present form is not known, but evidently it had been established at the time when the journals of House of Lords began in the time of Henry VIII and those of the House of Commons with Edward VI in 1547. It may be safely inferred that at this time the practice prevailed. In Sir Thomas More's "Utopia" published in 1615 we find the following language suggestive of the three reading custom: "One rule observed in their council, is, never to debate a thing on the same day on which it is first proposed; for that is always referred to the next meeting, that so men may not rashly and in the heat of discourse engage themselves too soon, which might bias themselves so much that they might rather study to support their first opinions than by perverse and preposterous sort of shame hazard their country rather than endanger their own reputation or venture the being suspected to have wanted foresight in the expedients that they at first proposed, and therefore to prevent this they take care that they may be deliberate rather than sudden in their motions."

In William Penn's "Charter of Liberty to Pennsylvania" in 1682, provision was made as follows: "Unless on suddain and indispensable occasions no business in Provincial Council or its respective Committees shall be finally determined the same day it is moved." The Continental Congress in Philadelphia in 1774 adopted this rule: "No question shall be determined the day on which it is agitated and debated.

if anyone of the colonies desires the determination to be postponed to another day." Notice should be taken that William Penn foresaw the necessity of dispensing with the rigidity of the rule in case of emergency; that the Continental Congress did not absolutely require that the question be determined on a separate day. The constitutions of thirty states now require three readings of bills on separate days. Four permit two readings on the same days. Twenty of these states, not including Pennsylvania have made it possible to dispense with the three readings required in cases of emergency.

Article III Section 4 of the Constitution of Pennsylvania not only provides that every bill must be read on three "different" days in each House but that each bill must be read "at length." The purpose of such a provision can be no other than to secure adequate information to the members. When printing was unknown, or little used, and members of legislative bodies were illiterate, the reading of bills may have been necessary. But surely this is not the case today. Nor is the constitutional mandate in practice complied with by the Reading Clerk, whose duty it is to make known the contents of a bill when reached on the calendar. First readings are disposed of by a rapid, mumbled reading of the title, second readings are disposed of by a reading, in like manner, of the title and of the first few lines of each section of bill. Often only a few of the early sections of a lengthy bill are read. On the third reading a like course is pursued. No beneficial purpose is served by this constitutional requirement. First of all it is not observed. If it were, the legislative session would thereby be lengthened to at least the extent of four and probably six months. Secondly, members pay little or no attention to the reading by the clerks. Daily calendars are furnished each member. Files containing the printed bills are on the desk of each member. The rules of the Assembly provide that copies of a bill must be in the members' files before the measure may be called for consideration. The Speaker with scrupulous care calls the bill for consideration. Each bill is clearly identified by its bill number, calendar number and page position on the calendar. An attentive and interested legislator finds no difficulty in following the proceedings. The reading of the bills, at length, would be a tremendous waste of time. Even so much of the reading as is now pursued is a waste of time. Members are not benefited. No man able to read would try to understand the bill as read by the clerk so long as printed copies of the bill are available. The printing press has taken from the reading "at length" rule every purpose for which it was intended. Experience proves the requirement wholly useless. In the Constitutional Convention of 1919, an effort to this end failed although strongly recommended. The late Judge Mayer Sulzberger, a delegate at that convention, thus expressed his thought on this matter: "Might it not mean that it shall be read at length by the legislator who has it before him and has not the legislative practice established that as the true meaning. You cannot read without reading, and if you read it, you read it at length." He thought that cutting out the words "at length" would not relieve the

situation. The debate at that convention disclosed that the failure resulted from the lack of familiarity with the legislative procedure and the real issues involved. Let us hope for success in the next Constitutional Convention when the State Bar Association should make concentrated effort in these respects, at least, to simplify the legislative procedure. For my part such a subject should be a matter for control by rules of the Legislature and not by constitutional provision.

SECTION 5. THE LEGISLATURE AS AN ENTITY: CONTINUATION OF ITS POWERS AFTER ADJOURNMENT

PEOPLE v. REARDON

Court of Appeals of New York, 1906. 184 N.Y. 431, 77 N.E. 970.

Appeal from Supreme Court, Appellate Division, First Department.

Habeas corpus proceedings by the people, on relation of Albert J. Hatch, against Edward Reardon, a peace officer of the county of New York. From a judgment of the Appellate Division (97 N.Y.S. 535, 110 App.Div. 821) affirming an order dismissing the writ and remanding relator to custody, relator appeals. Affirmed.

On the 8th of June, 1905, the relator was arrested under a warrant issued by a justice of the Court of Special Sessions of the city of New York, charging him with the commission of a misdemeanor in that on the 7th of June, 1905, at the city of New York, he violated chapter 241, p. 474, of the Laws of 1905 "by the sale and delivery of certain shares of stock of certain railroad corporations without making any bill or memorandum of such sale, or affixing any stamp or stamps to such a bill or memorandum, or in any way paying the tax as required by said act." . . . A writ of habeas corpus issued to test the validity of said statute was dismissed by the justice of the Supreme Court before whom it was returnable, and the usual order remanding to custody was made. Upon appeal to the Appellate Division, the order was affirmed, one of the justices dissenting, and the relator appealed to this court.

VANN, J. (after stating the facts). The issue of law joined by the petition, return and reply is whether the Legislature had power to enact, and did in fact enact, chapter 241, p. 474, of the Laws of 1905, which provides for a tax on the sale and transfer of stock certificates. That act is part of the tax law, which it amends by adding a new article known as No. 15. It imposes a tax "on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company or corporation, made after the first day of June, 1905," of two cents "on each hundred dollars of face value or fraction thereof." Payment of the tax must be denoted by an adhesive stamp or stamps affixed in a manner adapted to the circumstances of the sale. A violation of the act by a transfer without payment of the tax is made a misdemeanor and may be punished by fine, or imprisonment, or both, and the of-

fender is also subject to "a civil penalty of five hundred dollars for each violation," to be recovered by the state comptroller in any court of competent jurisdiction. The statute further provides that no transfer of stock without payment of the tax "shall be made the basis of any action or legal proceedings, nor shall proof thereof be offered or received in evidence in any court in this state." The taxes thus imposed "and the revenues thereof shall be paid by the state comptroller into the state treasury and be applicable to the general fund, and to the payment of all claims and demands which are a lawful charge thereon." The act is attacked as invalid on the ground that it was prematurely passed before it had been on the desks of the members of the Legislature in its final form for at least three calendar legislative days prior to its final passage, as required by section 15, article 3 of the Constitution; that it makes an improper classification; that the tax is imposed on a wrong basis; that it is imposed upon property without the state, and that the act violates the commerce clause of the federal Constitution. After carefully considering these objections, we have reached the conclusion that they are not well founded, and the following are our reasons, so far as we have found time to express them:

First. The statute in question originated, as a bill, in the Senate, where it was amended from time to time and reprinted as often as it was amended. Printed copies thereof, as it was when introduced and as it was each time after it was amended, were promptly placed on the desks of the members of both houses when it was introduced and after each amendment. This was not required by any written rule of the Legislature but was in accordance with the general practice that has prevailed since the Constitution of 1894 was adopted. The bill was passed by the Senate on the 3d of April, 1905, was sent to the Assembly for its concurrence on the 4th, and was finally passed by that body on the 5th, neither the Governor nor the acting Governor having certified to the necessity of its immediate passage. The journal of the Assembly states that the bill was "printed and on the desks of the members in its final form at least three calendar legislative days prior to its final passage." These are, in substance, the facts relating to the subject as alleged in the petition for the writ and not denied in the return. The Constitution provides that "No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the Governor, or the acting Governor, shall have certified to the necessity of its immediate passage, under his hand and the seal of the state." Const. art. 3, § 15. The object of this provision, which first appeared in the Constitution of 1894, is to prevent hasty and careless legislation, to prohibit amendments at the last moment and to secure more publicity than had been required before. Care was taken to provide for emergencies by a certificate of necessity from the Governor, which authorizes immediate action. The requirement is not directory, but mandatory, as is obvious from the form of the command, which prohibits a bill from becoming a law without compliance therewith. The question is, who are meant by "the mem-

bers" upon whose desks the printed bill is to be placed? Does the provision mean that the members of the Legislature are to have the bill on their desks for three days prior to its final passage, which was the fact in instance before us; or that the members of the house in which it originated must first have it on their desks for three days, and after they have passed it the members of the other house must have it on their desks for three days more before they can pass it? If the latter is the true meaning of the requirement, it was not obeyed, for the bill was passed by the Assembly on the second day after it was passed by the Senate.

The Constitution created the Legislature as an entity, consisting of two houses, the Senate and Assembly. In every article, except the last, which relates only to the date of operation, and in almost every section it recognizes the existence of the Legislature, as such. Grants of power are made to the Legislature and restrictions upon the exercise of power are directed to the Legislature, not to the Senate and Assembly. Both senators and assemblymen are members of the Legislature, and as such are required to take an oath of office. Article 13, § 1. The command of the people is addressed to the Legislature continuously throughout the fundamental law. Thus it provides that "no member of the Legislature shall receive any civil appointment within this State . . . during the time for which he shall have been elected," and that "no person shall be eligible to the Legislature" under certain circumstances (article 3, §§ 7, 8); directs that "the members" shall not be questioned "for any speech or debate in either house of the Legislature" (Id. & 12); that senators and members of Assembly shall be elected on a day named "unless otherwise directed by the Legislature" (Id. § 9); that "no private or local bill, which may be passed by the Legislature, shall embrace more than one subject" (Id. § 16); that "the Legislature shall not pass a private or local bill" in certain cases (Id. § 18); that "the Legislature shall neither audit nor allow any private claim or account against the state" (Id. § 19); that the Governor may "convene the Legislature, or the Senate only, on extraordinary occasions," and shall "communicate by message to the Legislature" (article 4, § 4); speaks of "the final adjournment of the Legislature" (Id. § 9); "the Legislature at its next meeting" (Id. § 5), and the "next session of the Legislature" (article 5, § 7); authorizes the Legislature to alter judicial districts and create judicial departments (article 6, §§ 1, 2); prohibits "the Legislature" from selling certain canals (article 7, § 8), and from suspending specie payments (article 8, § 5); requires it to provide a system of free common schools (article 9, § 1); to provide for filling vacancies in office (article 10, § 5); to organize the militia (article 11, § 3); to incorporate cities and villages (article 12, §§ 1, 2); and to submit proposed amendments to the people (article 14, § 1).

Many other sections, containing similar provisions, might be cited but the foregoing are sufficient to show that while the Senate and Assembly are separate bodies, they constitute the Legislature; that their united action becomes the act of the Legislature and that the members of both houses are members of the Legislature. A bill is the draf

of a proposed statute submitted to the Legislature for enactment. It cannot become a law by the action of the Senate alone, or of the Assembly alone, but only by the action of both, when it becomes an act of the Legislature, subject to the approval of the Governor. It may originate in either house and when introduced in either it is before the Legislature, or else no bill can ever get before it, for each house is part of the Legislature. When, therefore, the Constitution provides that no bill shall be passed unless it shall have been printed and upon the desks of "the members" in its final form for a certain period, it means the members of the Legislature, not the members of the Senate and Assembly, merely as such. This is emphasized by the contrast in the form of the command when action is required by the members of each house separately, as in section 20 of article 3 relating to the requirement of "a two-third vote" upon a bill "appropriating the public moneys or property for local or private purposes." There the command is addressed "to the members elected to each branch of the Legislature," separately, instead of to the members of the Legislature, collectively, which is the usual form. When the Constitution speaks of three calendar legislative days it means three calendar days of the Legislature, or days when the Legislature is in session. It does not mean six days, which the construction contended for would involve. The bill in its final form, that is in the form in which it becomes a law, must be on the desks of all members of both houses for three days before it is passed by either. But one occasion for placing it on the desks is named, not two separate occasions, the first confined to one house and the second to the other. All members of the Legislature are thus given notice of every bill when introduced into either house and when amended by either house. No reprinting is required as the bill goes from one house to the other unless it has been amended, and whenever amended it must be reprinted. Every member is informed at once of bills pending in either house, so that he can promptly study the proposed legislation, communicate with his constituents, note the comments of the press, observe the state of public opinion and appear before the committee to which the bill is referred in the house of its origin for the purpose of making suggestions before he is called upon to vote in his own house. It prevents artful and dangerous amendments just before the final vote, which was formerly a great evil. It has the same effect, so far as publicity and opportunity for deliberate consideration are concerned, as if every bill were introduced into each house at the same time. The construction thus indicated is reasonable and proper, for it follows the Constitution as written, complies with its spirit and fulfills its purpose. It is in accordance with the practical construction of every Legislature that has been in session since the provision was adopted, and the constitutional debates show that this was the construction of the convention which adopted it. Revised Records, 887, 917. We can give no heed to the criticism of counsel that there is no statute or written rule requiring bills to be placed on the desks of members, for it is not the province of the courts to direct the Legislature how to do its work. It is sufficient for us that the Constitution requires each house "to keep a journal of its proceedings" and that the journal of the Assembly,

which may be consulted to support a statute, shows that the constitutional provision in question was complied with when the act before us was passed. Article 3, § 11. . . .

[The court then held, with regard to several contentions of relator-appellant, that the Legislature had the constitutional power to enact the statute in question.]

The order appealed from should be affirmed.

NOTES.

1. In Orfield, "The Unicameral Legislature in Nebraska", 34 Mich.L.Rev. 26 (1935), the author concludes: "The adoption of a unicameral legislative system recommends itself for many reasons. It is more democratic, the bicameral system being based on a division of persons into classes. It is not wholly untried, having been once used in three states, and now existing in eight out of nine Canadian provinces, in the Swiss cantons, in Norway, in several of the countries created since the World War, in our city governments, and in our constitutional conventions; the unicameral principle is applied to the executive and judicial branches of our government, and to the management of business corporations. The function of legislating is made simpler by the unicameral system. The legislature is made a more responsible organ. The possibility of corruption is reduced. More capable legislators are secured. The rapid passage of legislation is secured, though a sufficient degree of deliberation is retained. Expenses of legislative operation are reduced. The planning of comprehensive legislative programs is facilitated.

"The history of other governmental innovations induces the belief that the unicameral legislature is not to be viewed as a universal panacea. Much good can be expected, however, when the unicameral idea is coupled up with other reforms, such as a small number of legislators, adequate salaries, long terms of office, the advice of experts, sound methods of legislative procedure, possibly (as in Nebraska) a non-partisan basis of election, and a parliamentary cabinet executive."

See also George W. Norris, "One House Legislatures", *supra*, p. 281.

2. See discussion of the unicameral legislature in New York State Constitutional Convention Committee (1938) Vol. VII, Problems Relating to Legislative Organization and Powers, pp. 125-140. Cf. United States Constitution, Article I, sections 1, 2 and 3 and Amendment XVII, with New York Constitution, Article III, section 1 and Nebraska Constitution, Article III, Section 1 (as amended 1934).

IN RE HAGUE

Court of Chancery of New Jersey, 1929. 105 N.J.Eq. 134, 147 A. 220.

FALLON, V. C. The record in this case has not been submitted to me. My decision in *Ex parte Hague*, 104 N.J.Eq. 31, 144 A. 546, of which the present case is a sequence, is dispositive as to this court of the matters in controversy herein other than the questions—(1) whether the joint resolution No. 13, adopted by the legislature of the year 1929 had any vitality after the final adjournment of said body other than to enable the committee appointed thereunder to report; (2) whether the legislature of the year 1929 was authorized to amend and supplement the aforesaid resolution; (3) whether the petitioner herein may be compelled to answer questions propounded to him, which he declined to answer, relating to his private affairs and property. I do

of the opinion that each of the aforesaid questions must be answered in the negative. The legislative power vests in a senate and general assembly. State Const., art. 4, Sec. 1 (1. Said bodies meet separately on the second Tuesday in January, at which time of meeting the legislative year commences. State Const., art. 4, Sec. 1) 3. Neither of said bodies are continuous; they expire annually. State v. Rogers, 56 N.J.L. 480, at p. 631, 28 A. 726, 29 A. 173. Although the senate—providing an always-existent membership—may be considered as having a permanent existence, it does not have continuous vitality. State v. Rogers, *supra* (at p. 622). It is only when the senate and general assembly are lawfully assembled that they constitute the legislature—the law-making body of the state. Each of said bodies are subject, in their action, to constitutional limitations and laws, in common with all other bodies, officers and tribunals within the state. In re Gunn, 50 Kan. 155, 32 P. 470, 19 L.R.A. 519; Kilbourn v. Thompson, 103 U.S. 168, 26 L.Ed. 377; Burnham v. Morrissey, 80 Mass. 226, 74 Am.Dec. 676. All powers of the legislature, as such, cease upon the final adjournment of said body. All powers delegated to a committee appointed by a joint resolution of the senate and general assembly also cease. Fergus v. Russel, 270 Ill. 304, 343, 344, 110 N.E. 130, Ann.Cas.1916B, 1120; Bank v. Worth, 117 N.C. 146, 23 S.E. 160. The legislative committee appointed under the aforesaid joint resolution had no authority after the final adjournment of the 1928 legislative session, except to make a report. Bank v. Worth, *supra*. The legislature constituted for the year 1929 was without power to amend or supplement the aforesaid joint resolution. The power of the legislature is distinguishable, in this respect, from its conceded authority to amend or supplement a law. A joint resolution adopted by a state legislature is not a law. It is of less solemnity than a law, and clearly distinguishable therefrom.

NOTES

(1) In *Harpending v. Haight*, 39 Cal. 189, 2 Am.Rep. 432 (1870), the governor's messenger took a bill with a veto message to the senate, the house in which the bill originated. Upon finding that the senate had adjourned temporarily, the messenger returned the bill and message to the governor. Held, (1) that this was not a proper return of the bill to the senate, (2) that the senate could not, however, defeat the return by a temporary adjournment which included the last day for the governor to return the bill, and (3) that a proper return could have been made by leaving the bill with an officer or employee of the senate.

" . . . The Executive may return a bill to the Senate, though it be not, at the moment of the return, in actual session. If it has adjourned for the day, or for three days, it still has an organized existence as a legislative body, with its President, Secretary and other officers, to whom, under such circumstances, a substitutional delivery of the bill and message might be made, . . ."

(2) In *Edwards v. United States*, 286 U.S. 482, 52 S.Ct. 627, 76 L.Ed. 1239 (1932), a question certified by the Court of Claims, i.e., whether a bill approved by the President within ten days after it was presented to him, but after the final adjournment of the Congress which passed it, became law, was answered in the affirmative. The Court quoted from its opinion in *La Abra Silver Mining Co. v. U. S.*, 175 U.S. 423, 20 S.Ct. 168, 44 L.Ed. 223 (1899), where it had held that the President may

approve bills during a recess of the Congress: "It is said that the approval by the President of a bill passed by Congress is not strictly an executive function, but is legislative in its nature; and this view, it is argued, conclusively shows that his approval can legally occur only on a day when both Houses are actually sitting in the performance of legislative functions. Undoubtedly the President when approving bills passed by Congress may be said to participate in the enactment of laws which the Constitution requires him to execute. But that consideration does not determine the question before us. As the Constitution while authorizing the President to perform certain functions of a limited number that are legislative in their general nature does not restrict the exercise of those functions to the particular days on which the two Houses of Congress are actually sitting in the transaction of public business, the court cannot impose such a restriction upon the Executive."

BURNS v. SEWELL

Supreme Court of Minnesota, 1892. 48 Minn. 425, 51 N.W. 224.

GILFILLAN, C. J. Action to enforce a mechanic's lien under Laws 1889, c. 200. The appellants object that, under the constitutional provisions with respect to the passage and approval of bills, that chapter did not become a law. It originated in and passed the house, and going to the senate was amended and passed, and returned to the house, where, as amended, it was passed April 19th. April 22d it was reported enrolled, and sent to the governor. April 23d the legislature adjourned. April 24th the governor approved it. The objection is that, the bill not having passed during the last three days of the session, the governor had no constitutional power to approve it, and, its return to the house being prevented by the adjournment, it failed to become a law. In the ordinary course of enacting and approving laws, as prescribed in the constitution, art. 4, § 11, after passing both houses a bill is to be presented to the governor. If he approve, he shall sign and deposit it in the office of the secretary of state, and notify the house where it originated. It is then a law. If he do not approve, he is to return it, with his objections, to the house where it originated. Then if, upon a reconsideration, it is approved by a two-thirds vote of each house, it becomes a law, notwithstanding the governor's objections. But as the governor might, by omitting to return the bill, deprive the houses of the opportunity to reconsider and pass it over his objections, the section referred to provides: "If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature, by adjournment within that time, prevent its return, in which case it shall not be a law." Under a provision similar to the foregoing in the constitution of New York, it has been held that the adjournment of the legislature within the three days does not prevent a bill becoming a law, if it be signed by the governor, and that the only effect of such adjournment is to prevent it becoming a law merely by failure of the governor to return it, (*People v. Bowen*, 30 Barb. 24, 21 N.Y. 517;) and also a like provision in the constitution of Illinois, (*Seven Hickory v. Ellery*, 103 U.S. 423.) This is upon

a proper rule of construction. The part of the sentence following the word "unless" relates to and qualifies the preceding part of the sentence, and does not affect the power and duty of the governor to sign the bill if it meets his approval. Immediately following the above-quoted part of the section is: "The governor may approve, sign, and file in the office of the secretary of state, within three days after the adjournment of the legislature, any act passed during the last three days of the session, and the same shall become a law." This does not confer on the governor power to approve bills after the adjournment, for he would have it without the clause, but it is a limitation upon his power, restricting its exercise to the period of three days after the legislature shall adjourn. What in this clause is the meaning of the word "passed?" Ordinarily a bill is said to have passed one of the houses when the final vote in its favor in that house has been taken and announced. Is that the sense in which the constitution is to be understood when speaking of the passage of bills, not by one house, but by the legislature, with reference to action upon them by the governor? For that purpose, is a bill deemed to be passed so long as the house in which it is has control over it, and may reconsider its action upon it? We think not. Section 21 of the article provides: "Every bill passed both houses shall be carefully enrolled, and shall be signed by the presiding officer of each house." When that is done the bill is in condition to be sent to the governor for his action upon it. It is then to be deemed as passed for that purpose. That the word "passed," as used in the constitution, may sometimes include the enrollment and signature by the presiding officers and sending to the governor, is apparent from section 22 of the article, which provides that no bills shall be "passed" on the day of adjournment; and continues: "But this section shall not be so construed as to preclude the enrollment of a bill, or the signature and passage from one house to the other, or the reports thereon from committees, or its transmission to the executive for his signature,"—provisions wholly unnecessary if the word could not include those things. The inconvenient consequences that might arise from using the word in section 11 to indicate merely the final vote upon a bill are so manifest as to furnish a strong presumption that it is not used in that limited sense. It must happen at every session that the final vote on many bills is taken more than three days before the day of adjournment, but which bills it will be impossible to have enrolled and signed, so that they may be sent to the governor, until less than three days remain. In such cases, if the time of passing them is to be computed from the vote, many of them must be lost for want of time on the part of the governor to examine them while the legislature is in session. We think that bills enrolled during the last three days of the session are within the meaning of the clause authorizing the governor to sign them within three days after the adjournment. . . .

NOTE

In *State ex rel. Smith v. Ryan*, 123 Kan. 767, 256 P. 811 (1927), a similar constitutional provision was held not to confer power on the governor to sign a bill after the adjournment of the legislature, apparently because the adjournment of the legislature prevents the governor from returning the bill with objections. The contention that the governor has such power in the absence of a contrary provision, a proposition assumed in the principal case, was unsuccessful here.

SECTION 6. PROOF OF PROCEDURAL AND TEXTUAL IRREGULARITY: THE SO-CALLED ENROLLED BILL AND JOURNAL ENTRY RULES

WOODWARD v. PEARSON

Supreme Court of Oregon, 1940. 165 Or. 40, 103 P.2d 737.

KELLY, JUSTICE. By this suit, plaintiff, a citizen, property owner and taxpayer of Oregon, challenges the constitutionality of chapter 460, Oregon Laws 1939, p. 907 et seq. This measure is entitled, "An Act To provide for the codification, publication and distribution of the codes and statutes of the state of Oregon; making an appropriation therefor; and declaring an emergency." From an order sustaining a demurrer to plaintiff's complaint and dismissing it, plaintiff appeals.

Five grounds are given in support of plaintiff's contention that the act in question is invalid.

The first of these grounds is that chapter 460, *supra*, was not legally passed or adopted by the legislature; and the mandatory provisions of the Constitution have not been observed in the enactment.

In plaintiff's complaint it is alleged:

"III. That the Senate and the House of the Legislative Assembly of Oregon, in its 1939 Session, passed alleged H. B. 494, as amended, appropriated \$65,000 for publication of a Code, and as such it was signed by the President of the Senate, Speaker of the House, and on the 21st of March 1939, it was approved and signed by the Governor of the State of Oregon, and is alleged Act, Chapter 460, of Oregon Laws 1939, however, in fact, no such Bill had been introduced in the Senate or House.

"IV. That prior to the passage of said purported H. B. 494, the Senate and House appointed conferees on said alleged House Bill, and thereafter the Senate and House adopted an alleged conferees report, which provided, among other amendments, the following: to strike out the figures \$65.00, in the two separate places in paragraph (3) of said H. B. 494, and insert in lieu thereof the figures \$62.50; to strike out the figures \$35,000 in paragraph (5) thereof, and insert in lieu thereof the figures \$31,250; and to strike out the figures \$65,000 in paragraph (5) thereof and insert in lieu thereof the figures \$62,500.

"V. That when said House and Senate passed said purported H. B. 494, as amended, it omitted therefrom the amendments of the said conferees report as above mentioned, but included all the other amendments in said conferees report, and it was so enrolled, passed and adopted as aforesaid, and by reason thereof said alleged Act, Chapter 460 of the Oregon Laws of 1939, is void, invalid, and of no force and effect."

In the case of a house bill, which has been amended by the house, the original bill and its amendments are delivered to the chairman of the house committee on engrossed bills for engrossment. The engrossed bill, which is merely a redaction of the original bill and its amendments, is sent to the senate. If amendments are made in the senate, the engrossed bill, together with the endorsements thereon showing the course taken and the senate amendments, is sent to the house; if the senate amendments are adopted by the house and the measure passed as thus amended, the house committee on enrolled bills receives the engrossed bill and amendments and makes a redaction therefrom which is the enrolled bill. This enrolled bill is signed by the speaker of the house and the president of the senate and transmitted to the governor. The amendments omitted from the enrolled bill in suit were those recommended by the third joint conference committee appointed after failure of the two houses to agree upon amendments theretofore recommended. The question here presented is whether, in the absence of any record in explanation of this omission, the act is invalid. The question is not a new one in this jurisdiction. In an opinion by Mr. Justice Harris, exhaustively treating the authorities upon the question, the rule is stated thus: "Every reasonable presumption is to be made in favor of the regularity of legislative proceedings. If the Constitution does not require a given proceeding to be entered in the journal, the absence of a record in the journal will not invalidate a law. It will not be presumed from the mere silence of the journal that either house has exceeded its authority or disregarded constitutional requirements in the passage of legislative acts. . . .

In an earlier case, this court, speaking through the late Mr. Justice Robert S. Bean in reference to a similar record, said: "Mere silence of the journal is not sufficient. Within this rule, we think the act in question must be regarded as valid. It nowhere appears in the journal that it did not pass in the form as actually signed by the presiding officers, and now on file in the office of the secretary of state. It is true, the journals show that in its progress through the legislature an amendment was adopted which is not included in the enrolled act; but the vote by which such amendment was adopted may have been reconsidered, and the amendment defeated. At least, the courts are bound to presume such to have been the case. The enrolled act, as filed by the secretary of state, is signed by the officers of the house and senate required by the constitution to sign all bills and joint resolutions passed by their respective bodies, and is therefore officially attested in the manner required by the organic law as one that has

regularly and duly passed the legislature, and this attestation must prevail unless the contrary conclusively appears by the journals of their proceedings. *State v. Francis*, 26 Kan. 724. The constitution requires all bills and joint resolutions to be signed by the presiding officers of the respective houses. Article 4, § 25. And their signatures must be given full force and effect, and import absolute verity, unless affirmatively contradicted by the journals which the constitution requires to be kept." *McKinnon v. Cotner*, 30 Or. 588, 592, 49 P. 956, 957.

The contention that the act in question is invalid because of the omission mentioned is not tenable. . . .

[The court then discussed several other contentions of the plaintiff, holding against him.]

The judgment and decree of the circuit court is affirmed.

CARLTON v. GRIMES

Supreme Court of Iowa, 1946. 237 Iowa 912, 23 N.W.2d 883.

BLISS, JUSTICE. Chapter 136 of the 51st G.A. (General Assembly) of Iowa, known as S.F. (Senate File) 229 of that Assembly amended section 4644.11, Code 1939, section 309.11, Code 1946, by increasing the tax millage on taxable property leviable annually by county boards of supervisors for secondary road maintenance, and amended section 5093.03, Code 1939, section 324.2, Code 1946, to increase the license fee or tax on motor vehicle gasoline fuel from three cents per gallon to four cents per gallon, and amended section 5093.35, Code 1939, section 324.63, Code 1946, to provide that one cent of the four-cent gasoline tax should be apportioned so that three-fifths thereof would be credited to the secondary road construction fund of the various counties according to the area of each, and that two-fifths of said one cent tax would be credited to the street construction fund of the several incorporated cities and towns of the state in the ratio of their respective populations to the total population of all such cities and towns according to the last Federal census.

The suit was begun May 24, 1945. The statute became effective July 4, 1945. On July 3, 1945, Judge H. D. Evans, of the Eighth Judicial District of Iowa, entered an order in the District Court of Johnson County, Iowa, directing the Treasurer of the State to collect the additional one cent tax and to segregate it and deposit it in banks designated by said court to await its further order on the final determination of this suit. The amount collected approximates \$6, 000,000.

Briefly stated the chief contentions of the appellant and ground relied upon for reversal are: first, that S.F. 229 was not passed as required by the Constitution of Iowa in that said Act was amended after being voted upon in both Houses of the Legislature, and was not voted upon or passed in the final form as signed by the President of

the Senate and the Speaker of the House, and approved and signed by the Governor and filed in the office of the Secretary of State. . . .

Taking up first the contention of the appellant that the Legislature violated the requirements of the Constitution of Iowa in the mechanics of the enactment of S.F. 229, we set out the pertinent sections of that instrument.

Sect. 9, Art. III. "Each house shall . . . keep a journal of its proceedings, and publish the same; determine its rules of proceedings . . . ; and shall have all other powers necessary for a branch of the General Assembly of a free and independent state."

In section 9, *supra*, is the mandate that each house of the Assembly shall keep a journal of its proceedings. There is no constitutional mandate as to just how, or in what manner, the journal of the proceedings shall be kept. "In the absence of a statutory or constitutional requirement regulating the keeping of journals the entries may be of a most cursory nature." (Citing authorities.) Crawford, *The Construction of Statutes* (1940), sect. 46, pp. 75, 76. A constitutional provision directing each house to keep journals of its own proceedings does not require entries to be made of every action taken on proposed amendments to pending bills. *State ex rel. Lane Drug Stores v. Simpson*, 122 Fla. 670, 166 So. 262; *Id.*, 122 Fla. 582, 166 So. 227. The only absolute command as to any specific part of the proceedings which must be entered on the journal is the one in section 17 that "the question upon the final passage shall be taken immediately upon its [the bill] last reading, and the yeas and nays entered on the journal." It is only the yeas and nays on the "final passage" of a "bill" which must be entered on the journal. This mandate must always be complied with whether demanded or not demanded. The entry on the journal of the yea and nay vote is not required on an amendment to a bill, or on any other matter or question in the course of the bill's enactment, except as stated in section 10. In that section it is provided that a member of the Assembly may have his protest or dissent, respecting any act or resolution, entered on the journal, and the "yeas and nays of the members of either house, on any question, shall, at the desire of any two members present, be entered on the journals."

There is no requirement in the Iowa Constitution that any bill proposed, engrossed, enrolled, or enacted, or any amendment thereto, or substitute therefor, must be entered on any journal. Therefore the best, and the only recorded legislative evidence of the text and content of any bill enacted, is the enrolled bill authenticated by the signatures of the presiding officers, signed and approved by the Governor, and deposited in the office of the secretary of state.

The practice of reading any proposed bill to legislative bodies has been followed since their inception. It has been a practice quite uniformly recognized that every bill should be read three times, usually on different days. The Constitutions of some of the states require

this. There is no such provision in the Iowa Constitution. There is no express requirement that a bill be read any specified number of times before its enactment. The words "its last reading" in section 17, *supra*, may imply previous reading or readings, and yet a "last reading" may be a first, second, third, or other reading. The purpose of any provisions for reading a bill is to inform the Legislature concerning the nature of the proposed enactment and to prevent hasty legislation. Since all bills are promptly printed and copies are given to each member, and a file thereof is kept on his desk, the matter of reading bills to each assembly has become of less importance and is not so much stressed in Constitutions or assembly rules. See sections 259, 260 and 261, Code 1939, sections 17.15, 17.16 and 17.17, Code 1946, for provisions relative to printing legislative journals and proceedings. In the Legislature of Iowa and in many Legislatures a reading of the title is considered sufficient except for the last reading. Senate rule 17 of the 51st General Assembly provided that "every bill . . . shall have received three several readings previous to its passage; but no bill . . . shall have its second and third readings on the same day, without a suspension of this rule, except on the last legislative day; . . ." Rule 44, of the House rules of the 51st G.A., states: "Every bill shall receive two readings but no bill shall receive its first and last readings on the same day." There is no mandate in the Constitution that the fact of any readings shall be entered on the journal. As said in Luce on Legislative Procedure (1922) p. 210: "Iowa legislators are not hampered by any constitutional obstacles in the matter."

With the exception of the few mandatory provisions noted the Constitution of Iowa has given the General Assembly a free hand in determining its rules of procedure. Whether either chamber strictly observes these rules or waives or suspends them is a matter entirely within its own control or discretion, so long as it observes the mandatory requirements of the Constitution. If any of these requirements are covered by its rules, such rules must be obeyed, but the observance or nonobservance of its remaining rules is not subject to review by the courts. *Miller v. City of Oelwein*, 155 Iowa 706, 711, 136 N.W. 1045.

There is no controversy in the evidential record and it is short. The appellant offered in evidence the House and Senate journals, and photostats of portions of each pertaining to S.F. 229, a photostatic copy of the original bill S.F. 229 (Ex. "G") and within the folder was a photostatic copy of the House amendment to the bill though the latter was not referred to in the verbal offer of the exhibit. Appellant also offered copies of H.F. 364 and S.F. 292, companion bills offered for an increase in the gasoline tax from three cents to four cents, but these bills were never enacted.

To these Exhibits the appellees offered three-fold objections, substantially as follows: 1. incompetent, irrelevant and immaterial, in the best evidence, surplusage and an attempt to impeach the verity of a duly enrolled, signed, approved and filed enactment known

S.F. 229; 2. the enrolled and filed bill constitutes conclusive and exclusive proof of the text of S.F. 229 . . . and no other evidence is material or competent; 3. object to every part of journal records except record of final reading, vote and passage as shown on pages 834, 835 of House journal, as surplusage and an attempt to impeach the verity of said enactment as enrolled, signed, approved and filed. Exhibit "K" a photostatic copy of S.F. 229, as deposited in the office of the secretary of state, was offered by all parties.

In brief the contentions of appellees are that Exhibit "K" is conclusive and exclusive proof of its verity, not only as to its text, but to the regularity and constitutionality of its enactment. . . .

The appellant insists that not only the journal proceedings in the legislative course of S.F. 229 are admissible, but that Ex. "G", which is outside of that record and Exhibits H.1 and I.1 (copies of H.F. 364 and S.F. 292) are also admissible, and impeach the enrolled bill. He puts much reliance upon the rule of *Smith v. Thompson*, 219 Iowa 888, 258 N.W. 190, while appellees urge that the rule therein stated is unsound and should be overruled. . . .

The common law rule is that the enrolled bill, nothing to the contrary appearing on its face, is an absolute verity, is conclusive of its textual content and of its lawful enactment, and cannot be impeached by the legislative journals or evidence extrinsic of the journals. This is the rule of the English courts, the Federal courts, and of many of the state courts. *Crawford, The Construction of Statutes*, supra, § 139; 1 *Sutherland*, supra, footnote, pages 227-229.

Other courts apply the rule that the enrolled bill imports absolute verity, in a modified form. They hold that the enrolled bill is a verity and conclusively proves that the General Assembly complied with all constitutional provisions, excepting those provisions of the Constitution compliance with which is expressly required to be shown on the journals.

There are other courts which hold what is sometimes designated as the journal entry rule which is that the enrolled bill is not a verity but is prima facie evidence that the Legislature met all constitutional requirements, but the journals are admissible to rebut the prima facie presumption. Under this rule the failure of the journals to show that proceedings required by the Constitution to be entered on the journal were had rebuts the presumption that the proceedings were taken, and impeaches the bill. But if the silence of the journal is with respect to a matter which the Constitution does not require to be shown on the journals it is not sufficient to rebut the presumption of the enrolled bill. In such case the journals must go further and affirmatively show non-compliance with the requirement.

Even the courts, which do not subscribe to the conclusiveness of the enrolled bill, agree that all impeaching evidence is restricted to the enrolled bill itself and the legislative journals. *Crawford, The Construction of Statutes*, supra, § 143; 1 *Sutherland*, *Statutory Construction*, 3d Ed. supra, § 1408. The latter authority in the same sec-

tion states that even the original bill (Exhibit "G" on this appeal) or the engrossed bill are inadmissible to impeach the enrolled bill or contradict the journal. Citing *State ex rel. McKinley v. Martin*, 160 Ala. 181, 48 So. 846, 848; *In re Granger*, 56 Neb. 260, 76 N.W. 588; *State v. Abbott*, 59 Neb. 106, 80 N.W. 499; *State v. Jones*, 1900, 22 Ohio Cir.Ct.R. 682.

The power to determine the regularity of the passage of a legislative enactment is vested in the courts. *Portland Gold Mining Co. v. Duke*, 8 Cir., 191 F. 692; *Standard Underground Cable Co. v. Attorney General*, 46 N.J.Eq. 270, 19 A. 733, 19 Am.St.Rep. 394; *Lyons v. Woods*, 153 U.S. 649, 14 S.Ct. 959, 38 L.Ed. 854; *Sherman v. Story*, 30 Cal. 253, 89 Am.Dec. 93; *Sims v. Weldon*, 165 Ark. 13, 263 S.W. 42. But there are limits to which they may go in such proceedings. Inquiry may not be made into the qualification of the members of the Legislature. Matters of parliamentary law and the failure of the Legislature to observe its rules of procedure, insofar as they are not required by the Constitution, must not be considered. The courts will determine only whether the Legislature complied with the requirements of the Constitution in enacting the challenged bill. But there is a presumption that such provisions of the Constitution have been complied with by the Legislature both as to substance as well as to form and enactment. *Crawford, The Construction of Statutes*, supra, sect. 138 and decisions cited.

What we have said in this division of the opinion fully answers the contention of the appellant that S.F. 229, involved in the Appeal before us, was not lawfully enacted in compliance with said section 17 of the Constitution. . . .

Affirmed and remanded.

NOTES

1. See commentary on the principal case in 32 Iowa L.Rev. 147 (1946).
2. New York Legislative Law, § 40, reads: "No bills shall be deemed to have so passed unless certified by the presiding officer, which certificate to such effect shall be conclusive evidence thereof." It has been held that where the certificate of the presiding officer of the house or senate is defective in failing to show that the requisite number of members was present or that the requisite number voted for the bill, recourse may be had to the journals of the respective houses to support the validity of the amendment. *Matter of New York & Long Island Bridge Co. v. Smith*, 148 N.Y. 540, 42 N.E. 1088 (1896).

FREEMAN v. GOFF

Supreme Court of Minnesota, 1939. 206 Minn. 49, 287 N.W. 238.

JULIUS J. OLSON, JUSTICE. This suit was brought under our uniform declaratory judgments act, Laws 1933, c. 286, to determine "the validity and construction" of L.1939, c. 444, "and to determine and obtain a declaration of plaintiff's status and rights thereunder," his contention being that the act as passed by the legislature is not the same as the enrolled bill approved by the governor and for that reason vio-

lates Minn.Const. art. 4, § 11, which provides that "every bill . . . passed . . . shall, *before it becomes a law*, be presented to the governor" for approval (italics supplied), and, further, that the act is constitutionally objectionable because it subjects plaintiff to penalties which are not uniformly enforced under the act against all persons similarly situated. The court held with plaintiff and made findings and ordered judgment to that effect. Judgment was entered accordingly, and defendants have appealed.

The facts are not in dispute and may be thus summarized: Plaintiff is a duly licensed "on sale" liquor dealer in Minneapolis and operates a cafe and bar there. Attached to the exterior of his premises is a large neon illuminated sign suspended from the corner of the building advertising the sale of beer. The court found the cost thereof to be "approximately \$400." Within his place of business is another sign 20 by 28 inches advertising the sale of intoxicating liquors. These signs when placed in their respective positions, and as since maintained, are not violative of any local ordinance or state law unless the mentioned act makes them such. So the case hinges upon the validity of that enactment. The material portions of the purported act, as signed by the governor, read:

"Section 1. No sign of any kind, printed, painted, electric or illuminated, advertising intoxicating liquors or non-intoxicating malt liquor containing not more than 3.2 per cent of alcohol by weight, shall be permitted on the exterior of, or immediately adjacent to, any premises licensed to sell said beverages, or any or all of them at retail *nor shall any such exterior signs be permitted upon or adjacent to the public streets and highways of this state or in a position where such sign will be visible to travelers upon such streets or highways.*

"Section 2. Any such sign now or hereafter placed upon premises, or immediately adjacent thereto, licensed to sell said beverages, or any or all of them [at retail], shall be removed on or before the expiration of a period of 90 days next following the passage of this act. Provided, however, that any sign, costing in excess of \$1,000.00 and constructed of such shape and design as to fit a particular location, need not be removed.

"Section 3. No sign of any kind, printed, painted, electric or illuminated, advertising intoxicating liquor or non-intoxicating malt liquor containing not more than 3.2 per cent of alcohol by weight, shall be permitted in or upon the interior of any premises licensed to sell said beverages, or any or all of them [at retail], which sign shall exceed 18 inches by 27 inches, or 486 square inches in size."

(The words in italics of § 1 were not in the bill passed by the legislature. The words "at retail" quoted within brackets in §§ 2 and 3 were not present in the enrolled act approved by the governor but were a part of the original bill passed by the legislature.)

The court was of opinion that the "discrepancies which appear between the enrolled bill [the one receiving the governor's approval] and the bill passed by the legislature . . . constitute material variance rather than clerical errors," and as such rendered the en-

actment void. It was of the view that the entire act fell because the variance between the two bills is a material one and that as such the rule of severability does not apply. Defendants' claim is that the italicized portion of § 1, while constituting a "spurious portion" of the act, does not preclude the court from applying the rule of severability. They say that the presence of an unconstitutional provision does not authorize the court to declare the remainder void unless all the provisions of the act are so essentially and inseparably connected and so interdependent that it cannot be assumed the legislature would have passed the valid provisions without the invalid portions.

1. This court is firmly committed to the so-called "journal entry rule," under which "the regularity of the enactment of a law may be inquired into and the legislative journals may be examined to ascertain whether the law has been passed in accordance with constitutional requirements." *Bull v. King*, 205 Minn. 427, 286 N.W. 311, 312. Applying that rule to the facts here appearing leaves no doubt that the enrolled bill receiving the governor's approval is essentially a different act from the one passed by the legislature.

2. In *Bull v. King*, supra, we also said (205 Minn. 427, 286 N.W. at page 313): "The bill presented to the governor for his approval must be the same bill which was passed by the legislature. This requirement is mandatory. If there is a material variance between them, the bill presented to the governor cannot be said to be the same bill which was passed by the legislature. In that situation he approves not a bill passed by the legislature, but another. A material variance between the bill passed by the legislature and that approved by the governor invalidates the entire enactment." (Citing many cases.)

3. Clearly, then, the decisive question is whether the bill passed by the legislative body is (205 Minn. 427, 286 N.W. at page 313) in "substance and legal effect" the same as the one receiving the governor's approval, "for on the answer of this question depends the validity of the enactment." As we have seen, the italicized portion of § 1 of the enrolled bill contains not only a prohibition against certain signs on the "exterior" of the licensed premises, but also a prohibition against such signs being "permitted upon or adjacent to the public streets and highways of this state or in a position where such signs will be visible to travelers upon such streets or highways." No argument is needed to demonstrate that this portion of the enrolled bill is not only a material, but, we think, a vital, variance between the bill passed and the one signed by the governor.

The argument that a variation is not different from an unconstitutional provision which may be stricken from a statute and yet leave the remainder intact falls because it ignores the fact that the unconstitutional provision exists in a state validly enacted, while a material variance prevents any part of the act from ever becoming a statute. The subdivisions of an act are but parts of the whole. Under our constitution (art. 4, § 11), "every bill . . . passed . . . shall, *before it becomes a law*, be presented to the governor" for approval.

(Italics supplied.) Here it is apparent that the bill as passed by the legislature has never been presented to the governor nor approved by him. Without such presentation and approval it cannot become a valid law. And the variance being a material one, the rule announced in *Bull v. King*, *supra*, and the cases cited to sustain that view is that, "a material variance between the bill passed by the legislature and that approved by the governor invalidates the entire enactment."

It therefore necessarily follows that the result reached by the trial court is right, and its judgment is affirmed.

NOTES

1. See Sutherland, *Statutory Construction* (3d ed. 1943) vol. 1, § 1406, for a different definition of the "journal entry rule."

2. In *McClellan v. Judge of Recorders Court of Detroit*, 229 Mich. 203, 211, 201 N.W. 209, 212 (1924), the Court said: "It is true that in some jurisdictions decisions go far in holding that where the legislative records are silent as to various requirements being observed they will presume the legislature has done what it should do To follow such rule of presumption to its logical conclusion, in practical effect leaves it optional with the legislature to follow the course expressly commanded by the Constitution in passing a bill, and makes the journal a bulwark behind which constitutional mandates must be ignored. If silence upon the subject is sufficient and a statute must be presumed valid unless it affirmatively appears by the legislative journal that some constitutional requirement was disregarded, all the legislature need do is to record in its journal the final vote showing the bill passed, and presumptions do the rest. It is safe to suggest that the legislature would seldom affirmatively record in its journal that it had failed to comply with any constitutional requirement."

3. In *Post v. Supervisors*, 105 U.S. 667, 26 L.Ed. 599 (1881), in holding that an Illinois statute was validly enacted, the Supreme Court of the United States followed the decision of the Illinois supreme court; journals are competent evidence of proceedings in the legislature. If journals fail to show that an act has been passed in the mode described by the constitution, the presumption of validity arising from the signatures of the presiding officers and of the executive is overthrown and the act is void.

4. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892), an enrolled bill, authenticated by the signatures of the presiding officers of both houses of Congress, signed by the President, and received by the Secretary of State, was held conclusive evidence that the bill was passed by Congress. The journals, committee reports or other printed documents are not available as evidence to show that a bill, as passed, contained a section which did not appear in the enrolled act.

5. In *Bull v. King*, 205 Minn. 427, 286 N.W. 311, 313 (1939), the court said: "The 'enrolled bill rule' permits bills to become laws which have not been actually passed by the legislature. The rule has been said to be conducive to fraud, forgery, corruption and other wrongdoings in connection with legislation. Courts applying such a rule are bound to hold statutes valid which they and everybody know were never legally enacted."

See *Minnesota Mutual Life Ins. Co. v. Johnson*, 212 Minn. 571, 4 N.W.2d 625 (1942), holding that failure of the engrossing staff of the senate to delete from a bill the words stricken by an amendment shown in the senate journal was a clerical error vitiating the statute as enrolled.

6. In *People ex rel. Purdy v. The Com'rs of Highways of Marlborough*, 54 N.Y. 276, 13 Am.Rep. 581 (1873), an act resulting from a bill which required a two-third vote was held void, since "the law in question does not appear either upon the printed statute book or upon the original act to have been passed by a two-third vote, and consequently it never had the effect of law."

HARBAGE v. TRACY

Court of Appeals of Ohio, 1939. 64 Ohio App. 151, 28 N.E.2d 520.

GEIGER, JUDGE. . . . It is alleged that the plaintiff is a taxpayer and the defendant is the Acting Auditor of State, sued in that capacity. The plaintiff petitions the court for a temporary and permanent injunction restraining defendant from paying to the members of the General Assembly of the state of Ohio any money whatsoever for mileage between July 27, 1936, and December 8, 1936, during which period no session of the General Assembly was held and no actual expenses for mileage were incurred.

Plaintiff states that he had reason to believe that unless restrained the auditor will pay the members of the General Assembly allowance aggregating \$21,507 for such mileage. A temporary restraining order was allowed as prayed for. . . .

The court . . . found that on the 22nd of July, 1936, the 91st General Assembly of Ohio was in session; that on that date each house separately voted to take a five-minute recess and thereupon disbanded to their respective homes; that on the 8th day of December the members returned and each house convened in actual legislative session; that neither house convened in actual session between July 22 and December 8, 1936, and that in such interval there was no actual session or actual meeting of the General Assembly on account of which any member would have been entitled to any mileage from the treasury of the state; that entries were made in the journals of each house to show the convening of each house twice or more a week, from July 22, 1936, to December 8, 1936; that such entries were in fact incorporated in the House and Senate journals so that it would appear that forty sessions of each house of the General Assembly had been held when in truth and in fact no such sessions had been held; that thereafter the clerk of the House and President of the Senate certified to the auditor mileage allowances for the members of the House and Senate authorizing the payment of mileage not incurred and for mileage for each of the sixteen weeks within which forty fictitious sessions were purported to have been held which did not in fact occur, and that the amount of payments vouchered on account of the members of the House was \$21,430.32, which has been appropriated to and is now in the fund known as traveling expenses; that \$5,363.09 for mileage for the members of the Senate have in fact been paid and were paid before the final adjournment of the General Assembly, contrary to Section 50, General Code; that the threatened payments to the members of the House and further payments to the members of the Senate would be and are legally a fraudulent perversion of public funds, and

that by reason of the premises plaintiff is without adequate relief.

On February 17, 1939, the Auditor of State gave notice of appeal to this court on the question of law and fact.

Counsel for the defendant takes the position that the journal of the respective houses may not be impeached to show that the facts recited did not as a matter of fact occur. Counsel in their brief state in substance that in spite of the opinion of the Court of Common Pleas, the rule as to the unimpeachability of legislative journals is of universal application; that it is a positive rule of constitutional law resulting from the doctrine of the separation of the power of government which precludes the interference by the judiciary with any of the acts and proceedings of either house of the Legislature, in this instance, the keeping of the journal which is an act of the whole house and that any distinction sought to be shown between "legislative acts" and "ministerial acts" does not in fact exist.

We can not support counsel in this claim. If entries have been made in the journal of each house in compliance with a long-established custom, which entries do not in fact tell the truth in reference to the matter here in question, but show that there were forty legislative sessions between July 22nd and December 8th, which did not as a matter of fact occur, we are of the opinion that such a manifest misstatement of facts can not be shielded from scrutiny which would develop the truth by the claim that the journals of the two houses may not be impeached. We have considered the cases in which this proposition has been sustained and we find none in which such palpable misrepresentation has been journalized which have been protected by the court, on either the theory that the journal could not be impeached or that the judicial branch could not interfere with the legislative branch of the government.

Taking the broad view of the Constitution and the statutes, we are of the opinion, first, that the journal of the two houses do not import absolute verity, and that the rule that they may not be impeached has no reference to the matter now in controversy; second, that the members of the Legislature are not entitled to mileage unless the Legislature be in actual session during the time for which the mileage is paid.

We therefore arrive at the conclusion that the judgment of the court below should be affirmed.

NOTES

1. Appeal in the principal case to the Supreme Court of Ohio was dismissed, 136 Ohio St. 534, 27 N.E.2d 141 (1940). For a commentary on the principal case see 25 Minn.L.Rev. 528 (1941).

2. *Cox v. Mignery*, 126 Mo.App. 669, 103 S.W. 675 (1907):

The common council of the city of St. Joseph passed an ordinance which required a concurring vote of two-thirds of the council by a vote of six to two. A journal entry was made showing a vote of six to two. A handwritten alteration was made

in the typed journal showing a vote of five to three and the entry as altered was printed in a newspaper. At a subsequent meeting of the council, the minutes as printed were approved, with no apparent knowledge on the part of the council of the change. The court held that the ordinances of common councils are entitled to the presumptions indulged with respect to statutes; that an enrolled statute is presumed to be validly enacted if it shows on its face no ground of invalidity; and that this strong presumption may be overcome only by legislative records which clearly show the fact to be otherwise. The attested ordinance was held not to be upset by the altered record, for the general rule that an interlineation is presumed to be bona fide and to have been made before the record was approved was held to be inapplicable "where the interlineation is, in itself, suspicious."

3. Article 4, Section 1 of the Constitution of Minnesota provides that "no session (of the Legislature) shall exceed the term of ninety legislative days." In the 1941 session of the legislature, the ninetieth legislative day was on April 24, according to an opinion of the attorney general recorded in the journal of the House of Representatives for February 26. Article 4, Section 22 of the Constitution is in part as follows: "No bill shall be passed by either house of the legislature upon the day prescribed for the adjournment of the two houses." On April 23, before midnight, the clocks in the legislative chambers were covered, and the legislature remained in session for five days thereafter, during which time many bills were passed. Proceedings on these bills are recorded in the journals of the houses dated April 23. In the Senate journal for April 24 appears the following entry: "Mr. Lommen offered a statement. Mr. Orr moved that the statement be rejected. Which motion prevailed. Which statement was rejected." The proffered statement, not recorded in the journal, was to the effect that the Senate had remained in session after the ninetieth legislative day, and that certain acts were passed during that time and were therefore unconstitutional. What would be the probable result of an attack on the constitutionality of the above mentioned acts as having been passed in violation of the above quoted sections of the Constitution?

4. "Legislative Overtime [From the Minneapolis Star.]

To the Editor: We in the St. Louis Park high school social science class think that action must be taken to amend our state constitution so that our law makers will have adequate time to pass necessary legislation without mistakes.

In a legal sense how can time stop just because the clock is covered in our legislative chamber? Covering the clock would never excuse us when we have a social science assignment due.

Can bills passed after the 90-day session be declared unconstitutional?

What possible objections can our lawmakers have for not submitting an amendment to the people of our state for ratification?

Committee, St. Louis Park High School Social Science Class.

EDITOR'S NOTE: Validity of laws passed by the legislature after the last day midnight deadline has not been tested in the Minnesota courts. In other states, however, the courts have ruled that such laws are valid, accepting the records of the legislature at face value. The last day's journal of the legislature is printed to include all legislative actions, even though they may have taken place after the deadline. The Minnesota attorney general has given an opinion that the date of the legislative journal of the "closing day" governs the time limit within which the governor must sign bills after the legislature adjourns. As to what good extending the legislative session would do, your guess is as good as ours, human nature and procrastination being what they are."

STATE v. KIESEWETTER

Supreme Court of Ohio, 1887. 45 Ohio St. 254, 12 N.E. 807.

SPEAR, J. The burden is on the relators to show that the bill became a law. It is not claimed that the bill was signed by the presiding officer of either house, or was enrolled or filed in the office of the secretary of state in the regular course of proceeding. It is not to be found among the printed laws in the current volume of Ohio Laws. Following the laws and resolutions, and immediately after the certificate of the secretary of state, an *addendum* is found printed (by what authority does not appear) on pages 454 and 455, containing what is claimed to be a copy of the bill as passed, and with it a certificate of the clerk of each house, of date some 20 days subsequent to the adjournment of the general assembly, giving a recital of the action taken in each house in regard to the bill; that of the clerk of the senate, in addition, to the effect that the foregoing is a true copy of the bill as it passed. This cannot aid the relators. The proceedings, as shown by the journals, the court may take judicial notice of, and the certificate of the identity of the printed bill, by the clerk of the senate, is not of consequence, because not authorized by statute. Not so, however, with the certificate of the secretary of state, on page 453. That is required by section 129, Rev.St., and effect is given to it by virtue of that section. The certificate shows that *the foregoing* acts and joint resolutions are true copies, copied from the original rolls on file in his office, and negatives the idea that that which follows is copied from such rolls. Hence the contents of pages 454 and 455 of the volume referred to have no legal significance, and the volume, (84 Ohio Laws,) in legal effect, indicates that this bill was not one of the laws enacted by the Sixty-seventh general assembly. No copy or record of the bill appears on the journal of either house. The bill presented does not, therefore, in the light of what the court may take judicial notice of, purport to be a law, and, in order to declare it such, the court must ascertain its contents by resort to sources of information other than those referred to.

The questions then, are whether, for this purpose, resort may be had to evidence *dehors* the journals and the roll of duly certified laws in the office of the secretary of state, and whether, notwithstanding the bill was not signed by the presiding officer of either house, and was not enrolled in the office of the secretary of state as a law, it nevertheless has the force of law. Unquestionably, the legislature intended that this bill should become a law, and, unless this court can answer the questions proposed in the affirmative, this purpose will be, at least for the present, defeated. The publication provided for by the bill would tend to the advancement of science, and to the enlightenment of the people upon a subject of general interest, and one which is constantly growing in importance. So that there is strong inclination on the part of the court to determine the question involved in such way as will give expression to the will of the law-making power. Nevertheless, if, upon due consideration, it is manifest that the bill cannot

be maintained as a law of the land, it is the imperative duty of the court to so declare, however much we may regret the result. Impressed with the importance of the question, we have given to the case careful consideration.

Section 17, art. 2, Const., is as follows: "The presiding officer of each house shall sign, publicly in the presence of the house over which he presides, while the same is in session and capable of transacting business, all bills and joint resolutions passed by the general assembly." No judicial interpretation has been given to this section, so far as we are informed. The preceding section, which provides that every bill shall be fully and distinctly read on three different days, and that no bill shall contain more than one subject, which shall be clearly expressed in its title, etc., has been considered by this court, and the views of the court upon it are well stated by Swan, J., in *Pim v. Nicholson*, 6 Ohio St. 177, as follows: "This court held, in the case of *Miller v. State*, 3 Ohio St. 475, that the provisions of the above section, relating to the distinctness required in reading a bill, and a number of times a bill shall be read, were, as they in fact import, intended as permanent *rules* for the proceeding of the houses. They are directory only, and are to be enforced by the houses, and not by judicial interposition. The further provision, in the same section, that no *bill* shall contain more than one subject, which shall be clearly expressed in its title, is also made a permanent rule in the introduction and passage of bills through the houses. The subject of the bill is required to be clearly expressed in the title, for the purpose of advising members of its subject, when voting, in cases in which the reading has been dispensed with by a two-thirds vote. The provision that a bill shall contain but one subject was to prevent combinations, by which various and distinct matters of legislation should gain a support which they could not if presented separately. As a rule of proceeding in the general assembly it was manifestly an important one. But if it was intended to effect any practical object for the benefit of the people in the examination, construction, or operation of acts passed and published, we are unable to perceive it. The title of an act may indicate to the reader its subject, and under the rule each act would contain one subject. To suppose that for such a purpose the constitutional convention adopted the rule under consideration would impute to them a most minute provision for a very imperfect heading of the chapters of laws and their subdivision. This provision being intended to operate upon bills in their progress through the general assembly, it must be held to be directory only."

It is entirely clear that section 17 cannot be treated as a mere guide to the action of the general assembly in order to the more full enlightenment of the members in the performance of their duties, or as a check upon them, as the signing of a bill by the presiding officer in no substantial way affects the action of the members, or relates to the passage of the bill through either body. The members, as such, have performed every duty regarding a bill prior to the time when the duty of signing by the presiding officers may be performed. This signing

in open session may, incidentally, serve to fix the attention of members to the bill being signed, but it has a much more important purpose. It authenticates a bill, and affords a sure means of identification. No official copy is required of a bill introduced, nor is it required to be copied on the journal, and a legal standard of comparison is wanting. The signatures of the presiding officers, therefore, furnish the evidence that that which the journals show, by title and number, passed the general assembly, is this identical measure. The act thus authenticated is to be given the force of law, is to be treated as such, and to prove itself upon inspection; and this verification by the officers designated by the constitution is the conclusive evidence to the secretary of state that the act so signed is a law, and entitled to be enrolled as such in the office of that officer, and, under his direction, to be published, duly certified by him, for the information and guidance of all the people of the state. The signing is therefore for the benefit of the people in their examination to ascertain what is and what is not law. It is apparent that the reasoning which led this court to declare section 16 to be directory does not apply to section 17, and that the cases referred to are no authority in the case at bar.

Were there a provision requiring that all bills introduced should be spread at length upon the journal, and were this bill to be found copied on the journal of either house, it is probable that, following former holdings of this court, resort might be had to that mode of identification. But no such record exists; and reliance upon title, number, and designation, for identification of contents, would, we think, be inadmissible.

At the trial, the state librarian was offered by the relator as a witness, and it was proposed by the testimony of this witness to identify a copy which it was claimed had been deposited in the state library, in compliance with section 59, Rev.St., and thus supply proof of the contents of the bill. That is to say, the court was asked to take the copy thus proffered from the state library, and, by making in it the changes which the journals of the two houses show were made while the bill was pending, make up a completed bill, and declare it law. The testimony is believed not to be competent. It was an effort to introduce parol proof, and, in effect, to try the validity of a law upon the testimony of witnesses. The section referred to requires that the clerk of each house shall deliver to the printer, for his use in printing, all of the papers and documents laid before the branch of which he is clerk, which are ordered by such branch to be printed; and the printer shall immediately print 240 copies thereof, of which number each of the executive officers shall receive 1 and the state librarian 5, which he shall preserve. Upon whom devolves the duty of delivering these copies is left to inference. No provision is made for their certification as true copies, nor for special care in their safekeeping, nor for perpetuation of evidence of contents by a record of them. The librarian is required to simply preserve the copies which he receives,—a duty which attaches to all books and pamphlets of which he has the care. He is not required to make copies for use elsewhere, nor is provision

made for a certificate of any kind, or for any mode of authenticating them. Yet, if this be competent testimony, the occasion for its introduction may arise as well in any court in the remotest county in the state as in this court. Copies deposited in the library furnish a convenient source of information to any persons interested in pending legislation; but it cannot be that the legislature intended that a copy of a bill found in the state library should be treated as a record of a law, or as taking the place of the signatures of the presiding officers, and it is apparent that the admission in evidence of the testimony proposed would establish a precedent of a loose and most dangerous character. The effect of a resort to parol proof to establish the validity of a law was fully considered in *State v. Smith*, 44 Ohio St. 348, 7 N.E. 447, and it is not necessary to do more here than refer to that case.

Whether a provision imperative in its terms should be treated as directory or as mandatory has been held to be a matter of expediency, though Judge Cooley, in his work on Constitutional Limitations, observes that "courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provision of a constitution." Another author says that "the question is in the main governed by considerations of convenience and justice." Giving effect to the more liberal view, it may be said that if no advantage would be lost, or right destroyed, or benefit sacrificed either to the public or to an individual by such a holding, the provision might be regarded as directory; or, if less injury would result by disregarding than by enforcing the provision according to its letter, then it could with propriety be treated as directory merely. But if the lax rule would tend to the injury of the public, or, if applied to the facts of a given case, (though possibly conducive to good results in that special instance,) would introduce a dangerous precedent, then, especially as to constitutional provisions, should a court be reluctant to depart from the letter of the constitution. Cooley, *Const.Lim.* 93; *Maxw.Int.St.* 452; *State v. Covington*, 29 Ohio St. 117.

In the light of these considerations, we inquire whether section 17, before quoted, should be regarded, in this case, as merely directory, or as embodying a positive requirement. And this is the practical question: Where a bill has received the sanction of a majority of each house of the general assembly, but has not been signed by the presiding officer of either house, or filed in the office of the secretary of state in the regular course of procedure, or enrolled there, or published among the authorized laws, can it be treated as a law by the courts? We are reluctantly led to the conclusion that it cannot. The advantages to be derived by a recognition of this bill as a law, would, we think, be far outweighed by the perils which might follow the establishment of so dangerous a precedent. As applied to this case, the result of this holding but postpones, in all probability, to the meeting of another assembly, the accomplishment of the object sought. Nor will this view necessarily work irreparable inconvenience, as applied to any class of legislation. In a case where the subject-matter of a bill thus defeated is vital to the public business of the state, the authority of

the governor to call together the general assembly, and give opportunity for all needed requirements to be observed, is ample. On the other hand, the importance of furnishing to the people sources of information, certain in their character and convenient of access, as to what is and what is not law, is obvious. All are presumed to know the law, and it is of great interest to each citizen, as well as to the public officer, that there be some authentic record to which he may resort to ascertain certainly and definitely what laws are enacted by the legislature, what control him in the daily transactions of business, and of what, at his peril, he is bound to take notice. Whatever conduces to certainty in this regard, therefore, is of great moment to every person in the state, and no rule of construction would be wise which leaves so important a matter in doubt or confusion.

It is urged that to give controlling effect to section 17 would be to clothe the presiding officers of the general assembly with a veto power, and such a result cannot have been intended by the convention which framed the constitution. Certainly that body did not so intend, but we think the result proved is not likely to follow. Our attention is called to the case of *Leavenworth v. Higginbotham*, 17 Kan. 62. In that case the bill in question was passed, signed by the governor, and published more than 11 years prior to the decision, and all departments of the state government had held it valid, though it lacked the signature of the presiding officer of the senate. The court decided that "the bill should be held to be valid, although it may not have the signature of the presiding officer of the senate affixed to it." In the opinion, prominence is given to a consideration of the suggested dangers which would follow if the signatures of the presiding officers were deemed essential. Whatever significance should be attached to this consideration in the newer states, we are impressed that, as applied to this state, the danger is more fancied than real. Section 17 has been in force, as a constitutional requirement, since the formation of the state, and this is the first instance, so far as we are advised, in which there has been a failure to observe it. If any has occurred, the learned counsel has omitted to call attention to it. However, the obvious answer to this objection is that confidence must be reposed somewhere. It is not to be presumed that men selected to fill places of such high trust will intentionally violate the constitution, and prove false to their oaths.

Cottrell v. State, 9 Neb. 125, 1 N.W. 1008, is cited. In that case a like provision was held to be directory. Maxwell, C. J., in the opinion says: "The signature of a presiding officer to a bill is a mere certificate to the governor that it has passed the requisite number of readings, and been adopted by the constitutional majority of the house over which he presides. The vote upon the passage of the bill must be determined from the journal of the respective houses. And when it appears from the journals that a bill has passed by the requisite majority, and has been approved by the governor, the failure of the presiding officer to affix his signature thereto will not invalidate the act,

as it will be presumed that the governor had sufficient evidence before him of the passage of the bill at the time he approved the same."

It appears that all due formalities had been observed as regards the act, save only the signature of the presiding officer of the senate. It had the governor's signature, was duly enrolled in the office of the secretary of state, and it had been in force for years. The governor's signature apparently served, not only as showing his official assent to the measure, but as authenticating the bill itself. In this state the governor takes no part in the approval or authentication of laws. There are other notable differences between these cases and the case at bar. If a case were presented where a bill, lacking only the signature of the presiding officer of one house, had been enrolled by the secretary of state, published as a law, and recognized as such by all other branches of the state government, and acquiesced in for years, a different question would be before us.

The two cases referred to are the only authorities we have noticed which appear to sustain the relator's claim, and we think, when duly considered, they fail to do so. On the other hand, the positions heretofore assumed are believed to be in consonance with the views of text writers and with many adjudicated cases. . . . Writ refused.

NOTE

Evansville v. State, 118 Ind. 426, 21 N.E. 267 (1888): While article 4, section 25 of the Indiana constitution requires that all bills passed shall be signed by the presiding officers of both houses, article 5, section 14 provides that after a return of a bill by the governor with objections and after approval by a majority of both houses upon reconsideration, the bill "shall be a law." It was held, therefore, that a bill passed over the objections of the governor need not again be signed by the presiding officers in order to be validly enacted.

SECTION 7. PLACE OF THE EXECUTIVE IN THE LEGISLATIVE PROCESS

LUKENS v. NYE

Supreme Court of California, 1909. 156 Cal. 498, 105 P. 593.

SHAW, J. This is an action in mandamus to compel the Controller to issue a warrant on the State Treasurer to the plaintiffs for the sum of \$22,808.15, being the second installment of the amount appropriated to John Mullan by the act of the Legislature approved March 22, 1905 (St.1905, p. 791, c. 592), in satisfaction of his claim against the state. The plaintiffs are his assignees. The act appropriates \$45,616.30 in payment of said claim, and declares that "the Controller is hereby authorized and directed to draw his warrant for the said sum and the Treasurer of State is hereby authorized and directed to pay the same, and thereupon the said John Mullan shall make and deliver unto the Controller a full receipt and release of his said claim." One-half is made payable on January 1, 1906,

and one-half on January 1, 1907. The installment due on January 1, 1906, has been paid. This action is to compel a warrant for the remaining one-half. The act exempts the claim from the provisions of section 672 of the Political Code, and therefore it is not required to have the sanction of the board of examiners.

The answer of the Controller alleges the following facts in defense: Prior to the passage of the act the claim had been assigned to the plaintiffs. After the bill had been passed in both houses of the Legislature, and before its approval, the Governor informed the plaintiffs that the amount allowed by the bill was excessive, and that he would not approve the same unless the plaintiffs would agree to accept the sum of \$25,000 in full satisfaction of the claim. Thereupon plaintiffs and the Governor agreed that \$25,000 was the full amount of the claim. An agreement was drawn up providing that, in consideration of the sum of \$25,000, to be paid in two installments, the first, of \$22,808.15, to be paid January 1, 1906, and the second, of \$2,191.85, to be paid on January 1, 1907, the said plaintiffs acknowledged full receipt and satisfaction of the claim, and released the state from further liability, claim, and demand therefor, and that if the payments were not made on said dates, the agreement should be void. For the purpose of inducing the Governor to approve said bill and attach his signature thereto, so that it would become a law, plaintiffs signed the said agreement and delivered it to the Governor for the benefit of the state, and the Governor, relying upon the said agreement, and being thereby induced to do so, signed the said bill, whereby it became a law. The plaintiffs, in pursuance of said agreement, on January 2, 1906, demanded of the Controller a warrant for the sum of \$22,808.15, due on that day by the act, and thereupon the Controller, for the purpose of carrying out said agreement, and relying thereon, and also on the representations of the plaintiffs that they would accept the sum of \$25,000 in full satisfaction of said claim, issued and delivered the said warrant so demanded, and the plaintiffs collected the same from the Treasurer. The Controller is ready and willing to issue a warrant for the remainder of \$2,191.85, due under the agreement, and has offered the same to the plaintiffs, who refuse to accept it.

A demurrer was sustained to the answer, and judgment passed to the plaintiffs as prayed for. The appellant contends, first, that the agreement is valid; second, that the plaintiffs, after thereby inducing the Governor to sign the appropriation bill in question, are estopped to demand any greater sum than the agreement provides; and third, that under the rules applying in mandamus the lower court, in the exercise of a sound discretion, should have refused the writ on the ground that the claim for the excess is unjust and inequitable.

The Governor was without power to take or receive the agreement in question, and he could not make it a valid contract. While engaged in considering bills which have passed both houses of the Legislature, and which are presented to him for approval or disapproval, he is acting in a legislative capacity, and not as an executive. He is

for that purpose a part of the legislative department of the state. *Fowler v. Peirce*, 2 Cal. 172; *People v. Bowen*, 21 N.Y. 521. As an executive officer, he is forbidden to exercise any legislative power or function except as in the Constitution expressly provided. Article 3. His powers, as a part of the legislative department, are specifically enumerated in the Constitution. When such a bill is presented, "if he approves it he shall sign it; but if not he shall return it with his objections to the house in which it originated." If, while the Legislature is in session, he neglects to return or sign a bill for 10 days, Sundays excepted, it becomes a law without his signature. If the Legislature adjourns within the 10 days, it does not become a law unless, within the designated time after such adjournment, he shall sign and deposit the same in the office of the Secretary of State. Const. art. 4, § 16. When exercising these powers he is a special agent with limited powers, and, as in the case of other special agents, he can act only in the specified mode, and can exercise only the granted powers. If he attempts to exercise them in a different mode, or to exercise powers not given, his act will be wholly ineffectual and void for any and every purpose. When he goes beyond the limits of these powers in the attempt to exercise them, his acts, so far as they transcend the powers, are of no force.

In Ohio the Senate alone attempted to empower a committee to investigate the city officers of Cincinnati, a matter not germane to the powers or business of the Senate. Holding the committee an illegal body the court said: "Whatever inherent power the General Assembly in its entirety may possess by virtue of its being the repository of the whole legislative power of the state, we do not think it follows as a conclusion that one of its constituent parts must likewise possess the same inherent powers. It may be conceded that either branch of the Legislature has all such powers as are necessarily implied in the express grant of powers to it by the Constitution; but, under the system of distribution of powers in the American Constitutions, and especially under the Constitution of Ohio, which is explicit in excluding from the legislative department the exercise of any power which is not delegated in the Constitution (article 1, § 20), the authority of a single branch of the Legislature to act separately must be found in express terms or by necessary implication in the Constitution. It is clear that the 'legislative power' whatever may be the extent of that power which is conferred upon the General Assembly, is not expressly delegated to a part of the General Assembly. Nor is it impliedly so delegated. The Constitution explicitly grants and defines the separate powers of each branch of the General Assembly. . . . The powers of each house are not general and subject only to limitation in the Constitution, as is the legislative power of the entire General Assembly; but they are specific or enumerated powers. . . . We therefore must look to the enumerated powers alone to determine this question; and it were just as sane to claim that either branch of the Legislature might, by itself, enact a law as to claim that by 'inherent power' it could inde-

pendently exercise any legislative power outside of those specifically designated in the Constitution." *State v. Guilbert*, 75 Ohio St. 43, 78 N.E. 934.

The same principles apply when the power of the Governor as a legislative instrumentality is involved. He may act only in the prescribed mode, and may exercise only the powers enumerated or necessarily implied. In the case of a bill containing several items of appropriation of money he may approve one or more of them, and object to the others. Article 4, § 16. In no other case is he empowered to modify or change the effect of a proposed law, or to do anything concerning it except to approve or disapprove it as a whole. He cannot participate in the discussions or proceedings of either house, except by sending them a veto message when a bill is disapproved. If he approves a proposed bill, his duty requires him to sign it as evidence of such approval. This approval, except in the single instance stated, must be of the bill as a whole, and without qualification. Any attempt on his part to attach to his approval any qualification, or to withhold his consent to a part of the law and give it to other parts, will either be entirely nugatory and ineffectual, and leave the approval absolute, or it will completely nullify the approval and operate as a veto of the whole bill. *Porter v. Hughes*, 4 Ariz. 1, 32 Pac. 165; *State v. Holder*, 76 Miss. 158, 23 South. 643. His approval makes such a bill a part of the statute law, next to the Constitution, the highest manifestation of the will of the people. The Governor cannot qualify or change it by any contemporaneous agreement or contract on behalf of the state with persons who are to be benefitted by the law, whereby they agree to release to the state a part of such benefit. That would be to permit the Governor and the persons concerned to make the law to suit themselves without the concurrence of the legislative houses. His signature, when it is shown to have been attached, is the exclusive and conclusive evidence of his unqualified approval, and, the result being law, no evidence, nor the judgment of any court, can be allowed to modify or change its terms or effect, or prevent or impair its complete operative force. The Constitution makes no distinction between a law appropriating money to satisfy the claim of a private individual and a law declaring the will of the people on any other subject. Its mandate is unalterably fixed by the words of the bill, made a law by the final act of the Governor, and it is unchangeable except by the power which enacted it. "It is a principle in the English law that an act of Parliament, delivered in clear and intelligible terms, cannot be questioned, or its authority controlled, in any court of justice." 1 Kent's Com. 447. And in the United States: "If there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power in any other form of government." Id. 448. . . .

Affirmed.

NOTES

1. For discussion of various aspects, of the function of the executive in the legislative process, see Dodd, *Governor's Approval of Legislation in Connecticut*, 7 N.Y. U.L.Rev. 182 (1929); Field, *Presentation of Bills to the Governor*, 56 Am.L.Rev. 898 (1922); Reppy, *The Power of the Executive to Split an Item of Appropriation Bill*, 4 Tex.L.Rev. 182 (1926); Rogers, *The Power of the President to Sign Bills after Congress has Adjourned*, 30 Yale L.J. 1 (1920); Note, *Recall of Bill after Submission to Governor*, 1 Mich. Sec. Supplement to Mich.L.Rev. 62.

2. For short comprehensive discussion of the functional relationship between the legislature and the executive, see Chamberlain, "Legislative Processes, National and State", (Ch. XV, *The President and Congress*, and Ch. XVI, *Governor and Legislature*) (1930).

3. See *supra* at p. 211.

STATE ex rel. MARTIN v. ZIMMERMAN

Supreme Court of Wisconsin, 1939. 233 Wis. 16, 288 N.W. 454.

ROSENBERY, CHIEF JUSTICE. Art. VII, sec. 21 of the Wisconsin constitution provides: "The legislature shall provide by law for the speedy publication of all statute laws. . . . And no general law shall be in force until published."

Sec. 14.29, Wisconsin Stats., provides:

"The secretary of state shall:

"(10) *Publish proposed constitutional amendments and laws.* To publish the laws as provided by section 35.64. . . ."

Sec. 35.64 provides: "*Publication of all laws.* Every law shall be published in the official state paper immediately after its passage and approval, in type not smaller than six point; and until so published shall not take effect."

Sec. 14.18 provides:

"*Deposit of acts; notice.* The governor shall cause all legislative acts which have become laws by his approval or otherwise to be deposited in the office of the secretary of state without delay, and shall inform thereof the house in which the respective acts originated."

The position of the Secretary of State is that the act deposited with him by the Governor as alleged in the petition is not a law because it was not constitutionally approved and he is therefore not required to publish it for the reason that its publication will be a futile act. This contention requires us to consider the meaning of the term "law" as used in the constitution and in the statutes with respect to publication of acts of the Legislature approved by the Governor. It is apparent that the word "law" was not used in its broad general sense. When so used it is defined as "the aggregate of those rules and principles of conduct which the governing power in a community recognizes as those which it will enforce or sanction." *State v. Lange Canning Co.*, 1916, 164 Wis. 228, 157 N.W. 777, 780, 160 N.W. 57. In that sense an act of the Legislature can never be a law until it

is published as required by the constitution and the statutes. If that argument were sound, the Secretary of State could prevent any act of the Legislature from becoming a law by merely refusing to publish it. Under the constitution and the statute it is clear that an act of the Legislature cannot operate as a law until it has been officially published. Therefore when in Art. VII, sec. 21 of the constitution the Legislature is required to provide for the speedy publication of all statute laws, and it is further declared that no general law shall be enforced until published, the term "law" is used in a narrower sense. It is plain that the term "law" as there used refers to an act of the Legislature which has been deposited in the office of the Secretary of State properly authenticated by the presiding officers of the two houses and approved by the Governor to become effective as a rule of conduct when published.

We do not need to consider in this case acts of the Legislature which become laws otherwise than by the approval of the Governor for the Governor in this case approved the act in part and the part approved thereby became a "law" within the meaning of that term as used in Art. V, sec. 10 of the constitution. When an act so approved reaches the office of the Secretary of State, the Legislature has commanded that he immediately publish it. Upon its publication unless otherwise provided, it then becomes a law in the broad sense of prescribing a rule of conduct. Neither the constitution nor the laws enacted pursuant thereto confer upon the Secretary of State any discretion with respect to what he shall do with an act which reaches his office in the manner prescribed by law and in the form of law. No discretionary power to pass upon the constitutionality of acts so authenticated and deposited with him can be inferred. The statute is mandatory and imposes upon him the duty to publish which is a purely ministerial function.

The constitution prescribes and defines the powers of the legislative and executive departments of the government and all officers in the discharge of their functions are under an obligation to comply with its requirements. The Secretary of State is not vested by virtue of his office with the power of interpreting the constitution for other officers in the discharge of their duties. When the Secretary of State refuses to perform a duty imposed upon him by law on the ground that some other official has not performed his duty in accordance with the provisions of the constitution, he acts judicially and exercises a power not conferred upon him.

The whole governmental process would be thrown into utter confusion if ministerial officers in one department in the absence of legislative authority assumed to exercise the power to pass upon the validity and constitutionality of the acts of officers of co-ordinate departments of government. If one ministerial officer or one officer in the performance of a ministerial duty may constitute himself a tribunal to pass upon the acts of other officers, such power might be assumed by all officers and the governmental process would be brought to a halt.

Upon the oral argument it was ably contended on behalf of the Secretary of State that the power of the Secretary of State was limited to determining whether the procedural steps prescribed by the constitution had been followed and it was not to be supposed that the Secretary of State had power to pass upon the validity of acts because they violated what may be referred to as substantive provisions of the constitution. An act of the Legislature which is not authorized by the constitution is no more a law than an act which has not been properly adopted because the necessary procedural steps have not been followed. In either event no effective law results. This Court has said with respect to an unconstitutional law that the matter stands as if the law had not been passed. *Bonnett v. Vallier*, 1908, 136 Wis. 193, 116 N.W. 885, 17 L.R.A., N.S., 486, 128 Am.St.Rep. 1061. While the present incumbent of the office disclaims any such power, if the power he does claim is vested in him, his successors in office would have a perfectly logical right to proceed the whole way and assume the power to pass upon validity of the acts of the Legislature upon substantive as well as procedural grounds. Despite the ingenious argument made with respect to limiting the discretionary power of the Secretary of State to procedural matters, we see no logical ground upon which such a distinction may be based. If the act is invalid for any constitutional reason it is no law and the publication of an act which is enacted in violation of the substantive provisions of the constitution is just as futile an act as the publication of one passed in violation of procedural requirements. . . .

Let the writ issue.

WALTER P. ARMSTRONG, UNSOLVED PROBLEMS OF LEADERSHIP AND POWERS.

A Review of Binkley, *President and Congress*,
33 A.B.A.Jour. 417, 418-419, 420 et seq. (1947).

Seven Presidents Who Tried to Furnish Leadership for Legislation

Throughout our entire history there have been but seven Presidents who attempted with any degree of success to furnish Presidential leadership for Congressional legislation. Of these Thomas Jefferson, Andrew Jackson, James K. Polk, Woodrow Wilson and Franklin D. Roosevelt were Democrats, and William McKinley and Theodore Roosevelt, Republicans.

Jefferson, not only the leader but the creator of his party, placed his lieutenants in key positions in both Houses, and with their aid and by personal influence (his enemies called it intrigue) directed the course of legislation.

The concept of Andrew Jackson that the Presidential office was a basis for influencing Congress was entirely different from that of Jefferson. Jackson's election had marked the end of an era. His predecessors had been nominated by a Congressional caucus and two

had been elected by the House of Representatives. Jackson, however, owed neither his nomination nor election to Congress. His firm conviction was that he was the first popularly elected President and "bore a mandate fresh from the hands of the 'sovereign' people." Satisfied that he alone represented the whole Nation, he abandoned the secret influence of Jefferson and obtained results by appealing to the people over the heads of the Congress.

James K. Polk, Whig and abolitionist historians to the contrary notwithstanding², was another "strong" President. He is placed among presidential leaders of Congress rather because of his publicly expressed belief in the principle³ than because of his own conduct; his usual procedure was to present Congress with a *fait accompli*.

Woodrow Wilson's Enthusiasm for the British Parliamentary System

Woodrow Wilson was the first President thoroughly to explore all the theoretical implications and empirical advantages of Presidential leadership of Congress. Long before his election he had not only shown his enthusiasm for the British parliamentary system but had indicated his view that the President, like the Prime Minister, was cast for a double role—head of the government and party leader. As he put it, "the President cannot escape being the leader of his party except by incapacity and lack of personal force The whole art of statesmanship is the art of bringing the several parts of government into effective cooperation The President is at liberty, both in law and conscience, to be as big a man as he can." . . .

. . . Dr. Binkley merely comments: "In any case, whatever its merits, a parliamentary system is out of the question in the United States in the foreseeable future." (page 266) Certainly no one can predict when any Constitutional change will come; nor does any seem in immediate prospect.

Indications of Trends for Effective Integration

There are, however, indicia not only that our thinking on this subject has undergone a change but that there is a discernible trend in favor of effective integration of the Executive and Congress. Moreover, the course the change will take, when it does come, is adumbrated. Not only the right but the duty of the President to act as a part of the legislature in recommending measures and using his veto⁴ are clearly established.

² "The impartial verdict of history" is not always impartial. Some historians are like that stout old Tory, Dr. Samuel Johnson, who "took care that the Whig Dogs should not have the best of it". An Essay on Johnson, by Arthur Murphy, page 379.

³ Polk first clearly stated the distinction between the function of a President as Chief Executive and as party leader.

[Footnotes 4-7 are omitted. Ed.]

⁴ This view was of slow growth. There was introduced a resolution impeaching John Tyler which had for its basis his veto of a tariff measure when there was no Constitutional objection to it.

Jackson's mandate-from-the-people theory, revived and popularized by the two Roosevelts, has gained general acceptance; indeed, it is likely that any President who in the future fails to take the lead in introducing and forwarding a legislative program will be deemed to have abdicated one of his most important functions.

There has been no comparable development in Congress. While the LaFollette-Monroney Act⁹ has partly reorganized and should strengthen Congress it by no means implements it for national leadership. Indeed, in the House, where localism so frequently determines the membership, it is difficult to see how national leaders, independent of the President, can emerge.

Current Proposals to Make Presidential Leadership Effective

The purpose of recent legislative proposals is to make effective, not to supplant, Presidential leadership. The Kefauver Resolution¹⁰ would take the first step by providing for a question period during which cabinet members would confer with Congress. It is difficult to see how there can be any objection to this save on the part of those intransigents who are opposed to anything—however innocuous—that remotely resembles the parliamentary system.

The Fulbright Amendment¹¹ tentatively offers a solution. Under it the Constitution would provide for concurrent terms of six years

⁹ Legislative Reorganization Act of 1946, Chapter 753, Public Law 601, 79th Congress 2nd Session. Cf. "The Legislative Reorganization Act of 1946", by Charles W. Shull; *Temple Law Quarterly*, January 1947. Vol. XX—No. 23, page 375. For a penetrating discussion of the LaFollette-Monroney Act (commenting not only on its provisions but on its omissions) see the chapter titled "Postscript" in George B. Galloway's *Congress at the Crossroads*, Thomas Y. Crowell Co., New York, 1946.

¹⁰ Now House Resolution 17 of 80th Congress 1st Session. For a discussion by Representative Kefauver and others see *Congressional Record*, March 27, 1940, page 1808 et seq., and March 28, page A 1413. Cf. The Kefauver Resolution, by Armstrong, *American Bar Association Journal*, June 1944, Vol. 30, page 326.

¹¹ Senate Joint Resolution 29 of 80th Congress 1st Session. The Committee on the Judiciary has not yet held hearings on the proposed amendment and therefore there has been no debate on the Floor. Senator J. S. Fulbright in a personal letter to the reviewer writes: "Generally speaking, my thesis has been that in the early days of this country, when we were not playing a part in international affairs of any great importance, it was tolerable to have the rivalry between the Executive and Legislative branches which is inherent in our system and non-action rarely led to any great disaster. However, with the assumption of obligations in the international field, it seems to me that some machinery should be worked out in which there is greater coordination between the Executive and Legislative branches. In other words, there is a pressing necessity that decisions on these problems be made promptly and positively." The Resolution in full is:

"JOINT RESOLUTION

"Proposing an amendment to the Constitution of the United States relative to the election and terms of office of President, Vice President, and Members of Congress.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as a part of the Constitution when ratified by conventions in the several States, as provided in the Constitution:

for the President, Senators and Representatives, with power in the President (by Executive Order) and in Congress (by concurrent Resolution) to terminate all incumbencies by ordering a new Presidential and Congressional election. One obvious objection to this plan seems to be that under it the issue sought to be submitted to the people would not necessarily be decided. So many sectional, local and personal factors enter into the election of Representatives and even Senators that it is conceivable that the people might return the same Congress and the same President. There is at least this possibility so long as the President and Congress depend not upon one another but upon the people for their election.¹²

"Article —

"Section 1. The Congress by concurrent resolution or the President by Executive order shall have power to provide from time to time that an election shall be held in the several States for the purpose of choosing a President and Vice President, Senators, and Representatives in Congress, for the terms hereinafter specified. Such election shall be held on the first Tuesday which occurs more than ninety days after the date of passage of such concurrent resolution or the promulgation of such Executive order.

"Sec. 2. If no election under section 1 shall have been called before the date scheduled for the Presidential election next following the date of the ratification of this article, a President, Vice President, two Senators from each State, and Representatives in Congress shall then be chosen. The terms of the President and Vice President and of all Senators and Representatives in Congress holding office on the date of such election shall end on the fortieth day following such election and the terms of the persons chosen shall then begin and continue for a period of six years unless earlier terminated by an election held as specified in section 1.

"Sec. 3. A new election for the purpose of choosing a President and Vice President, two Senators from each State, and Representatives in Congress shall automatically be held six years after the date of the election last preceding in the event that no call for an earlier election shall have been issued by the President or Congress under section 1."

This plan differs from that of Thomas K. Finletter in Can Representative Government do the Job?, 1945, in that Mr. Finletter proposes that only the President be given the right to dissolve Congress and call a general election.

¹² The failure of Wilson's appeal for a Democratic Congress and of Franklin D. Roosevelt's "purges" are significant. The reaction of the electorates to the attempt to purge indicated not so much opposition to the President's general policy as resentment at what was felt to be his interference in local affairs. For a challenging comparison of the presidential with the parliamentary system see the chapter titled: "The President and Congress" in *The American Presidency, an Interpretation*, by Harold J. Laski (Harper & Brothers, New York, 1940). For a succinct exposition and analysis of the present methods of communication between the Executive and Congress and of proposed changes see the chapter titled "Legislative-Executive Liaison" in *George B. Galloway's Congress at the Crossroads*, Thomas Y. Crowell Co., New York, 1946. Mr. Galloway was staff director for the LaFollette-Monroney committee.

Cf. *The President, Congress, and Legislation*, by Lawrence H. Chamberlain, Columbia University Press, New York, 1946; *The President, Office and Powers: History and Analysis of Practice and Opinion*, by Edward S. Corwin, New York University Press, New York, 1940; *Big Democracy*, by Paul H. Appleby, Alfred A. Knopf, New York, 1945; *A New Constitution Now*, by Henry Hazlitt, 1942; *The Need for Constitutional Reform*, by W. Y. Elliott, 1935; *The Business of Congress*, by Samuel W. McCall, 1911; *A New Constitution for a New America*, by William Macdonald, 1921; *The Republic*, by Charles A. Beard, New York, the Viking Press, 1943; *Congress at the Crossroads*, by George B. Galloway, Thomas Y. Crowell Co., New York, 1946; *The Presidency and the Crisis: Powers of the Office From the Invasion of Poland to Pearl Harbor*, by Louis William Koenig, King's Crown Press, New York, 1944; U. S. Congress . . . House . . . Committee on the Judiciary . . . Amending the Second War Powers Act, 1942, as Amended . . . Report. (To accompany H.R. 4780.) 79th Congress 1st Session, House Report 1282, U. S. Government Printing Office, Washington, 1945; U. S. President's

Whatever may be the answer, and whether we are yet a sufficiently homogeneous people to agree upon any answer, here is a problem that must eventually be solved. Its solution is one of the major tasks of American statecraft.

Committee on Administrative Management. Submitted to the President and to Congress in accordance with Public Law No. 739, 74th Congress 2nd Session, U. S. Government Printing Office, Washington, 1937, Louis Brownlow, Chairman; University of Chicago Round Table: Congress and the President, a radio discussion by Everett Dirksen, Walter Johnson and Estes Kefauver, January 20, 1946; This is Congress, by Roland Young, 2nd ed., Alfred A. Knopf, New York, 1944; Strengthening the Congress, by Robert Heller, National Planning Association, Washington, 1945. See also reviews of the last two of the above books, by Armstrong in American Bar Association Journal, April 1945; Vol. 31, page 188.

NOTE.

On parliamentary law and its relation to legislative procedure, see: Tilson, "Parliamentary Law in Shaping Legislation", 15 Conn.B.J. 61 (1941); Tilson, "Parliamentary Law and Procedure" (1935).

Chapter 3

TYPES OF STATUTES

SECTION 1. DIRECT LEGISLATION

STATE v. HOWELL.

Supreme Court of Washington, 1919. 107 Wash. 167, 181 P. 920.

CHADWICK, C. J. At the general election held in 1912, the people of the state of Washington adopted as a principle of government the power to initiate laws and to review at the bar of popular opinion all acts, bills, or laws passed by the legislature of the state of Washington.

The right so to do is emphasized as a power reserved, and the terms of the amendment imply in the strongest possible way that the intention of the people was to reserve a right to review every act of the legislature which might affect the people in their civil rights or limit or extend their political liberties; for they wrote an exception, saying that a referendum may be ordered in all cases, "except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions." Amendment 7, art. II, Sec. 1. The writing of an exception specifying the things not reserved is an expression, within sound rules of construction, of a reservation to pass upon all things not so specified.

The court, in passing directly upon the amendment, and in other cases arising under city charters, has held firm to the principle of the referendum and has consistently refused to limit it by construction.

In December, 1917, Congress proposed an amendment (Stats. of U. S., Sixty-Fifth Congress, 1918, Sess. II, Ch. 212, p. 1050) to the Federal constitution, providing that:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress." . . .

This amendment was submitted to, and ratified by, the legislature of the state of Washington by joint resolution passed January 13, 1919. On March 20, 1919, relator tendered a petition for a referendum to the respondent secretary of state; he asked that it be filed and a ballot

title be supplied. Respondent refused to receive it upon the grounds, (a) that the amendment, having been adopted by a joint resolution and not by an act, bill or law, was not within the terms of the seventh amendment; and (b) that it was not a subject for referendum under article V of the Constitution of the United States.

Addressing ourselves to the first contention of the respondent, Is the resolution an act, bill or law, within the meaning of those terms as employed in our constitution; whether the people intended an act, bill, or law to be statute enacted by the legislature, or whether they meant action by the legislature which affected them as law? . . .

It is well known that the power of the referendum was asserted, not because the people had a willful or perverse desire to exercise the legislative function directly, but because they had become impressed with a profound conviction that the legislature had ceased to be responsive to the popular will. They endeavored to, and did unless we attach ourselves to words and words alone, reject the idea upon which the referendum is founded and blind ourselves to the great political movement that culminated in the seventh amendment—make reservation of the power to refer every act of the legislature with only certain enumerated exceptions.

Guided by these considerations, we are satisfied that the people used the words "act, bill or law" in no restricted sense, but in a sense commensurate with the political evil they sought to cure.

And why should not the amendment be a law within the meaning of the seventh amendment? No reason is assigned other than that "law" as there used is synonymous with "bill" or "act." We may well argue and be within sound rules that, if the people had so intended, they would not have used the word "law" at all, as was done in the state of Oregon. We can conceive of no more sweeping law than the proposed amendment. Certainly no amendment has ever been proposed that goes deeper into the vitals of the American idea of government. It surrenders pro tanto the sovereignty of the state, gives to the Federal government a right to enact laws and to enforce them through the Federal courts, and it will deny the citizen the protection of some of those guarantees that we have written out of the travail of time into our own Bill of Rights. Upon construction, we hold that the amendment to the constitution of the United States is a law within the meaning of the seventh amendment, and is subject to referendum.

But it is contended that, whereas the legislature ratified the amendment by joint resolution instead of by act of bill as it might have done, the resolution being not to nominate an act, bill or law, is not subject to a referendum. This argument defeats itself, for if we are to be literal and exact in terminology and so insistent upon "scholastic interpretation" as to admit this premise, we must hold that the legislature had no power to ratify the amendment except by act or bill, for we find no power granted in the constitution to that body to act in matters legislative other than by act or bill.

This reasoning would lead to two consequences, equally absurd: Either the amendment being ratified by resolution, the act of ratification is void as a thing done in a manner not provided; or, if sustained, would permit the legislature to defeat the power of referendum by acting, in matters purely legislative, by resolution instead of by bill. The latter is the consequence in the instant case, if the argument of the learned Attorney General is to be sustained. But we are not put to the extremity of holding that the legislature may not, in matters of ratification, act by resolution for there is a high road of reason leading down to a true result.

The contention that a resolution, although it may have the force and consequence of a formal legislative enactment and affect the people in their civil and political rights, cannot be referred arises from a misconception of the term. This case sounds in fundamentals, not in definitions. It is not the resolution, but the act of the legislature in adopting it that is to be referred. A resolution, like all acts of the legislature, is to be measured by the end accomplished. It is true that we have no provision in our constitution providing for the passage of resolutions, even in the formal matters in which the legislature has throughout the entire history of our territory and state been wont to act, but it is just as evident that there is no limitation upon the power of the legislature to act by resolution.

The constitutions of some of the states and the constitution of the United States (section 7, article 1) permit or recognize the practice of acting by resolution, and some of them limit its uses. It has been held, if the constitution is silent, as ours is, that legislation cannot be effected by that method. *Boyers v. Crane*, 1 W.Va. 176; *State ex rel. Attorney General v. Kinney*, 56 Ohio St. 721, 47 N.E. 569; *Barry v. Viall*, 12 R.I. 18.

And were we considering a matter involving private right arising in or out of the laws of this state, we could not question the authorities just cited; but they are not applicable for the reason that the authority to act in the matter of a proposed amendment to the constitution of the United States does not arise in or out of the constitution of the state, but arises out of the Federal constitution, and any act, whether it be by resolution or by bill, on the part of the state legislature must be held to be a sufficient expression of the legislative will unless Congress itself challenges the method or manner of its adoption. It is upon this principle that the supreme court of the United States has held that the question whether the referendum does violence to the constitution of the United States is non-justiciable, holding that the question whether it deprives the government of a state of its representative character, thus violating the guarantee of a republican form of government, is a question for Congress and not for the courts. The power to question the manner of adoption being in Congress and not in the courts, the contention that the legislature had no power to act by resolution is non-justiciable; but this holding does not foreclose an inquiry as to the legislative character of the thing done. . . .

The final and, as we believe, the principal ground of opposition is that the amendment, being submitted under article V of the constitution of the United States, is a Federal question in the sense that state laws and state constitutions have no bearing upon or relation to the issue.

It is argued that, inasmuch as article V of the constitution of the United States provides that a proposed amendment "shall be valid to all intents and purposes, as part of this constitution, when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof," etc., the people have hitherto fixed the manner and form of ratification, against which the reserved power of the people of a sovereign state may not prevail. If we are to stand upon the word "legislatures," if that word, and that alone, is the Alpha and Omega of our inquiry, it follows that the controversy is at an end, but we are cited to no instances where a great question involving the political rights of a people have been met by such technical recourse—where any court has so exalted the letter or so debased the spirit of the law. . . .

It may be set down as a truism that the Congress of the United States has no concern of the manner in which the people of the several states pass upon the proposed amendment. It is the act of ratification or rejection by the legislative power in a state, and not the manner of doing, that makes for the result to be accomplished.

It may be true that it might have been provided that amendments could be made directly by Congress, and the submission of amendments for ratification or rejection by the legislatures of the several states at all was a matter of grace upon the part of the whole people when the constitution was adopted, but we would incline to the opinion that the right to pass upon proposed amendments should be treated as a reservation in the several states of the right to express their legislative will in the manner in which they had then provided or might thereafter provide and, when so regarded, as a compact between the states and the Federal government.

It is provided in the Federal constitution that proposed amendments shall be ratified by the legislatures of the states or by conventions assembled for the purpose of considering them. It cannot be urged successfully that the framers of the constitution used the words "legislatures" and "conventions" as terms describing then present institutions, for it is well known that, at the time the constitution was adopted, some of the states did not have legislative assemblies.

Article V can mean no more than this: that no amendment shall be adopted unless it is sanctioned by the supreme legislative power of a sufficient number of the commonwealths, whether such ratification be by legislative assembly, convention, or such other method as might thereafter be adopted by the people in the several states.

If we hold that the words "legislatures" and "conventions" do not control the plain purpose and spirit of article V—that is, that the people shall pass upon a proposed amendment by their representatives, if that be the plan provided by them at the time of its submission, or, if not,

under such other plan of expressing their will as may not be offensive to the Federal constitution—we are on solid ground. For the framers of the constitution had well in mind—for they had lived in that time when our political system was being fashioned into concrete form—they understood, as we sometimes forget that

“The theory of our political system is that the ultimate sovereignty is in the people, for whom springs all legitimate authority.” Cooley, *Constitutional Limitations* (6th ed.), p. 39.

Wherefore it may be said that it is the meaning and intent of article V that an amendment to the constitution of the United States shall not become effective until it has been ratified by the legislative authority of a sufficient number of the states, and it should not be held that a ratification or rejection by a popular vote under the referendum clause of a state constitution would be contrary to the provisions of article V, unless it can be said, under sound rules of construction, that the referendum is offensive to the constitution of the United States.

The people of several of the states, having the sovereign right of self-government, excepting only as they may have yielded that right under the constitution of the United States and its amendments, have adopted the referendum as a rule of government, and the only objection that has ever been urged, or that could have been urged against it, is that it violates section 4, article IV of the constitution guaranteeing to every state a republican form of government. The supreme court of the United States has held that it does not so offend. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377.

The fault of disassociating a word or correlative words from the text of a written law and premising a judgment without the warmth of spirit of that law may be illustrated. If we are wrong it may well be that a state might, and withal unwittingly, put it beyond its power to pass upon a proposed amendment to the Federal constitution. If the people of this state had, when they adopted the referendum, provided for the abolition of our legislative assembly (as they might have done), and had provided that all laws should thereafter be initiated by and voted upon by direct vote of the people, or that the legislative functions of the state be exercised by a council of three and that all their acts should be subject to a referendum at the next succeeding general election, it would follow, under the theory advanced to defeat a referendum in this case, that a proposed amendment could not be either ratified or rejected in the state of Washington, for there would be no “legislature” or “convention” in the sense in which those terms are employed in the Federal constitution.

Significance is placed on the word “conventions,” it being contended that, if the word “legislatures” had been used alone, our argument might seem plausible, but the added word “conventions” necessarily implies that Congress had in mind a representative body and not legislative authority; but we are inclined to take a broader view.

It was doubtless intended that "legislatures" should mean one thing; that is, the legislative authority of the state; and "conventions" another thing, an extraordinary representative body convened by and in the state for the sole purpose of passing upon the proposed amendment to the Federal constitution. If it had no other intention in adopting the term "legislatures"—in specifying one of the instrumentalities for passing upon the proposed amendment—than to express the idea of legislative power, of whatever that power consists, then it must be deemed to mean all the branches or component parts of that power, which have included the qualified voters also if they so desire. Inasmuch as the constitution was formulated not for a day or a year, but for all time, except as amended, we may consider that it contemplated the same kinds of state legislative bodies then in existence and known to the framers, or any other kinds of legislative bodies that should come into existence in the future.

One of the important ideas governing the framers of the national constitution was that amendments to that instrument should be ratified by the states as units, recognizing and preserving the integrity and sovereignty of the states as parties to the compact creating and continuing that constitution. Doubtless there was no other idea prevailing in providing for adoption of amendments by the "legislatures" or "conventions" of three-fourths of the states than that. Certainly it was, and is, of no concern to the others what sort of legislature any particular state has, so long as it conforms to the scheme of a republican form of government.

We have preferred to meet the question upon the plane of broad reason, having in mind the spirit and policy of the referendum, but we are not without competent authority to prove that the manner or the name attached to the legislative power of the state, whether it be a representative body or the people themselves, is of no concern to the Federal government. . . .

Our attention is called to a decision of the supreme court of Oregon in *Herbring v. Brown*, 92 Or. 176, 180 P. 328. The premise of the decision is that the reserved power of the people is limited to a review of "any act of the legislative assembly," and that the word "act" was used having in mind the exercise of the legislative function as outlined in the original draft of the state constitution, and that the word "act" did not comprehend a joint resolution.

We have already demonstrated that our constitution is more comprehensive. The decision does not appeal to us for another reason. Its basis is fundamentally unsound in that it proceeds upon the theory that the right of the people to legislate upon the question rests in the antecedent provisions of the state constitution, whereas the right comes from the constitution of the United States.

Other questions were discussed by counsel. We have considered them and are agreed that they are not controlling.

The writ will issue.

NOTES

1. "In the absence of constitutional provisions, however, the courts have generally held invalid the attempts of legislatures to enact statutes the execution of which is made contingent upon statewide popular approval." 41 Yale L.J. 132, 133 (1931). See also *supra* at p. 222.

2. In *Hawke v. Smith* No. 1, 253 U.S. 221, 40 S.Ct. 405, 64 L.Ed. 871, 10 A.L.R. 1504 (1919), the question was whether a provision of the Ohio constitution extending the referendum to the ratification by the General Assembly of proposed amendments to the Federal Constitution was in conflict with Art. V of the Constitution of the United States. In deciding in the affirmative, Day, J., said: "What did the framers of the Constitution mean in requiring ratification by 'Legislatures'?" That was not a term of uncertain meaning when incorporated into the Constitution. A legislature was then the representative body which made the laws of the people. . . . The argument to support the power of the State to require the approval by the people of the State of ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the States through the medium provided at the time of the proposed approval of an amendment. The argument is fallacious in this—ratification by a state of a constitutional amendment is not an act of legislation, within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment. . . . It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented." For a discussion of the problem involved in this case and the principal case see Taft, "Can Ratification of an Amendment to the Constitution be Made to Depend on a Referendum?" 29 Yale L.J. 821 (1920).

3. See *Moulton v. Scully*, 111 Me. 428, 89 A. 944 (1914), holding that the power of the state legislature to recommend the removal of a public officer by address is unaffected by a constitutional provision which provides that resolutions of the legislature are subject to referendum.

STATE v. OSBORN

Supreme Court of Arizona, 1914. 16 Ariz. 247, 143 P. 117.

PER CURIAM. This is an action brought to restrain the Secretary of State from certifying and causing to be printed on the official ballot at the election to be held on November 3, 1914, an initiated measure to create and organize Miami county. The complaint alleges:

"That the said proposed initiative bill is legally insufficient in this: That it purports and is intended to provide for the division of Gila county and to create the county of Miami, and that the said bill has no application in any other part of the state, and cannot operate at any other time than as provided in the said proposed bill and that the same can have no application to any other part of the state and cannot operate at any other time, and that it is local and special legislation, and is intended to divide a particular county and to create a particular county, without reference to any other counties, or to any other time, and that each of the matters and things intended,

provided, and proposed to be enacted can be done by general law, and that the said proposed initiative bill is in conflict with subdivision 20 of section 19, of article 4 of the Constitution of the state of Arizona, in that it is a special, local law in a case where a general law can be made applicable, and for these reasons the said proposed initiative bill is legally insufficient within the scope and meaning of paragraph 3327 of the Revised Statutes of Arizona."

A general demurrer to the complaint was sustained, and, the plaintiff refusing to amend, judgment was rendered in favor of defendant. The appeal is from this judgment.

Paragraph 3327, Civil Code of 1913, provides that:

" . . . On a showing that any petition is not legally sufficient, the court may enjoin the Secretary of State and all other officers from certifying or printing on the official ballot for the ensuing election the ballot title and number of the measure or proposed amendment to the Constitution set forth in such petition. . . ."

It is conceded that the petition in this instance is regular in form, and is signed by the requisite number of legal voters, the only objection to the measure going on the official ballot being that it is special legislation, and therefore, when tested by subdivision 20 of section 19, article 4, of the Constitution, is "legally insufficient." It is claimed that the Secretary of State should look beyond the mere form of the petition and into its substance with a view of determining if the proposed law is in conflict with the Constitution; that he should determine if the measure should be enacted whether it would be a valid law or not, and if in his judgment an invalid law, it is his duty to refuse to certify it for a place on the official ballot. The Constitution makes the petition an indispensably necessary thing and step in the process of legislation directly by the people. It is as much so as the drawing and introducing of a bill in the legislature by one of its members. Whether the voters in taking this step are acting ministerially or in their legislative capacity is immaterial. In either event the step is essential, made so by the Constitution and by legislation. Chapter 1, tit. 22, Civ.Code 1913.

The government of the state is divided into three separate departments, the legislative, the executive, and judicial, and it is provided by the Constitution (article 3) that:

"Such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."

In *Allen v. State*, 14 Ariz. 458, 130 P. 1114, 44 L.R.A.,N.S., 468, we said:

"The people did not commit to the legislature the whole law-making power of the state, but they especially reserved in themselves the power to initiate and defeat legislation by their votes. In this state the legislature and the people constitute the law-making power."

The appellant concedes that the courts are powerless to restrain a member of the legislature from introducing any measure, valid or

did, for the reason that the courts cannot interfere with the action of the legislative department. What legal warrant has a court to enjoin the Secretary of State from certifying a measure whether valid or invalid? Is not the initiative petition also a step in the process of legislation? For the Secretary of State, or the courts, to assume to advance the power and right to decide whether the proposed measure was invalid would be tantamount to claiming the power of life and death over every initiated measure by the people. It would limit the right of the people to propose only valid laws, whereas the other law-making body, the legislature, would go untrammelled as to the legal soundness of its measures. Such differentiation of powers is expressly prohibited by section 14, article 22, Constitution, which says:

"Any law which may be enacted by the legislature under this Constitution may be enacted by the people under the initiative. Any law which may not be enacted by the legislature under this Constitution shall not be enacted by the people."

This certainly means that the power of the people to legislate is as great as the power of the legislature to legislate, and for the courts to assume a supervision of one of the law-making bodies, and require that measures proposed by it must first receive judicial sanction before action by that body, while the other may proceed without let or hindrance, is not in accordance with the letter or spirit of the Constitution.

We conclude, following Oklahoma and Oregon, whose Constitutions on the initiative are like ours, that the words "legally sufficient" as used in paragraph 3327, Civil Code of 1913, mean that the petition shall conform with the requirements of the law as to form and signature. It is not a legal petition if not regular in form, and does not contain the signatures of legal voters as required. Of course, this requires that the petition shall be genuine. If it is fraudulent or if the signatures are forged, it is not legally sufficient. As the court said in *State v. Olcott*, 62 Or. 277, at page 279, 125 P. 303, at page 304:

"We are of the opinion that by the term 'legally sufficient' the legislature meant to describe a valid petition, signed by legal voters, and complying substantially, not necessarily technically, with the requirements of the law."

The petition here attacked is not irregular, but in form conforms with the requirements of the law. In *Threadgill v. Cross*, 109 P. 558, 26 Okl. 403, 138 Am.St.Rep. 964, the court said that the secretary, in an action like this one, "may not defend against this proceeding by questioning the validity of the proposed amendment." The last court further said:

"In the procedure for amending the Constitution of this state (the same is true as to initiated laws), which can only be effected by an election thereon, it becomes necessary for the people of the state to call into their service certain of their executive officers, and require them to perform certain ministerial duties. If the placing of such

duties upon such ministerial officers gives in turn to them the right and power to question the validity of any or all the amendments proposed, and to refuse to act when they decide that any such proposed measure will be invalid, then the most subordinate ministerial officer of the state having any duties to perform in connection with such an election may himself do indirectly that which he could not have, nor any other citizen of the state have the courts do by proceeding instituted for that measure, to wit, pass upon the validity of the proposed measure and stay the election by a judicial decree, if it be determined that the proposed measure is invalid."

In *State ex rel. Cranmer v. Thorson*, 9 S.D. 149, 68 N.W. 202, 33 L.R.A. 582, it was said:

"Power to amend the Constitution belongs exclusively to the legislature and electors. It is legislation of the most important character. This court has power to determine what such legislation is, what the Constitution contains, but not what it should contain. It has power to determine what statutory laws exist, and whether or not they conflict with the Constitution; but it cannot say what laws shall or shall not be enacted. It has the power, and it is its duty, whenever the question arises in the usual course of litigation, wherein the substantial rights of any actual litigant are involved, to decide whether any statute has been legally enacted, or whether any change in the Constitution has been legally effected, but it will hardly be contended that it can interpose in any case to restrain the enactment of an unconstitutional law."

Whether or not the proposed law if enacted by the people will be a valid exercise of the legislative power reserved by them in their fundamental law is not in this case, and, of course, cannot now be determined by this court. What we do hold is that the appellant is precluded in this proceeding from questioning the constitutionality of such proposed law. If the people do enact such proposed law when submitted to them at the polls, as well said in *Threadgill v. Cross*, *supra*:

"That question can and will be determined only when it is presented to this court in the course of litigation by some litigant whose rights are involved."

In deciding this case, we are not concerned with questions of policy, or as to whether it is right and proper that the whole people of the state should be permitted to vote on the question of the division of Gila county and the creation of Miami county. The question of policy in thus allowing the whole people of the state to vote on what is concededly a local matter is one that belongs to another department. It is for us to declare the law as we find it.

Judgment affirmed.

NOTES

1. Cf. *State v. Superior Court for Thurston County*, 92 Wash. 16, 159 P. 92 (1916), where a restrictive injunction was granted enjoining the defendants (the initiators of a measure and the Secretary of State) from printing and circulating

public expense an initiative petition while it contained a "declaration of purposes" which the court held not to be a genuine preamble but a "mere argument and mere statements in support of the proposed measure". The court said:

To establish that the procedure questioned is unfair is not sufficient. Any law proposed may be, and often is, unfair to some. Except when dealing with essential morals or fundamental principles, in the modern complexity of human affairs and relations there is little legislation that can be said to be entirely fair. Legislative bodies, whether delegated or principals in mass, are not to be stopped from exercising the supreme function of making laws by such considerations. The real question now to be determined is, Have they the power? Courts will not concern themselves with any questions of policy or hardship or expediency. Nor will they in any case intervene to hinder or influence the process of legislation in any of its steps. Were it a question of whether a delegated member of legislative body of any kind could introduce to that body a "bill" or law of any kind, no matter how arbitrary, how novel, or how foolish, the answer at the very outset would unhesitatingly be that no other department of our triune form of government could in any wise interpose. We now have a dual system of legislation; one by a delegated, bicameral legislature, deliberative, maker of its own rules of procedure in general; the other by the legal voters of the state in mass. Here we have the question, Is the proponent of an initiative measure in any sense a legislator? And ancillary to that, is the filing of a proposed bill or law a legislative step? A third and vital question then arises, Can the courts interfere?

"As to the first question, we conceive that an initiator of a bill (which means the draft of an act or proposed law) is not, under this system of direct legislation, a legislator. *State v. Olcott*, 62 Or. 277, 125 P. 303. He is merely given license or privilege to propose and file a proposed measure. This is a preliminary step in the process of legislating. It may be dispensed with, but it is nevertheless provided for in furthering or 'facilitating' the system. He must proceed in conformity with the license. The question then is, Are these proponents exercising this privilege legally? In the first place, it must be considered that we have a step or procedure authorized and granted by law and to be exercised and administered under a general law authorized by the supreme law, the constitution; not a legislator acting in a parliamentary, deliberative body, empowered within certain constitutional limitations to make its own rules of procedure at the moment, and co-equal with any other branch of government. But, it is said, the people in their legislative capacity are superior to all other branches of government, the legislative body in mass, certain legal political rights are conferred upon them to be exercised in a prescribed manner. These rights must be considered as no greater than the rights of other members of the legislative body in mass to oppose the proposed measure. It cannot be assumed that the right of one legal voter to attempt to obtain the enactment of a given measure is greater than the right of other legal voters to attempt to prevent its passage. All are equal before the law. There is no presumption that, because certain legal voters or legislators desire and propose certain legislation upon a certain subject, the same is desired by the voters in mass. In fact, it can be assumed as a safe postulate that other members of the voting mass will oppose it. It is the sole ground of relators here that they are entitled to interfere in the matter because they are voters and do oppose the proposed measure, irrespective of the merits of the measure and regardless of the reasons for their opposition, and that if the proponents of the measure are proceeding in accordance with the positive law, their only recourse is at the polls. This position is sound. This brings us to the precise question as to the legality of the procedure of the proponents.

"The present situation seems in some measure to be an attempt to evade the plain provisions of the statute regarding the publication of arguments and the payment of the expense thereof, and the decision in the last cited case. Ordinarily

the reason for an enactment lies wholly in its enactment. The existence of a law ought to be its own reason. While all preambles to initiative legislation would not be subject to criticism as mere arguments by the proponents, but intended to be proper declarations of purpose in a proposed law, we are convinced that the one under consideration is; and that it is not a mere political question nor an exempt legislative process, but is regulated by the law, and is subject to judicial interpretation."

2. In *State v. Stewart*, 53 Mont. 18, 161 P. 309 (1916), in holding an initiated statute unconstitutional as to subject matter, the court said: "The people of this state, acting as a legislative body, can no more transgress the provisions of the state Constitution than can their representatives in the legislative assembly. The terms of the Constitution can be changed or modified only in the manner indicated in Article XIX of the Constitution."

3. On initiative and referendum generally, see Lobingier, "The People's Law", chapters 27-28 (1909); Munroe, "The Initiative, Referendum and Recall" (1912).

SECTION 2. DECLARATORY LEGISLATION

PENNSYLVANIA LAWS, 1833

No. 128, § 6.

AN ACT

Relating to last wills and testaments

Sect. 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met.

Sect. 6. That every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall be of no effect.

PENNSYLVANIA LAWS, 1848

No. 18

A SUPPLEMENT

To an act relating to last wills and testaments, passed the eighth day of April, eighteen hundred and thirty-three.

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That every last will and testament heretofore made, or hereafter to be made, excepting such as may have been finally adjudicated prior to the passage of this act, to which the testator's name is subscribed, by his direction and authority, or to which the testator hath made

his mark or cross, shall be deemed and taken to be valid in all respects: Provided, The other requisites, under existing laws, are complied with.

GREENOUGH v. GREENOUGH

Supreme Court of Pennsylvania, 1849. 11 Pa. 489, 51 Am.Dec. 567.

Error to the District Court of Allegheny.

Sept. 17. This was an action of ejectment by John against Thomas Greenough. It appeared that Elizabeth Greenough died seised of the premises, unmarried, without issue, and leaving three brothers and a sister. The plaintiff and defendant were brothers of Elizabeth. She executed a will on the 17th August, 1840, and died ten days afterwards.

The plaintiff below, relying upon her dying intestate, offered no evidence other than the admission of the foregoing facts; denying, however, the legal execution of the will.

The defendant, claiming under the will, examined the subscribing witnesses to it, whose material testimony was as follows:—

Andrew Nicholson, sworn.—I signed this will as a witness. I went to her bed-side, and was introduced to Elizabeth Greenough. The will was read to her. It is my impression she requested me to sign it as a witness: either before or after it was read. She declared it to be her last will and testament, after it was read to her. M. B. Lowrie also signed it in the presence of the testatrix, and in my presence. I saw her make the mark, with the assistance of Lowrie steadying her hand. She was nervous at the time. The name was written by Lowrie, I think: it was there when she made her mark. She was feeble, and not able to write.

Cross-examined.—She was very nervous; her hand shook very much. I don't recollect her asking Lowrie to write her name. It would not have been possible for her to write her name. No conversation about her mark or signature afterwards. She appeared exhausted—said nothing. She grew worse after the will was signed, till she died. I did not hear her request any person to write her name.

M. B. Lowrie, sworn.—I wrote this will, under Elizabeth's direction, from her dictation. I read it carefully over, and she assented to it, and when I took it to her to sign it, she said she was not able and requested me to sign it for her. I did so. Before she subscribed her mark, I asked her if she acknowledged this to be her last will, and if we, myself and another, should sign it as witnesses. She assented to both, and I then subscribed it as a witness, and Nicholson also in my presence. She made her mark to the will in my presence. She could write before this, I think, but not at this time.

Cross-examined.—I may have steadied her hand, but she made the mark.

This will devised the land in controversy to Thomas, the defendant, for life, and after his death to be divided among the children of John, and others.

The signature of the will and the mark, described by the subscribing witnesses, was in this form.

her
Elizabeth X Greenough
mark.

The will was admitted to probate, 19th May, 1842.

The jury was directed *pro forma* that the will was well proved, and good and valid in law, and that the defendant was entitled to their verdict. The questions of law were reserved. In the opinion subsequently delivered by Hepburn, President, the learned judge held that the proof of the testatrix expressly directing Lowrie to sign her name to the will was insufficient, under the act of 1833, and that the will was of no effect under that act, but that the proof of her mark, under the act of 1848, was sufficient—the law acting upon the remedy and not upon the estate, and so violating no constitutional provision. Judgment on the verdict for the defendant.

GIBSON, C. J. So far as regards wills consummated by the testator's death—and this is one of them—the act of 1848 is founded on no power known to the constitution, but on the assumption of a power appropriated exclusively to the judiciary. Every tyro or sciolist knows that it is the province of the legislature to enact, of the judiciary to expound, and of the executive to enforce. These functions may, if the people will it, be performed by a single organ; but the people of Pennsylvania have not so willed it. They have ordained that the judicial power of the Commonwealth be vested in a Supreme court, in County Courts of Common Pleas, Oyer and Terminer, and Quarter Sessions, in a Register's Court, and an Orphans' Court: and in such other courts as the legislature may from time to time establish. But the judicial power of the Commonwealth is its whole judicial power; and it is so distributed, that the legislature cannot exercise any part of it. Under the constitution, therefore, there is no mixed power—partly legislative and partly judicial—such as was recognized in *Bradee v. Brownfield*. Did it exist, it could be exercised only in concert or in common; for it would give the judiciary as much right to legislate as it would give the legislature right to adjudicate. Thus blended, I know of no constitutional power, principle, or provision, that would give to either of them, as a co-ordinate branch, an exclusive right to the whole. What then did the legislature propose by the statute of 1848? This court had ruled in *Barr v. Strobell*, *Cavett's Appeal*, that a testator's mark to his name, at the foot of a testamentary paper, but without proof that the *name* was written by his express direction, is not the signature required by the act of 1833; and the legislature has declared, in order to overrule it, that "every last will and testament heretofore made, or hereafter to be made, except such as may have been finally adjudicated prior to the passage of this act, to which the testator's name is subscribed by his direction, or to which the testator has made his mark or cross,

shall be deemed and taken to be valid." How this mandate to the courts, to establish a particular interpretation of a particular statute, can be taken for anything else than an exercise of judicial power in settling a question of interpretation, I know not. The judiciary had certainly recognized a legislative interpretation of a statute before it had itself acted, and consequently before a purchaser could be misled by its judgment; but he might have paid for a title on the unmistakable meaning of plain words; and for the legislature subsequently to distort or pervert it, or to enact that white meant black, or that black meant white, would, in the same degree, be an exercise of arbitrary and unconstitutional power. All *ex post facto* laws are arbitrary; and it is to be regretted that the constitutional prohibition of them has been restricted to laws for penalties and punishments. In a moral or political aspect, an invasion of the right of property is as unjust as an invasion of the right of personal security. But retroactive legislation began and has been continued, because the judiciary has thought itself too weak to withstand; too weak, because it has neither the patronage nor the prestige necessary to sustain it against the antagonism of the legislature and the bar. Yet, had it taken its stand on the rampart of the constitution at the onset, there is some little reason to think it might have held its ground. Instead of that, it pursued a temporizing course till the mischief had become intolerable, and till it was compelled to invalidate certain acts of legislation, or rather to reverse certain legislative decrees. Conceding the right of legislative interpretation in the first instance, because it has prevailed too long to be disputed, we can pronounce the act of 1848 to be exclusively prospective without disturbing titles.

It is destitute of retroactive force, not only because it was an act of judicial power, but because it contravenes the declaration in the ninth section of the ninth article of the constitution, that no person shall be deprived of life, liberty, or property, except by the judgment of his peers or the law of the land. Taking the proof of execution, at this stage of the argument, to be defective under the act of 1833, it would follow that the plaintiff had become the owner of a third of the property in contest, by the only assurance that any man can have for his property—the law. Yet the legislature attempted to divest it, by a general law it is true, but one impinging on particular rights. Still it is argued that the act may be sustained as a confirmation of conveyances by will, as a confirmation of conveyances by deed was sustained in *Underwood v. Silly*, *Mercer v. Watson*, 8 Pet. 110, and other cases of the class. It was remarked in *Menges v. Wertman*, 1 Barr 218, that a party, who has received a benefit from a transaction, is under a moral obligation to convey, and that the legislature may add a legal one to it; and I still think that a distinction between a purchaser and a volunteer, is the only ground left to us to found a practical limitation of special legislation. In this case, the devisee is a volunteer, and the heirs are bound by no obligation which did not bind the legitimate heirs in *Norman v. Heist*. But the great obstacle in *Menges v. Wertman*, was the number of titles that depended on legislation of the same stamp. I have doubted whether we ought not to have swept them all away;

but we had a choice of evils set before us, and want of steadiness in the judiciary was thought to be the greater one. Decision, however, has not established a rule of property to control us in the present case; for judicial interpretation of the act of 1833 had preceded the act of 1848. The statutes in *Hess v. Wertz* and *Satterlee v. Mathewson*, 2 Pet. 380, were enacted, not to create a contract or to confirm one, but to remove a disability; and the protection not of a party, but the public, was certainly within the constitutional range of legislative action.

The defendant's next position is, that the testatrix's name, written by another, without her express direction, but acknowledged by her mark, was within the true intent and meaning of the original act. . . .

As a special case seems to be made for the opinion of the court, and not the jury, I am of opinion that the attestation was *prima facie* evidence, and sufficient.

Judgment affirmed.

NOTES

1. In *Lambertson v. Hogan*, 2 Pa. 22 (1845), it was said at p. 25: "Explanatory acts must be construed as operating on future cases alone, except where they are designed to explain a doubtful statute, in which cases they deserve and always will receive the most respectful attention from the judicial branch of the government."

2. Section 2 of an act approved September 17, 1861, amending an act of 1860, provided that "nothing contained in the act incorporating said board, approved January 12, 1860, shall be construed so as to prevent or hinder said board or their successors from removing the seat of their college . . . to any other place" It was claimed that this section was unconstitutional as declaratory of the meaning of the previous act. The court held, however, that the section was not unconstitutional as a declaration of the meaning of the former act and thus in its nature judicial, but that the section merely gave the power of removal where that power was not expressly given by the former act. *Bryan et al. v. Board of Education of the Kentucky Annual Conference of the M. E. Church South*, 90 Ky. 322, 13 S.W. 276, 277, 12 Ky.Law Rep. 12 (1900).

3. In *The Postmaster General v. Early*, 12 Wheat. 136, 6 L.Ed. 577 (1827), Marshall C. J., said at pp. 148-9: "The legislature may pass a declaratory act, which, though inoperative on the past, may act in the future."

4. For a collection of cases setting forth the language of declaratory statutes which have been held to be prospective only, see Note "Declaratory Legislation," 49 Harv.L.Rev. 137 (1935).

5. See also *infra*, Chapter 7, Section 2.

MERCHANT SHIPPING (Seaman's Allotment) ACT 1911

1 & 2, Geo. V., c. 8.

An Act to remove certain doubts as to the true interpretation of the Merchant Shipping Acts, 1894 to 1906, in respect of the Payment of Seamen's Allotment Notes. (18th August 1911.)

Whereas doubts have arisen as to the true interpretation of section one hundred and forty-one of the Merchant Shipping Act, 1894, and section sixty-two of the Merchant Shipping Act, 1906:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. By agreement with the master an allotment note may be granted to a seaman providing for—

(a) payment of a greater sum than one half of the wages;

(b) payment at a period earlier than one month from the date of the agreement with the crew and at intervals more frequent than one month.

2. This Act may be cited as the Merchant Shipping (Seamen's Allotment) Act, 1911.

HARDING v. COMMISSIONER OF STAMPS FOR QUEENSLAND

Judicial Committee of Privy Council. [1898] A.C. 769

LORD HOBHOUSE. This appeal arises out of a claim made on behalf of the Crown to charge succession duty on the estate of Silas Harding. The appellants are his executors. The respondents are the Stamp Commissioners, who claim duty. The Supreme Court to whom the executors appealed have decided that duty is chargeable. On some disputed points they decided against the commissioners, but there is no appeal on those points. The executors maintain that no duty is payable at all.

Silas Harding died in the year 1894, domiciled in the Colony of Victoria. In September, 1894, his will was proved in Victoria, and in April, 1895, ancillary letters of probate were granted by the Supreme Court of Queensland. He had a large property, and among it were the following particulars: (1) A debt of 102,036£. 2s. 7d. due from a Mr. Doneley; (2) a debt of 20,863£. 0s. 3d. due from the Queensland Brewery; (3) 3,000 shares in the Royal Bank of Queensland. The two debts were secured by mortgages on land, stock, and goods in Queensland. It is on these three items that the Supreme Court has held duty to be chargeable under the terms of the Succession and Probate Duties Act, 1892, as amended in 1895.

From the written reasons of the learned judges their Lordships collect that if the Act of 1892 had stood alone they would have felt constrained by the course of decisions in England, though not fully assenting to them, to hold that no duty was chargeable. Their judgment in effect turns on the application of the Act of 1895, and the first question is what was the law immediately before that Act was passed.

Sect. 4 of the Act of 1892 is in effect, as the learned judges point out, a transcript of s. 2 of the English Succession Duty Act of 1853. The material words are "Every . . . disposition of property by reason of which any person . . . shall become beneficially entitled to any property upon the death of any person . . . shall be deemed . . . to confer on the person entitled by reason of such disposition . . .

a succession"; and on that succession the duties are fastened. The literal force of these expressions includes the estate of Silas Harding. But then it includes a great deal more which nobody can suppose that the Legislature intended to tax: it includes all persons and all property all over the world, and if not confined within reasonable limits would enable the Queensland authorities to levy a tax in respect of foreign property on foreigners when within their power. Abnormal consequences such as these have been avoided by judicial decisions in England.

In *Thompson v. Advocate-General* the question arose under words of a similar character in the Act of 55 Geo. 3, c. 184. That Act imposed duties on "every legacy given by any will of any person." A gentleman domiciled in Demerara owned money locally situate in Scotland on which the Crown claimed legacy duty. The case was ultimately decided in the House of Lords; the judges were consulted, and their joint opinion delivered by Tindal, C. J. He pointed out the absolute necessity of limiting the sense of the words, and laid it down that such necessary limitation is that the statute does not extend to the will of any person domiciled out of Great Britain, whether the assets are locally situate there or not. That opinion was adopted by the House.

In *Wallace v. Attorney-General* a similar question arose under s. 2 of the English Succession Duty Act of 1853, which defines a succession in the same way as the Queensland Act of 1892. A gentleman domiciled in France owned personal property in England consisting of a sum of Consols. The Crown claimed succession duty on that property. Lord Cranworth held that the same limitation which had been put on the words "every legacy given by any will of any person" must be put on the words "every disposition whereby any person becomes entitled," and that the person intended is a person who becomes entitled by the laws of this country.

The soundness of this principle of construction has never been impugned, nor has the British Legislature thought fit to put any different limitation upon the generality of the terms in which legacy duty and succession duty are imposed. The matter appears to be well summed up in Mr. Dicey's work on the *Conflict of Laws* at p. 785, in which he paraphrases Lord Cranworth's application of the principle "*Mobilia sequuntur personam*" by saying that the law of domicile prevails over that of situation.

It is, of course, a maintainable opinion that the law of situation should prevail, and that a line which brings under the general words of taxation property which is protected by the taxing State, and which in case of dispute is administered by it, would form a more reasonable limitation of such words than the limitation by domicile. The learned judges below inclined to that principle; and the Queensland Legislature has adopted it. But the Court has only to decide what the Legislature meant when it passed the Act of 1892. Now, the decision in *Thompson's Case* was given in the year 1845; that in *Wallace's Case* just twenty years later; and it has been taken ever since that the expres-

sions in question do not apply to movable property belonging to persons of foreign domicile. Nearly thirty years after the later decision the Queensland Legislature passed their Succession Duty Act in terms identical with those of the English Act of 1853. It is impossible to suppose that they did not intend those terms to be read in the sense affixed to them by the English tribunals, and in which they would be read by every lawyer and every official conversant with the subject-matter.

It remains to see whether the Act of 1895 alters the incidence of the Act of 1892 upon a will which took effect in 1894, and the probate of which was granted in Queensland several months before the later Act came into force; in other words, whether the Act of 1895 is retrospective.

The Act is entitled "An Act to amend the Succession and Probate Duties Act, 1892"; and s. 1 provides that it may be cited as "The Succession and Probate Duties Act, 1892, Amendment Act of 1895." The important section is the second, which runs thus:—

"2. It is hereby declared that upon the issue of any grant of probate or administration in Queensland, succession duty is chargeable in respect of all property within Queensland, although the testator or intestate may not have had his domicile in Queensland."

That enactment is calculated to meet such cases as the present one, and if retrospective would be conclusive in favour of the respondents. The Supreme Court think that the section is declaratory because of the opening expression, "it is declared"; and then they go on to reason that a declaratory Act is *prima facie* retrospective, and confine themselves to examining whether it contains anything of a contrary nature so as to neutralize its declaratory and retrospective character.

Their Lordships cannot take such a view of the Act. The use of the expression "it is declared" to introduce new rules of law is not incorrect, and is far from uncommon. The nature of the Act must be determined from its provisions. Now, the Act does not contain any words to shew that it purports to construe the Act of 1892; it does purport to amend it; every other of its provisions is in language prospective, and in s. 2 itself the new rule is to take effect "upon the issue of any grant of probate," which is not fitting language to apply to estates for which probate has already been granted. In fact, the language of the Act points, as their Lordships think, distinctly to future operations. And, inasmuch as it falls under two well-established canons of construction, both requiring that, as against the persons sought to be affected, it should be shewn quite clearly and strictly to effect them—first, that which relates to statutes imposing liabilities, and, secondly, that which relates to retrospective statutes—their Lordships feel no hesitation in deciding that the Act cannot be retrospective.

The result is that, when the will of Silas Harding took effect and when the Queensland letters of probate were granted, the law of 1892 did not subject his movable assets to succession duty, and that the state

of things so existing has not been disturbed by subsequent legislation. They will humbly advise Her Majesty to discharge the order appealed from so far as it declares that succession duty is chargeable on all the property of the testator which was in Queensland at the time of his death, and, instead thereof, to declare that no succession duty is payable on the three items of the testator's property which are the subject of this appeal. The respondents must pay the costs of this appeal.

NOTES

1. Cf. *In re Robinson's Estate*, *infra*, p. 1213.

2. In *Attorney General v. Theobald*, 24 Q.B.D. 537 (1890), the question was whether a stamp duty was due on property passing under a trust made in consideration of marriage, which property passed to the next of kin of the settlor in 1885. The Statute of 1881 provided that a stamp tax should be paid on property passing under a voluntary settlement, and the defendant claimed that as the settlement involved was in consideration of marriage, it was not voluntary. Although the pleadings were closed and the case was ready for argument prior to the Act of 1889 which amended the Act of 1881 by including within the expression "voluntary settlement" "any trust . . . in favor of a volunteer", it was held that although the Act of 1889 states that the Act of 1881 "is hereby amended", the material part shows that the earlier Act must be read as having its meaning declared by the later Act. Hawkins, J., said at p. 561: "The words are of a declaratory character directing that, in all cases where the construction of sub-s. 3 of s. 38 comes in question after the passage of the Act of 1889, the former Act shall be construed as prescribed by the later Act."

3. See also *Kimbray v. Draper*, L.R. 3 Q.B. 160 (1868), where an Act with regard to costs was given retroactive effect, Blackburn, J., stating at p. 161: "The rule of interpretation in such cases is, that when the enactment changes or takes away rights, it is not to be construed as retrospective unless there are express words to that effect, but when it only changes mode of procedure, it is to be applied to all actions." To the same effect with regard to taxation of costs see *Freeman v. Moyes*, 1 Ad. & E. 338 (1834).

4. For a statement setting forth when statutes declaratory in form are retroactive in operation and when retroactive operation should not be given to a statute, see *Young v. Adams*, [1898] A.C. 469. A history of the development of the opposition to retroactive legislation and the present meaning of the principle appears in Smead, "The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence," 20 Minn.L.Rev. 775 (1936).

5. The constitutional limitations in the United States have been advanced as the reason why declaratory legislation in this country has usually been held to be prospective in operation only, when it is sustained at all, whereas England, with no constitutional restrictions, will give a declaratory statute retroactive effect where the language of the statute clearly so warrants. See Note, "Declaratory Legislation," 49 Harv.L.Rev. 137 (1935).

EXCERPT FROM STUDY "REVISION OF STATUTES IN
MATTER OF FORM" *

N. Y. Leg. Doc. (1947) No. 65 (N), 44-45.

Evidence of the intent of the Legislature may also be drawn from subsequent legislation, amending or supplementing the original act and establishing a meaning which was formerly uncertain. Such legislation is fully operative to declare the law for the future, and a change in language, particularly following a judicial decision, will be given great weight in determining the meaning of the amended statute. But while it may sometimes be expressly made retroactive so as to change or settle the law as to cases to which the former law was applicable, it is not conclusive as to the original meaning of the act.¹ Nevertheless, legislation of this kind has been relied on, as a "practical interpretation."² Of course, the presumption that an amendatory act is intended to make a change in the law ordinarily leads to the conclusion that the law prior to the amendment was *not* as expressed in the amendment.

The following test was stated in *People v. Davenport*:

"The force which should be given to subsequent, as affecting prior legislation, depends largely upon the circumstances under which it takes place. If it follows immediately after controversies upon the use of doubtful phraseology therein have arisen as to the true construction of the prior law it is entitled to great weight. . . . If it takes place after a considerable lapse of time and the intervention of other sessions of the legislature, a radical change of phraseology would indicate an intention to supply some provisions not embraced in the former statute."³

Apart from this test many amendatory acts appear clearly, or are shown by intrinsic evidence, to be intended as clarifying measures. And when an amendment does not purport to clarify, but adds new matter which is relevant and operative only on the assumption of a particular construction of the statute, or a construction of the

* Footnotes have been renumbered.

¹ That is, it operates, retroactively merely as legislation with respect to past events. Prospectively, it constitutes the governing statute, and the primary expression and evidence of legislative intent. See *People v. Briggs*, 193 N.Y. 457, 86 N.E. 522 (1908).

² See *Standard Accident Ins. Co. v. Newman*, 47 N.Y.S.2d 804, aff'd, 268 App.Div. 967, 51 N.Y.S.2d 767, leave to appeal denied, 268 App.Div. 1039 (1st Dept. 1944). In *McKee Land & Improvement Co. v. Swikehard*, 23 Misc. 21, 51 N.Y.S. 399 (Sup.Ct. Monroe Co., 1898), affirmed on opinion below, 63 App.Div. 553, affirmed 173 N.Y. 630, 66 N.E. 1112, a statute had been inadvertently included in the schedule of repeals of an act on an entirely different subject. At the same session the mistake was noticed, the repealed act was restored, and acts done under it were confirmed and ratified. In a decision relating to assessments for sewers under the act so repealed and restored, the Court placed more emphasis on the obviously unintentional nature of the repeal than on the effectiveness of the re-enactment.

³ 91 N.Y. 574, 591-592 (1883).

related provisions, such assumption may be treated as controlling the construction of the prior statute.⁴

STATE v. CANNON

Supreme Court of Wisconsin, 1932. 206 Wis. 374, 240 N.W. 441.

OWEN, J. Raymond J. Cannon, a former member of the bar of this court, was ordered suspended from such office for a period of two years on the 5th day of July, 1929. "State v. Cannon, 199 Wis. 401, 226 N.W. 385. The order of suspension, as an additional penalty, required the said Raymond J. Cannon to pay the costs of the original proceeding against him, which were taxed at the sum of \$2,699.78. The costs thus taxed were not paid. On the 23th day of May, 1931, under the provisions of said order, he made application for his reinstatement." . . .

The application was argued before the court on the 14th day of November, 1931. Aside from the question of whether the conduct of Mr. Cannon subsequent to his suspension had been such as to merit reinstatement, the court was confronted with the serious question of whether chapter 480, Laws 1931, was constitutional in so far as it purports (1) to reinstate said Raymond J. Cannon as an attorney at law; and (2) in so far as it purports to remit the costs imposed upon Mr. Cannon by the order of suspension. The statute reads as follows: "The license to practice law, duly issued to Raymond J. Cannon on the thirtieth day of April, 1914, and revoked by judgment of the supreme court on July 5, 1929, is hereby restored, and the costs imposed by said judgment are hereby remitted, and the said Raymond J. Cannon is hereby authorized, henceforth, to exercise all the rights and privileges of a duly licensed member of the bar." . . .

Under our Constitution all legislative power is vested in a Senate and Assembly. Section 1, art. 4. In so far as the prescribing of qualifications for admission to the bar are legislative in character, the Legislature is acting within its constitutional authority when it sets up and prescribes such qualifications. That there is a field within which the prescribing of such qualifications constitutes a legislative function cannot be doubted. One of the very important functions of the Legislature is to promote the public welfare and to protect the public from the results of incompetence, imposition, and fraud on the part of those who assume to practice the learned professions and occupations requiring skill and special training. In obedience to its duty in this respect, the Legislature of this state has limited those who may follow such professions and occupations to such as may demonstrate in the manner prescribed by the Legislature their fitness

⁴ *Wende v. Board of Supervisors of Erie County*, 115 Misc. 250, 187 N.Y.S. 851 (1920) reversed without discussion of this point, 203 App.Div. 510, 196 N.Y.S. 774 (subsequent recognition of statute as negating a prior implied repeal). *Baird v. City of New York*, 96 N.Y. 567 (1884) (construction of statute as authorizing purchases aided by subsequent statute recognizing liability therefor.)

and qualifications for such callings. Realizing that those who assume to practice law without the proper learning and good moral character have it in their power to work great harm upon those who have a right to assume that they are properly qualified to advise them in legal matters and to protect them in their legal rights, the Legislature has very properly prescribed certain qualifications which must be possessed by those who become licensed as attorneys at law (St.1929, § 256.28). The qualifications thus prescribed by the Legislature are presumptively such qualifications as the Legislature has deemed necessary in order to promote the public welfare and to protect the citizens of the state from imposition on the part of those who are licensed to act as attorneys at law. In thus legislating the Legislature has acted within a plain legislative field and has exercised its police power to promote the welfare of the citizens of the state. There can be no challenge to the right of the Legislature to exact of those who desire or assume to practice law such qualifications as in the judgment of the Legislature are necessary to protect the citizens of the state from becoming the unconscious victims of dishonesty or incompetence.

But when the Legislature has prescribed those qualifications which in its judgment will serve the purpose of legitimate legislative solicitude, is the power of the court to impose other and further exactions and qualifications foreclosed or exhausted? In so far as the prescribing of such qualifications constitutes legislative power, that power can be exercised only by the Legislature. There can be no doubt about that. It is apparent, however, that the judiciary may have another and different interest in the talents, qualifications, and character of those who are to become officers of the courts, as attorneys at law in this country are universally conceded to be. . . .

Our conclusions may be epitomized as follows: For more than six centuries prior to the adoption of our Constitution, the courts of England, concededly subordinate to Parliament since the Revolution of 1688, had exercised the right of determining who should be admitted to the practice of the law, which, as was said in *Matter of the Serjeants at Law*, 6 Bingham's New Cases 235, "constitutes the most solid of all titles." If the courts and the judicial power be regarded as an entity, the power to determine who should be admitted to practice law is a constituent element of that entity. It may be difficult to isolate that element and say with assurance that it is either a part of the inherent power of the court, or an essential element of the judicial power exercised by the court, but that it is a power belonging to the judicial entity cannot be denied. Our people borrowed from England this judicial entity and made of it not only a sovereign institution, but made of it a separate, independent, and co-ordinate branch of the government. They took this institution along with the power traditionally exercised to determine who should constitute its attorneys at law. There is no express provision in the Constitution which indicates an intent that this traditional power of the judicial department should in any manner be subject to legislative control.

Perhaps the dominant thought of the framers of our Constitution was to make the three great departments of government separate and independent of one another. The idea that the Legislature might embarrass the judicial department by prescribing inadequate qualifications for attorneys at law is inconsistent with the dominant purpose of making the judicial independent of the legislative department, and such a purpose should not be inferred in the absence of express constitutional provision. While the Legislature may legislate with respect to the qualifications of attorneys, its power in that respect does not rest upon any power possessed by it to deal exclusively with the subject of the qualifications of attorneys, but is incidental merely to its general and unquestioned power to protect the public interest. When it does legislate fixing a standard of qualifications required of attorneys at law in order that public interests may be protected, such qualifications constitute only a minimum standard and limit the class from which the court must make its selection. Such legislative qualifications do not constitute the ultimate qualifications beyond which the court cannot go in fixing additional qualifications deemed necessary by the courts for the proper administration of judicial functions. There is no legislative power to compel courts to admit to their bars persons deemed by them unfit to exercise the prerogatives of an attorney at law. The power of the court in this respect is limited only to the class which the Legislature has determined is necessary to conserve the public welfare.

But the statute is invalid for another reason. If it be granted that the Legislature has power to prescribe ultimately and definitely the qualifications upon which courts must admit and license those applying as attorneys at law, that power cannot be exercised in the manner here attempted. That power must be exercised through general laws which will apply to all alike and accord equal opportunity to all. Speaking of the right of the Legislature to exact qualifications of those desiring to pursue chosen callings, Mr. Justice Field in the case of *Dent v. West Virginia*, 129 U.S. 114, 121, 9 S.Ct. 231, 233, 32 L. Ed. 623, said: "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the 'estate,' acquired in them—that is, the right to continue their prosecution—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken." It is fundamental under our system of government that all similarly situated and possessing equal qualifications shall enjoy equal opportunities. Even statutes regulating the practice of medicine, requiring examinations to establish the possession on the part of the

applicant of his proper qualifications before he may be licensed to practice, have been challenged, and courts have seriously considered whether the exemption from such examinations of those practicing in the state at the time of the enactment of the law rendered such law unconstitutional because of infringement upon this general principle. *State v. Thomas Call*, 121 N.C. 643, 28 S.E. 517; see, also, *The State ex rel. Winkler v. Benzenberg*, 101 Wis. 172, 76 N.W. 345; *State v. Whitcom*, 122 Wis. 110, 99 N.W. 468.

This law singles out Mr. Cannon and assumes to confer upon him the right to practice law and to constitute him an officer of this court as a mere matter of legislative grace or favor. It is not material that he had once established his right to practice law and that at one time he possessed the requisite learning and other qualifications to entitle him to that right. That fact can in no manner affect the power of the Legislature to select from the great body of the public an individual upon whom it would confer its favors. . . .

The act is void for still another reason. Mr. Cannon was suspended from practice by this court in exact conformity to power conferred upon it by the statutes of this state. That act of suspension was a judicial act. Speaking of the power of the Legislature to revise the acts and judgments of the court, it is said in the *Federalist* (G. P. Putnam's Sons Ed.) at page 504: "It is not true, in the second place, that the Parliament of Great Britain, or the legislatures of the particular states, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory, neither of the British, nor the State constitutions, authorizes the reversal of a judicial sentence by a legislative act. . . . A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases."

In 6 R.C.L. § 163, it is said: "Since the legislature does not possess and may not assume the exercise of judicial powers, it cannot interfere in any way with pending judicial controversies. Therefore the legislature cannot annul or set aside the final judgment of a court of competent jurisdiction, or take particular cases out of a settled course of judicial proceedings."

In *City of Janesville v. Carpenter*, 77 Wis. 288, 46 N.W. 128, 131, 8 L.R.A. 808, 20 Am.St.Rep. 123, the court considered a statute which made it "presumptively injurious and dangerous to persons and property to drive piles, build piers, cribs, or other structures, . . . in Rock river, within the limits of the county of Rock, and the doing of any such act shall be enjoined at the suit of any resident tax-payer without proof that any injury or danger has been or will be caused by reason of such act." Of this law, the court said, at page 301 of 77 Wis., 46 N.W. 128, 132: "The legislature usurped the judicial power of the courts by the enactment of this statute. It adjudicates an act unlawful and presumptively injurious and dangerous, which is not and cannot be made to be so without a violation of the constitutional

rights of the defendant, and imperatively commands the court to enjoin it without proof that any injury or danger has been or will be caused by it. It reverses very many decisions of this court, on the very questions involved in it, and which have the effect of a judicial determination of the defendant's rights of property. It violates section 2 of article 7 of the state constitution, which provides that the judicial power of the state, both as to matters of law and equity, shall be vested in the various courts. It takes away the jurisdiction of the courts to inquire into the facts and determine the necessity and propriety of granting or refusing an injunction in such a case, according to the established rules of a court of equity. Ervine's Appeal, 16 Pa. 256 [55 Am.Dec. 499]. It is said in that case: "That is not legislation which adjudicates in a particular case, prescribes the rule, contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than to any other attribute of government."

The effect of the act under consideration was to nullify and set aside a judgment of this court. That this was beyond the power of the Legislature is too plain to justify further citation or elucidation. For these various reasons it must be held that the act which purported to reinstate Mr. Cannon as an attorney at law was utterly unconstitutional and void and entirely impotent to accomplish that purpose.

This brings us to a consideration of Mr. Cannon's application for reinstatement upon its merits irrespective of the legislative act. Mr. Cannon was suspended from practice until June 30, 1931, "and for such period thereafter as shall expire before his license to practice law is restored and he is reinstated as a member of the bar by this court, upon the presentation of proof that the expenses of this proceeding have been paid, and upon the further condition that he shall, before being reinstated, satisfy the court both by his conduct from this time forward and by assurances then given the court that he will not, if reinstated, be guilty of such conduct as that involved in the charges made in the complaint in this action."

Although the only evidence of such regeneration is to be found in his verbal assurances that he will henceforth demean himself in accordance with the ethics of the profession, we have concluded, somewhat doubtfully, we must confess, to give him another chance. We have concluded that he may be reinstated and placed in a position where he will have an opportunity to give substantial evidence of his professions, and thus justify the confidence reposed in him by his attorneys, the Legislature, and the Governor. Our action in this respect is accompanied by the hope that he will improve his opportunity to become an honorable and respected member of the bar.

But before he can be reinstated, he must pay the judgment for costs which was assessed against him in the original case. While the act of the Legislature purported to remit those costs, this attempt was also plainly beyond the jurisdiction of the Legislature as an unwarranted interference with the judgment of this court. . . .

We do not think Mr. Cannon should escape the payment of these costs. His conduct has not been such as to merit immunity from any portion of the judgment originally imposed.

Upon the payment of the judgment for costs rendered against Mr. Cannon in the original proceeding resulting in his suspension from practice, an order will be entered reinstating him as a member of the bar of this court.

NOTE

On the problem of curative legislation see *People ex rel. Mutual Life Insurance Co. of New York v. Board of Supervisors*, 16 N.Y. 424 (1857); *Virginia Coupon Cases*, 25 F. 647 (C.C.Va.1885); *City of New York v. Village of Lawrence*, 250 N.Y. 429, 165 N.E. 836 (1929), and a Note "The Effect of Curative Legislation" 22 *Colum.L.Rev.* 458 (1922).

SECTION 3. CREATIVE LEGISLATION

MORRISON v. SESSION'S ESTATE

Supreme Court of Michigan, 1888.

70 Mich. 297, 38 N.W. 249, 14 Am.St.Rep. 500.

"Adoption" has been defined to be the act by which relations of paternity and affiliation are recognized as legally existing between persons not so related by nature. A proceeding which so materially affects the succession of property and the rights of natural heirs is a very important one. It is not recognized by the common law of England, and exists in the United States only by special statute. . . . But among many of the continental nations it has been practiced from the remotest antiquity. It appears to have been a necessary concomitant of the type of archaic society when the family constituted the unit of the community, and was an important factor in developing society into the broader community called the state. Mr. Maine, in his work on Ancient Law, says:

"We must look on the family as constantly enlarged by the absorption of strangers within its circle, and we must try to regard the fiction of adoption as so closely simulating the reality of kinship that neither law nor opinion makes the slightest difference between the real and adoptive connection."

It flourished and was regulated by laws in both of the classical nations of antiquity.

In Greece, in the interests of the next of kin whose rights were affected by the case of adoption, it was provided that the registration should be attended with certain formalities, and that it should take place at a fixed time, the festival of Thargelia.

In Rome the system was in vogue long before the time of Justinian, and the ceremonies to accomplish the result were cumbered with much formality, but he reduced the system to a code, which simplified the proceedings, and from which modern legislation upon the sub-

ject has derived its principles, and adapted them to our civilization and wants.

It either required an imperial rescript or a proceeding before a magistrate to accomplish the purpose. Where resort was not had to an imperial rescript, if the person to be adopted was *alieni juris*, the parties appeared before a magistrate, and executed a deed in his presence,—

“Declaring the fact of adoption; the parties to the adoption—that is, the person giving, the person given, and the person receiving—being personally present to give their consent. But it was sufficient if the consent of the party adopted were expressed by his not declaring his dissent,—*non contradicente*.” Sanders, *Just.Inst.* 103 et seq.

The effect of adoption was to cast the succession on the adopted in case the adopting father died intestate. Some other consequences followed on the changed relation, but sufficient has been noticed to show that the real object of such proceedings is to change the succession of property of persons dying intestate, and to create relations of paternity and affiliation not before recognized as legally existing, and that the change of name is more an incident than the object of such proceedings. Our statute has the same object, and no one can fail to see the similarity of the proceedings required by it and the regulations of Justinian above quoted. . . .

J. GILBERT HARDGROVE, FUTILITY OF RESORT TO ROMAN LAW FOR INTERPETATION OF STATUTES ON ADOPTION

9 Marquette L.Rev. 239. (1925).

In a case recently presented to the Supreme Court of Wisconsin, it was held that a child adopted under the statutes of Wisconsin would not take by descent from a brother of the adoptive parent. In *re Bradley's Estate*, 185 Wis. 393, 201 N.W. 973, 38 A.L.R. 1. An argument was made to the effect that adoption, being unknown to the common law, must be presumed to have been taken from the Roman Law, that under the Roman Law adoption carried with it the right of collateral inheritance and that the same result should follow when we provide for adoption. The court, in its opinion, very properly, it is thought, did not discuss this argument, treating the case as turning upon a correct interpretation of the statute involved. However, as the argument is frequently met with and sometimes followed after what seems very superficial study, the writer believes that a discussion of the subject will be found of more than passing interest. . . .

No common law state which enacts a statute providing for adoption stands in such relation to the Roman Law that the statute can be said to have been adopted from that law, and least of all from the ancient Roman Law. Modern statutes dealing with adoption are framed to take care of a social practice, the origin of which in this country was wholly independent of the practice known to the

Roman state. There is no historical relation either in the laws or in the practice itself. . . .

The older Roman Law, tied up as it was with the archaic conception of the family was entirely disregarded by the continental European countries as being inapplicable to their social conditions, and the modern codes of those countries merely re-enact those parts of the later Roman law which had already been accepted as part of their general law.

NOTES

1. See *Green v. Paul*, 31 So.2d 819 (La.1947).

2. A "creative" statute has been defined as one which introduces an institution hitherto unknown in a body of law. See, for example, the Minnesota Youth Conservation Act and Non-Profit Medical Service Corporations Act, *supra*, pp. 146, 167; and cf. the law reforming statutes considered in Chapter 1, Sections 3 and 4, *supra*. Concerning the effect given to previous judicial interpretation of creative statutes adopted from another jurisdiction, see *infra*, p. 1078 et seq.

SECTION 4. AMENDMENTS, SUPPLEMENTS AND REPEALS

A. Amendments

STATE v. JOHNSON

Supreme Court of Minnesota, 1898. 74 Minn. 381, 77 N.W. 203.

MITCHELL, J. The defendant was indicted, tried and convicted of keeping his saloon open after 11 o'clock at night contrary to the provisions of G.S.1894, section 2012. The offense is alleged to have been committed in June, 1898, in the city of Crookston.

Upon the trial the defendant offered to prove that, although his saloon was not closed until 20 minutes after 11 o'clock, standard time, it was closed some 6 minutes before 11 o'clock, according to local sun time, which at Crookston is 26 minutes and 40 seconds slower than standard time. The court excluded this evidence, holding that the case was governed by the standard time which had been established by universal usage in this state. The same point arose during the trial in various ways, as, for example, upon instructions to the jury given or refused. This presents the only important question in the case.

This statute was enacted in its original form in 1878 (Laws 1878, c. 75), and re-enacted in its present and amended form in 1889 (Laws 1889, c. 87). In both its original and amended form, the hour for closing places where intoxicating liquors are sold is the same, viz., 11 o'clock at night.

When the original act was passed in 1878, the present standard time had not been adopted or come into use. The standard time then in use was "Northfield time," just as "Chicago time" and "New York time," etc., were in use in other parts of the country, and "Greenwich time" in England. This is what is called mean or standard sun time, as distinguished from local sun time, as shown by a

sundial; which, of course, varies with every change of longitude, and which was never in use in this state, and, since the day of railroads, is practically obsolete in every civilized country.

In 1883 the railroads of the United States and Canada adopted four kinds of standard time, viz., Eastern, Central, Mountain and Pacific, each applicable to a region covering approximately 15 degrees of longitude; in each case the standard being actual sun time at the central degree of longitude of the region to which the particular standard time was applicable. The state of Minnesota fell wholly within Central time, which was actual sun time at the ninetieth meridian of west longitude.

All standard mean times are based on sun time, but, for the sake of uniformity, sun time at some particular point is adopted as the standard.

The only substantial difference between the standard time now in use and that in use in 1878 is that, as the former embraces more degrees of longitude than the latter, it necessarily follows that at places the difference between it and local sun time is greater than it was under the standard time formerly in use.

The standard times adopted by the railroads in 1883 were soon adopted by the people,—in some parts of the country sooner than others,—and have long since become the sole standards of time throughout the United States. Cent.Dict. tit. "Time." In Minnesota, Central time was promptly adopted, and long before 1889 was in universal use, and established as the sole standard of time, in both public and private business. No other is ever used or referred to.

Counsel's contention is that this statute having been originally passed in 1878, before the present standard time was in use, it must be construed as referring to the standard time in use when the act was passed. Even if this is so, the statute would not refer to local sun time at Crookston, for that was never in use.

My own opinion is that, even if the statute of 1878 had never been amended and re-enacted, it should be construed with reference to the standard time established by law or usage at the time the offense is committed. On this, however, we are not all agreed. But we are all agreed that as the act, with amendments, was re-enacted after the present standard time was established by universal usage, it should be construed as referring to the standard time then and still in use.

We are not unmindful of the general canons of construction that, when a statute is amended "so as to read as follows," the provisions of the original statute retained in the amendatory act are to be deemed as having been in force all the time, and that words used in an amendatory statute are presumed to be used in the same sense in which they were used in the original. But to this latter rule there are exceptions, or rather cases which do not fall within it, and this, we think, is one of them.

We never had any statute in this state establishing any standard time. That matter has been left wholly to usage or custom. Neither the original nor the amendatory statute in terms adopts any standard of time. Under these circumstances, we are of opinion that the amendatory act should be construed as meaning the standard time in common use when the act was passed, and which is still in use.

When sustaining the objection to the evidence offered by defendant as to the difference between standard time and local sun time, the trial judge remarked:

"I shall certainly deprive this defendant, and all others, of any such buncombe as this for a defense."

There may be a difference of opinion as to the good taste of this remark. It was certainly provoked by defendant's own counsel in misstating the previous ruling of the court. But we fail to see how the remark could have prejudiced the defendant, when made merely with reference to a legal proposition, with which the jury had nothing to do.

There is nothing in the point that it did not appear whether the time referred to by the witness was 11 o'clock p. m. or 11 o'clock a. m. While no witness expressly stated that the time to which he referred was p. m., yet it is perfectly apparent that throughout the trial every one—witnesses, counsel and court—so understood it. The defense which defendant attempted to interpose as to the difference between standard and local sun time conclusively shows this.

Order affirmed.

NOTES

1. In *Posadas v. National City Bank*, 296 U.S. 497, 56 S.Ct. 349, 80 L.Ed. 351 (1936), the Court on certiorari affirmed a decision of the Philippine Supreme Court refunding the entire amount of taxes which the bank sought to recover after payment under protest. In order to reach its conclusion, the Court had to decide whether subsequent legislation had the effect of repealing and abrogating section 25 of the Federal Reserve Act of 1913. Holding that the subsequent legislation did not have the effect of so repealing and abrogating, Mr. Justice Sutherland said at p. 506: "It follows that such parts of the original § 25 as were copied into the amended section were not thereby repealed and immediately reenacted, but continued, uninterruptedly, to be the law after the amendment precisely as they were before." It was also stated at p. 503: ". . . The intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment."

2. *McAdam v. Federal Mutual Liability Ins. Co.*, 288 Mass. 537, 193 N.E. 362 (1934), involved a suit in equity whereby the plaintiff sought to recover a judgment obtained against an assured of the defendant. On appeal in affirming the decree below for the plaintiff, Pierce, J., quoting from several cases, said at pp. 363-4: "It is a familiar rule of construction, that when statutes are repealed by acts which substantially retain the provisions of the old laws, the latter are held not to have been destroyed or interrupted in their binding force". . . . "In practical operation and effect . . . they are rather to be considered as a continuation and modification of old laws, than as an abrogation of those old, and the re-

enactment of new ones.' . . . 'Those parts of the original statute which are inconsistent with the amended statute, and those only, are repealed by implication' [Citations omitted.]"

3. A good early statement of the rule is to be found in *Ely v. Holton*, 15 N.Y. 595 (1857), *infra*. See also *Great Northern R. Co. v. United States*, 155 F. 945 (C.C.A.Minn 1907); *City of Altamont v. Baltimore & Ohio R. Co.*, 348 Ill. 339, 180 N.E. 809 (1932).

O'PRY v. UNITED STATES

Supreme Court of the United States, 1919.
249 U.S. 323, 39 S.Ct. 305, 63 L.Ed. 626.

Appeal from the Court of Claims.

Claim by Isabel Kouns O'Pry, as sole descendant and heir of John Kouns, surviving partner of George L. Kouns and John Kouns, and another, against the United States. Judgment against the claimants (51 Ct.Cl. 111), and claimants appeal.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Section 162 of the Judicial Code, enacted March 3, 1911 (36 Stat. 1139, c. 231 [Comp.St. § 1153]), provides as follows:

"The Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June 1, 1865, under the provisions of the act of Congress approved March 12, 1863, entitled 'An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' and acts amendatory thereof, where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding."

To avail herself of that section Isabel Kouns O'Pry alleged herself to be the sole surviving descendant and sole heir of John Kouns and brought this suit in the Court of Claims and for grounds thereof set forth the following facts:

June 6, 1865, George L. Kouns and John Kouns were owners of 900 bales of cotton in two lots, of which 350 bales had been raised in Texas and 550 bales raised in Louisiana, and after the cessation of hostilities were brought to New Orleans, June 6, 1865. The cotton was worth the sum of \$123,110.

On that date—June 6, 1865—the act of Congress of July 2, 1864 (13 Stat. 375, c. 225), was in force, section 8 of which made it lawful for the Secretary of the Treasury, with the approval of the President, to authorize agents to purchase for the United States products of states declared in insurrection at designated places at such prices as might be agreed on with the seller, not exceeding three-fourths of the market value at the latest quotation in the city of New York.

(The other provisions of the statute are not necessary to quote.)

The act of July 2, 1864, was an amendment of the act of March 3, 1863, entitled "An act to provide for the collection of abandoned property and the prevention of frauds in insurrectionary districts within the United States." 12 Stat. 820, c. 120.

In pursuance of the authority thus conferred the Secretary of the Treasury designated, among other cities, the city of New Orleans as a place of purchase and by a subsequent regulation directed that the agents appointed should receive all the cotton brought to the places designated as places of purchase and forthwith return to the seller three-fourths of the cotton or sell the same and retain out of the price thereof the difference between three-fourths of the market price and the full price thereof in the city of New York.

The agent appointed at New Orleans was Otis N. Cutler, and, on the arrival of the Kouns cotton, Cutler, as such agent, took possession of it and refused to release the same or to allow the owners to have any custody of it until they paid him one-fourth of its market value, being the sum of \$30,777.50. They paid the same under protest and it was placed in the Treasury of the United States, where it remains. . . .

It is now asserted that . . . a claim has accrued to appellants by virtue of section 162 of the Judicial Code upon which they are entitled to recover. It will be observed by reference to that section that the Court of Claims is given jurisdiction of claims of those whose property was taken subsequent to June 1, 1865, under the provisions of the act of March 3, 1863, "and acts amendatory thereof," where the property was sold and its net proceeds were placed in the Treasury of the United States, and they are directed to be returned upon judgment rendered for the claimant. Appellants invoke the relief of these provisions by the contention that the cotton was taken under the provisions of the act of March 3, 1863, because the act of July 2, 1864, was an amendment to it, and that therefore the provision of section 162 of the Judicial Code is completely satisfied; in other words, that the money exacted was taken under the act of March 3, 1863 "and acts amendatory thereof." It is further contended that the conditions of section 162 being thus satisfied it is no answer to say that the seizure of the cotton was legal, it being the intention of Congress to declare that even in such case "the proceeds should be returned to the owners." And this contention counsel offers as an answer to *Cutler v. Kouns*, *supra*, and that Congress having by section 162 opened the doors of the Court of Claims "to claimants whose property was seized after June 1, 1865, they can no longer be met with the defense that because the seizure was lawful when made, there can be no recovery on account of it. To sustain such a defense would be 'to keep the word of promise to the ear and break it to the hope.'" The government opposes the contentions.

The act of March 3, 1863 (12 Stat. 820), is entitled "An act to provide for the collection of abandoned property and for the preven-

tion of frauds in insurrectionary districts within the United States." Its first section empowers the Secretary of the Treasury to appoint a special agent or special agents to collect and receive all abandoned or captured property in any state or territory in insurrection, with an exception not material. Section 2 provides that the property so received or collected may be put to public use or sold at public auction and the proceeds thereof put into the Treasury of the United States. By section 3 a bond may be required of the agent or agents, who may be required to keep a book or books of accounts showing those from whom the property was received, the cost of transportation and proceeds of sale. It is further provided that the owner of the property may at any time within two years prefer a claim for the proceeds thereof and upon proof of loyalty receive the residue of the proceeds.

It will be observed that the act had a special purpose and was directed to the receipt and collection of property in a particular condition, either abandoned or captured, recognizing however, that there might be a just claim to it, but limiting the assertion of the claim to two years after the suppression of the rebellion.

The act of July 2, 1864 (13 Stat. 375), describes itself to be "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary states, and to provide for the collection of captured and abandoned property, and the prevention of frauds in states declared in insurrection." The act, therefore, is declared to be an "addition" to preceding legislation, not an amendment to it. Is an addition the same as an amendment? We are informed by the dictionaries that in addition the added parts remain independent and by amendment there is change and, it may be improvement. The words and the processes they respectively describe may, however, be regarded as roughly or even accurately interchangeable and in investigating the meaning of legislation we must regard that possibility and resolve a doubt in the words by the purpose of the legislation. In other words, whatever the relation of the statutes, their purpose must be looked to to determine the application to them of section 162. So looked to, we agree with the government that the purpose of the act of July 2, 1864, demonstrates the contrary of the contention of appellants, and that the act was strictly in addition to prior acts and not an amendment of the act of March 3, 1863 in the sense asserted. The latter act applied to a different situation. The cotton collected under it and to which its provisions applied might be the property of those innocent of disloyalty, but victims of the disorder and violence of the times, and the government constituted itself a trustee for them and gave them the opportunity, at any time within two years after the suppression of the rebellion, to establish their right to the proceeds, requiring of them nothing but proof of loyalty and ownership. *United States v. Anderson*, 9 Wall. 56, 65, 19 L.Ed. 615; *United States v. Padelford*, 9 Wall. 531, 19 L. Ed. 788; *United States v. Klein*, 13 Wall. 128, 20 L.Ed. 519.

The cotton in the present case, unlike that to which the act of March 3 applied, was the subject of a business enterprise and taken to a market opened by the United States forces upon the conditions expressed in the act of July 2, 1864—that is, that its owners should turn over to the government one-fourth of the cotton, or its money equivalent, which would immediately become the property of the United States. *Cutler v. Kouns*, *supra*. The conditions in the two situations, therefore, are in broad contrast and it could not have been the intention of section 162 to confound the conditions. The section did no more than remove the bar of limitation of time to sue that was given by the act of March 3, 1863. It did not intend to transfer property that had become that of the United States.

Judgment affirmed.

NOTES

1. In *United States v. Lapp*, 244 F. 377 (C.C.A. Ohio 1917), the court, in affirming the decision below denying a writ of mandamus brought to compel the defendant to reinstate a deputy marshal, considered the effect on the general act of 1912 relating to the classified civil service of the act of 1913 relating to deputy collectors of internal revenue and deputy marshalls as well as the effect of the act of 1912 on the original act of 1883. At page 383 the court said: "A law is amended when it is, in whole or in part, permitted to remain, and something is added to or taken away from it, or it is in some way changed or altered to make it more complete or perfect, or to fit it the better to accomplish the object or purpose for which it was made, or some other object or purpose. [Citation omitted.] The act of 1912 is amendatory of the previous civil service law, adding thereto an additional section to remove a fault and better the then existing law."

2. In *Rubert Hermanos, Inc. v. People of Puerto Rico*, 106 F.2d 754 (C.C.A. Puerto Rico 1939), holding a Puerto Rican statute invalid as an attempt to amend an act of Congress contrary to the limitation prescribed in the Organic Act of Puerto Rico, the court said at p. 759:

"It is unimportant that the title of an Act does not declare an intention to amend a federal statute. Its character as an amendment must be determined by its effect rather than by its declaration of intention.

"Whether an act is amendatory of a prior act is to be determined by a comparison of their provisions, and its character is not determined by the fact that it does or does not profess to be an amendment. The form which the latter act may take is not material, and although it purports to be complete in itself, if it intermingles different provisions with the old ones or adds new provisions creating a new law from the prior act, then the new one is amendatory." 59 *Corpus Juris*, p. 851; *In re Lovett*, D.C., 2 F.2d 307.

"Similar legislation by the Territory of Alaska was declared invalid as an amendment of an act of Congress in *Auk Bay Salmon Canning Co. v. United States*, 300 F. 907, in which the court said [300 F. 910]:

"We see no escape from the conclusion that to make the changes in those laws which were attempted to be made by the territorial Legislature was to alter, amend, and to some extent repeal the acts of Congress relating to the same subject, and was within the prohibition of the Organic Act. To extend the period of the closed season, to enlarge the area affected by it, and to increase the penalties for violation of the fishing regulations, was to amend and alter the existing law. This conclusion is not obviated by the declaration therein contained that the statute shall not be construed as in any wise to alter, amend, modify, or repeal any of the fish laws, and that its purpose is only to provide for further and additional regula-

tions for additional protection to the salmon and insure a future supply thereof, and it is not ground for holding otherwise that the alterations and amendments did in fact result only in greater protection to the fish and were in the interests of and operated to the welfare of the inhabitants of Alaska.'"

FLETCHER v. PRATHER

Supreme Court of California, 1894. 102 Cal. 413, 36 P. 658.

HAYNES, C. Under proceedings had by the board of supervisors of the city and county of San Francisco, a contract was let to the defendant Prather for the construction of a sewer constituting an outlet of a system of sewers in that part of the city known as the Richmond district. The proposed sewer, or a considerable portion of it, is not to be constructed in a public street, but in private lands, the right of way for which has been granted by the owners. Fletcher, the appellant here, is the owner of lands within the assessment district, upon which the cost of constructing the sewer would be assessed, and brought this action to enjoin its construction.

The several defendants demurred to the complaint, the demurrers were sustained, and the plaintiff declining to amend his complaint, judgment was entered dismissing the action, and from that judgment he appeals.

The principal contention of appellant is that the statute under which the work was ordered is invalid.

Section 24 of an act approved March 18, 1885 (commonly known as the Vrooman act), authorized the construction of sewers "upon or in any street, lane, alley, court, or place in such city," but did not enumerate among the places in which sewers might be constructed private property over which the right of way for a sewer had been secured.

In 1889 the legislature passed an act entitled, "An act to amend sections two, . . . twenty-four, . . . of an act entitled, 'An act to provide for work upon streets, . . . and for the construction of sewers within municipalities,' approved March 18, 1885." (Stats.1889, p. 157.)

The only change made by the amendment of 1889 in section 24 of the original act was made by inserting, in addition to sewers, culverts, etc., authorized to be constructed, the words, "or cesspools."

In 1893 another act was passed entitled, "An act to amend sections two, twenty-four, and thirty-seven of an act entitled, 'An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities,' approved March 18, 1885." (Stats.1893, p. 172.)

In said section 24, as amended in 1893, the following clause was inserted: "And also for drainage purposes, over or through any right of way obtained or granted for such purposes, with necessary and proper outlet or outlets to the same."

Appellant's contention is that by the amendment of 1889, section 24 of the act of 1885 was repealed and ceased to exist as such; and the act of 1893, which by its terms amended section 24 of the original act, was an attempt to amend a section which had ceased to exist; that to accomplish the purpose intended the act of 1893 should have amended "section 24 of the act of 1885 as amended by the act of 1889."

It is perfectly clear that that which does not exist cannot be amended. If an entire act, or an entire section, is wiped out of existence by a repeal, there is nothing to amend; it is as though the act, or the section, had never been enacted. But it does not logically or necessarily follow that an amendment of a section of an entire act upon a particular subject has that effect. Whether by force of any provision of the constitution, or by settled rules of statutory construction, it has such effect is the question to be considered.

The constitution provides as follows: "No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended." (Art. IV, sec. 24.)

In the absence of a constitutional provision of this character, a section of an act might be, and often was, amended in one or more of four ways: 1. By striking out certain words; 2. By striking out certain words and inserting others; 3. By inserting certain words; and 4. By adding other provisions. This mode of amendment did not repeal or disturb the existence of the parts of the original section not stricken out; but the objection to this mode of amendment was that it tended to confusion and uncertainty, owing to the difficulty of correctly reading the original section with the amendments—a difficulty which largely increased with each subsequent amendment. This uncertainty not only affected those who were called upon to interpret statutes thus amended, but it begat uncertain and confused legislation, since every legislator, before he could intelligently vote upon proposed amendments, must first know with certainty how the section with all previous amendments read, and what it meant. So far as the original provisions of the section remained unchanged, they were in force from the date of the original enactment, and, so far as they were changed, the new or changed provisions took effect from the date of the amendment; so far as this is concerned, no reason for any change in the operation of an amended statute is suggested in the provision of the constitution above quoted, nor is any reason for a change apparent. We therefore conclude that its whole purpose and effect is to avoid the evils resulting from the mode of amendment which might and did prevail in the absence of such provision, and that it was not intended that the section as amended should not take its place by its appropriate number in the original act.

The provision in our first constitution in relation to amendment of statutes was the same as that contained in our present constitution; and in *Billings v. Harvey*, 6 Cal. 383, in commenting on this provision it was said: "The re-enactment creates anew the rule of

action, and even if there was not the slightest difference in the phraseology of the two, the latter alone can be referred to as the law, and the former stands to all intents as if absolutely and expressly repealed."

Section 325 of the Political Code, afterwards enacted, as it is said, to meet the foregoing decision, is as follows: "Where a section or part of a statute is amended, it is not to be considered as having been repealed, and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment."

In *Dillon v. Saloude*, 68 Cal. 267, 270, 9 P. 162, in speaking of section 3495 of the Political Code, which was amended in 1880 to conform to a provision of the constitution of 1879, after quoting the amendment, it was said: "The words quoted were added to the section, and 'are to be considered as having been enacted at the time of the amendment,' while 'the portions which are not altered are considered as having been the law from the time when they were enacted' " (citing the foregoing section of the Political Code); and, as if to emphasize the meaning of said section 325, section 330 of the same code provides: "An act amending a section of an act repealed is void."

Section 24 of the act in question, as amended in 1889, took the place of the original section 24 in the act of 1885, and though the reference to it in the act of 1893 would have been more specific if it had added "as amended by the act of 1889," the intention of the legislature is evident, and the effect is to amend the amended section.

This precise question arose in *Commonwealth v. Kenneson*, 143 Mass. 418, 9 N.E. 761, where an act passed in 1886 purported to amend certain sections of the public statutes which had been amended in 1885, without any reference to the amendatory act of 1885. The argument there, as here, was that an amendment of a repealed statute is a nullity. It was held that the intention of the legislature was plain, and the amendment of 1886 was sustained.

State v. Brewster, 39 Ohio St. 653, involved the same question. The syllabus upon this point correctly states the decision, as follows: "Where a section of the revised statutes is repealed, and re-enacted in a changed form, a subsequent statute which, in terms, again repeals and re-enacts the original section in still another form, is, as a general rule, to be regarded as a repeal of the section in its amended form, and the section in its last form will take its place in the revision as part of the revised statutes."

In *Oshe v. State*, 37 Ohio St. 494, 501, section 6941 was amended March 9, 1880. After the amendment Oshe was indicted for selling liquor "in violation of law, to wit, in violation of section 6941 of the revised statutes of Ohio," no reference being made to the amendment. The court said: "At the time of the passage of the amended

section it took the place of the original section of the revision, and was thereafter the only section 6941 of the revised statutes in force. The reference in the indictment, therefore, to that section of the revised statutes must be understood as referring to the section then in force." See, also, *Brigel v. Starbuck*, 34 Ohio St. 280, and cases there cited.

In *State v. Warford*, 84 Ala. 15, 3 So. 911, it was held that "a statute enacted in 1856, having been amended in 1868, and thereby repealed under the constitutional provisions then in force, a subsequent statute of 1885, amending the statute of 1856 by date and title, but not mentioning the former amendatory law, supersedes and repeals such amendatory law." *Blake v. Brackett*, 47 Me. 28, is also directly in point. In *Kamerick v. Castleman*, 21 Mo.App. 587, 590, Phillips, P. J., said: "I understand the rule of construction in this respect to be, that where a section of a statute is amended, and the amendment is in such terms that it takes the place of such section, the statute in which the original section stood, as to future acts, is to be regarded as if the amended section was incorporated therein. So much so is this the rule that if, by an act subsequent to the amendatory act, the section of the original statute be repealed, the amendment which stood in its stead is also repealed"; citing *Greer v. State*, 22 Tex. 588; *McKibben v. Lester*, 9 Ohio St. 627; *Holbrook v. Nichol*, 36 Ill. 161, 162; and *State v. Ranson*, 73 Mo. 78, 88.

That the intention of the legislature was to amend the section as amended by the act of 1889 is apparent, from the fact that the amendment of 1893 follows the language of the amendment of 1889 as to a provision not contained in the act of 1885, and changes it only by inserting a provision covering the construction of sewers over a right of way acquired over private property.

I have cited a larger number of cases, and quoted more freely from them than may be thought necessary, because the authorities are not uniform. Sutherland in his work on Statutory Construction, section 132, takes the opposite view and says: "An amendment of a section after it has been thus displaced (by amendment) is void."

The cases he cites in support of this statement are, with one or two exceptions, from the Indiana reports, and these cases are cited by appellant.

The leading case in that state is *Blakemore v. Dolan*, 50 Ind. 194. The facts in that case were that in 1865 an act was passed requiring the common council or board of trustees of each incorporated town, at their first regular meeting in April of that year, and biennially thereafter, to elect three school trustees. In 1873 that act was amended, requiring the election at the first regular meeting in April of that year, of three school trustees, who should hold their offices for one, two, and three years respectively, and thereafter one should be elected each year. In 1875 the act of 1873 was amended, requiring the common council or board of trustees at their first regular meeting in June of that year to elect three school trustees, who should hold

their office for one, two, and three years respectively, and thereafter one should be elected each year. These amendments were regularly made so far as the reference to the acts amended were concerned; in that respect being wholly different from the case at bar. It was there held that by the amendment "the original section is as effectually repealed and obliterated from the statute as if it had been repealed by express words; and it is upon this principle that it has been held that a section which has been once amended cannot be again the subject of amendment, but the section as amended must be amended."

Goodno v. City of Oshkosh, 31 Wis. 127, cited by appellant, was correctly decided, but it involved another question. There a section of the revised statutes was "amended so as to read as follows," the amendment consisting of an addition constituting an exception to the general provisions of the section. It was held that the provisions of the original section became incorporated in the section as amended; that the repeal of the amended section went to the whole of it, and that under the rule of construction adopted by statute in that state a prior statute was not revived by the repeal of an act repealing such former statute.

Upon this branch of the case, we conclude that the act of 1893, in question here, is a valid and constitutional enactment. . . .

Within the limits fixed by the statute, the superintendent of streets has the power expressly given him to fix the time for the commencement and completion of the work. It is not a matter left to be fixed by the agreement of the contractor and superintendent. The contractor makes his bid in view of the power given to the superintendent and its limitations, and it is only necessary that it should be definitely fixed with the knowledge of the contractor, and the time thus fixed then enters into, and becomes a part of, the contract. The time may be fixed either in the body of the contract, or, as here, indorsed upon it with the knowledge of the contractor, and authenticated by the official signature of the superintendent. There is nothing in *Libbey v. Elsworth*, 97 Cal. 316, or in *Washburn v. Lyons*, 97 Cal. 314, inconsistent with this view. The statute and the indorsement makes it part of the contract without the signature of the contractor to the indorsement.

In view of the conclusions reached it is not necessary to consider whether the city and county of San Francisco was improperly joined as a party defendant.

The judgment should be affirmed.

TEMPLE, C., and BELCHER, C., concurred.

NOTES

1. The question of implied repeal in *Fletcher v. Prather* is discussed *infra*, p. 385 et seq.

2. Despite the rule that a repealed act cannot be amended, the majority of courts attempt to give effect to the legislative intent as expressed in an amendment to a

repealed statute. Thus in *People ex rel. Strough v. Board of Canvassers*, 143 N.Y. 81, 37 N.E. 649 (1894), it was said at p. 650: "It is the duty of the court, when passing upon an act of the legislature, to uphold and give effect to it, where it is possible, and when the legislative intent is plain, and there is no room for doubt here as to what the legislature intended. . . . The enactment of this law is put into the form of an amendment of a law which was standing upon the statute books; and whether that earlier law, by force of subsequent legislation, had become inoperative, is wholly immaterial. The only question is, has the legislature, in the enactment complained of, expressed its purpose intelligibly, and provided fully upon the subject? If it has, then its act is valid, and must be upheld. That is the case here."

3. Some courts, in sustaining legislation which is in effect an amendment of a repealed act, do so on the grounds that the "amendment" is an independent enactment. See in this connection *Abrams v. Smith*, 98 N.J.L. 319, 119 A. 792 (1923); *Anderson v. Board of Com'rs of Douglas Co.*, 67 Colo. 403, 186 P. 284 (1920) ("The general trend of authorities is to the effect that the purpose of the Legislature should be upheld, where it can be done without doing violence to established rules of construction, and that a statute which deals fully with a subject of legislation should, if reasonably possible, be sustained as an independent statute." [p. 285]); *Attorney General v. Stryker*, 141 Mich. 437, 101 N.W. 737 (1905). Compare, however, *Wall v. Garrison*, 11 Colo. 515, 19 P. 409 (1888) where the court refused to sustain an act as independent because the subject was not expressed in the title and therefore the constitutional requirements were said not to be satisfied.

4. See Note: "Amendatory Act Effective After Lapse of Original Statute Held Valid," 17 Ind.L.J. 450 (1942). As to the effect of an invalid amendment, see "Statutes: Invalidity of Amendatory Act as Affecting Act Amended," 7 U. of Newark L.Rev. 92 (1941).

5. The rule applied by the Supreme Court of Minnesota in *State ex rel. Markham v. Elmquist*, 201 Minn. 403, 276 N.W. 735 (1937), that where a statute amends a former statute by re-enacting its terms with supplementary provisions the amended statute is merged in the amending statute, and the subsequent decision by a trial court applying the Indiana "replacement theory", are overruled by the Interpretation Act: M.S.A.1945, § 645.31.

ALLISON v. CORKER

Supreme Court of New Jersey, 1902.
67 N.J.L. 596, 52 A. 362, 60 L.R.A. 564.

(In 1893 the New Jersey Legislature passed a statute providing that townships might be divided into road districts with a road commissioner elected in each district by the freeholders of the respective districts. The Supreme Court held this statute unconstitutional in 1894 because the election of the road commissioners was limited to freeholders. By amendment of certain sections the legislature in 1896 changed this and vested the power to elect commissioners in the legal voters of the districts. It was contended that this did not render the legislation constitutional. A second statute passed in 1894 suffered the same sequence of events. Both are here considered.)

COLLINS, J. . . . The real reason of unconstitutionality of the act of 1894 was that the townships of the specified counties had no characteristics to differentiate them from townships of other counties.

The act, therefore, was in violation of article 4, § 7, par. 11, of the constitution, prohibiting private, local, or special laws regulating the internal affairs of towns and counties.

It is contended for the plaintiff in error that, notwithstanding the amendments of 1896, the legislation recited is still unconstitutional. A preliminary question raised is of the validity of the two acts of 1896, *independently considered*. It is argued that, as the original statutes were void, they could not be amended. For the purposes of this case it may be conceded that the unconstitutional provisions referred to were inseparable from the legislative intent, so that in each case the entire statute was unconstitutional. The question raised, therefore, is fairly presented. The argument is that an unconstitutional statute is a nullity. Granting this, it does not follow that it may not be imported into valid legislation by appropriate reference. It is entirely within the legislative power to give effect to documents without their full recital. Statutes validating agreements of lease, merger, or consolidation of railroad corporations are usually cast in that form (e. g., P.L.1871, pp. 946-1093; P.L.1872, p. 567). The matter is one purely of identification. Surely nothing can be more definite than a reference to a document that has been regularly promulgated as a public statute. In *Mortland v. Christian*, 52 N.J.Law, 521, 20 A. 673, it was held by this court that a statute providing for election of chosen freeholders of a county from assembly districts created under previous legislation was valid, whether such districts could be constitutionally created or not. But I am prepared to go farther, and hold that an unconstitutional statute is nevertheless a statute; that is, a legislative act. Such a statute is commonly spoken of as void. I should prefer to call it unenforceable, because in conflict with a paramount law. If properly to be called void, it is only so with reference to claims based upon it. Neither of the three great departments to which the constitution has committed government by the people can encroach upon the domain of another. The function of the judicial department with respect to legislation deemed unconstitutional is not exercised in rem, but always in personam. The supreme court cannot set aside a statute as it can a municipal ordinance. It simply ignores statutes deemed unconstitutional. For many purposes an unconstitutional statute may influence judicial judgment, where, for example, under color of it private or public action has been taken. An unconstitutional statute is not merely blank paper. The solemn act of the legislature is a fact to be reckoned with. Nowhere has power been vested to expunge it or remove it from its proper place among statutes. . . .

Reversed.

NOTES

1. The courts are about equally divided on whether a completely unconstitutional statute is capable of amendment. For the reasoning supporting a conclusion that it is not, since it is a nullity, see especially *City of Plattsmouth v. Murphy*, 74 Neb. 749, 105 N.W. 293 (1905). All agree that where an act is only partly unconstitutional

it may be amended by deleting or changing the invalid provisions. See Note, 60 L.R.A. 504.

2. Concerning constitutional requirements of titles of amending statutes, see Chapter 5, Section 2, *infra*, pp. 683-689.

B. Supplements

MCCLEARY v. BABCOCK

Supreme Court of Indiana, 1907. 169 Ind. 228, 82 N.E. 453.

HADLEY, C. J. The principal question in this appeal involves the construction of the statutes of the state concerning the voting of aid to interurban railroads incorporated under the street railway act. In July, 1904, a petition signed by more than 25 resident taxpayers and voters of Wayne township, Kosciusko county, was filed with the board of county commissioners, praying said board to order an election for the purpose of voting upon the question of donating to the appellee, the Winona Interurban Railway Company, a corporation organized under the statutes for the incorporation of street railway companies, \$25,000, as aid to the appellee in the construction of its railroad through the township. The prayer was granted, and the election held, which resulted favorably to the donation. The board of commissioners ordered the levy to be made, and the same was placed upon the tax duplicates of Wayne township for collection, and said duplicates placed in the hands of appellee Babcock, as treasurer of the county, for collection against appellants, who were taxpayers of said township. Whereupon this action was commenced by appellant for himself and 85 others to enjoin the collection of the tax. The complaint is in one paragraph. To the complaint each of the defendants filed a demurrer in these words: "The defendants and each of them separately demur to the plaintiff's complaint herein for each of the following reasons. . . ." The court sustained the demurrer of each of the defendants, and the plaintiff declining to plead further, judgment was rendered against him.

The complaint is based upon the theory that there is no valid law of this state authorizing the levying of a tax in aid of interurban railroads, and that the tax complained of is therefore illegal and void. . . . Then, is the act of 1903 constitutional? It is claimed that the act is in derogation of the Constitution of Indiana in two particulars: First, because it has no enacting clause, as required by section 1, art. 4; and, second, if intended as an amendment to the act of 1869, it is void for failure to set forth in full the section as amended in accordance with section 21, art. 4. It is sufficient to say, once for all, that the said act of 1903 has an enacting clause in the precise language of the Constitution, and hence the act is not obnoxious to section 1, art. 4. The first legislation authorizing the voting of aid to railroads was approved May 12, 1869, and entitled "An act to authorize aid to the construction of railroads by counties and townships taking stock in, and making donations to railroad companies." Laws 1869, p.

92, c. 44. The act of 1903, in controversy, has a title covering more than two printed pages, and begins thus: "An act supplemental to an act entitled 'An act to authorize aid to the construction of railroads by counties and townships taking stock in, and making donations to railroad companies, approved May 12, 1869; also supplemental to an act entitled,' " etc.; and in like manner proceeding to recite that said proposed act was supplemental to all the acts, either original, supplemental, or amendatory, affecting the original act of 1869, setting each act forth specifically by title and date of approval, all of which occupy so much space that we do not feel justified in quoting. The enacting section, in substance, is as follows: "Be it enacted by the General Assembly of the state of Indiana that wherever the word 'railroad' occurs in either section of the act of May 12, 1869, or in any section of any subsequent act, amendatory, or supplemental to said act of 1869, here setting forth such acts by title and date of approval, the same shall be extended to and held to include every kind of street railroad, suburban street railroad, or interurban street railroad . . . by whatever power its vehicles are to be or are transported." It will be observed that the new act makes no change in any existing statute relating to the subject of giving aid to railroads. Its passage did not affect the force and vigor of any previous legislative provision relating to the subject. If the act of 1869, and all subsequent, supplemental, and amendatory legislation, applied solely to what are commonly called "steam roads," as contended by appellant, that could make no difference to them, for every such company may yet proceed in every particular the same as if the act of 1903 had not been passed. It is plain that the act of 1903 is not, in effect, an amendatory act. To amend a statute is to alter it, to annul or remove that which is faulty and substitute that which will improve it. An amendment means to "change or modify in any way for the better." Webster's Int. Dict.; *Diamond v. Williamsburg Ins. Co.*, 4 Daly (N.Y.) 494, 500. The word "amend" is synonymous with "correct, reform, rectify." It means a correction of errors, an improvement, a reformation. It necessarily implies something upon which the correction, alteration, and improvement can operate. Something to be reformed, corrected, or improved. In *re Pa. Tel. Co.*, 2 Chest. Co. Rep. (Pa.) 129, 131. A supplemental act has quite a different meaning. "It signifies something additional, something added to supply what is wanting." Webster's Int. Dict. It is that which supplies a deficiency, adds to, or completes, or extends that which is already in existence, without changing or modifying the original. *State v. Wyandot Co.*, 16 Ohio Cir.Ct.R. 218, 221, 9 O.C.D. 90; *Rahway Savings Inst. v. City of Rahway*, 53 N.J. Law, 48, 20 A. 756. Since the adoption of the Constitution of 1852, it has been the custom of the General Assembly to pass remedial laws of the character of the one under consideration. . . . There is no express provision of the Constitution for supplemental legislation, so called, but it has been so long indulged by the General Assembly, and so long acquiesced in, and unquestioned by the people, that the important rights that have accrued and become settled by such legislation during the past half century should not now be disturbed, nor

the legislative power to pass such laws be considered an open question. It should be further said, however, that courts in considering questions relating to the constitutional power of the General Assembly in matters of legislation give great weight to the Assembly's own interpretation of such power, as the same is manifested by its continued and repeated exercise for a long period. *State v. Gerhardt*, 145 Ind. 439, 457, 44 N.E. 469, 33 L.R.A. 313, and authorities collated; *City of Terre Haute v. Railroad Co.*, 149 Ind. 174, 183-186, 46 N.E. 77, 37 L.R.A. 189. It is well established, however, that supplemental matter must be germane to the subject, as expressed in the title of the original act; that is, the new supplemental matter must be of a character which, if contained in the original act, would be clearly embraced within its title. Invoking the rule, appellant contends that the act of March 9, 1903, is not germane to the subject-matter and title of the act of 1869, and subsequent, amendatory, and supplemental acts, as enumerated in the title of the act of 1903, his insistence being that the two statutes relate to corporations organized for different and distinct purposes. We must examine the question under the guidance of the well-established rule of construction, that to sustain legislative action courts will liberally construe the title to the act, and accord to the words employed their fullest and broadest meaning to uphold the law; and, if the language is susceptible of two constructions, one inimical, and the other in support of the act, the latter will be adopted. This rule is clearly stated in *Hargis v. Board*, 165 Ind. 194, 195, 73 N.E. 915; *Board v. Albright* (this term) 81 N.E. 578. Technically a railroad is a way or road upon which iron rails are laid for wheels to run on, for the conveyance of heavy loads and vehicles. *Dinsmore v. Racine M. R., Co.*, 12 Wis. 649. The term "railroad" as employed in our general legislation relates to institutions of a quasi public character, to highways or roads constructed by the authority of the state, with fixed metallic rails upon which public carriers may propel their carriages, or cars, speedily in the transportation of passengers and freights. Any way or road having these characteristics is a railroad. It is the mode of construction and chartered use, and not the motive power, that determines the character of a railroad. It is declared in the original act providing for the incorporation of railroads that they shall have power to convey on their railroads, persons, and property, by steam, animal, or any mechanical power, or any combination of them. 1 Rev.St. 1852, p. 409, c. 83; section 5153, cl. 8, Burns' Ann.St.1901. The term "railroad" is generic, and embraces all species of road constructed and chartered with the above-mentioned attributes. *Rapalje & Lawrence Law Dict.* p. 1061; 1 *Wood's Railway Law*, p. 1; *Fulton v. Short Route, etc., Co.*, 85 Ky. 640, 4 S.W. 332, 7 Am.St.Rep. 619; *Bloxham v. Consumer's etc., R. R. Co.*, 36 Fla. 519, 18 South. 444, 29 L.R.A. 507, 51 Am.St.Rep. 44. One may be operated with heavy and infrequent trains, another with single and frequent cars. The real difference is only a matter of degree. At the time of the passage of the act of 1869 there was in use at least two kinds of species of railroad, viz., the great lines of state and interstate roads, operated by steam power, and the city street or horse railroad, similarly constructed and operated,

both common carriers, and both dispensing in large measures like conveniences and benefits to the general public. That the Legislature has regarded all kinds of railroads as belonging to the same genus is manifest from the recent numerous statutes wherein under the term "railroad" expressed in the title legislation has been accomplished affecting steam, electric, interurban, suburban, and street railroads.

. . . The principle involved in the case at bar is well illustrated in the case of *Barton v. McWhinney*, 85 Ind. 481. An act was passed in 1875, section 2 of which reads as follows: "Hereafter the general laws of the state and amendments thereto, approved Dec. 2, 1872, for the uniform assessment of taxes, shall apply to all cities and towns not having special charters, so far as the same shall be applicable." In the case referred to the statute was assailed as in violation of section 21, art. 4, of the Constitution, for failure to set out the amended section. The court in upholding the statute said (page 488): "We do not consider the act of 1895 obnoxious to the Constitution. If section 2 had been embodied in the act of 1872, its validity could not have been assailed; and it is no less valid where it is found. It is not a revision of any act, nor an amendment of any act or section of an act. If, by implication, it repeals or modifies the provisions of any other law, it is not therefore unconstitutional." We have seen that new matter, which, if it had been embodied in the original act, it would have been embraced within the subject expressed in the title, may be subsequently incorporated into such original act by a supplemental or amendatory act; and this may be done without title, beyond a statement clearly identifying the original act to which the new proposition is to become supplemental, since the validity of the new matter must be determined by the title of the original act. *Brandon v. State*, 16 Ind. 197; *Shoemaker v. Smith*, 37 Ind. 122; *Bell v. Maish*, 137 Ind. 226, 36 N.E. 358, 1118. The act in controversy is constitutional under another canon of construction, namely, that when a statute provides a rule of construction for prior statutes, and which is not in terms amendatory, it does not fall within the requirements of section 21, art. 4, Const., if covered by the title of the original act. As was said by this court in *Dequindre v. Williams*, 31 Ind. 444, 450: "It is not ordinarily the function of the Legislature to interpret statutes, nor is such interpretation binding upon the courts as to past transactions. But as to matters occurring hereafter such legislation guides all departments of the government. *Sedgw. on Constitution*. If a legislative construction be plainly contradictory to the terms of the act construed, it must nevertheless be taken as a new enactment, changing the old law." To the same effect, see *State ex rel. Michenor v. Harrison*, 116 Ind. 300, 307, 19 N.E. 146; *Chicago, etc., R. R. Co. v. State*, 153 Ind. 134, 51 N.E. 924. In the *Michenor Case*, it is further stated, at page 307 of 116 Ind., page 149 of 19 N.E.: "And it has been held that a statute declaratory of a former one has the same effect upon the construction of such former act, in the absence of intervening rights, as if the declaratory act had been embodied in the original act at the time of its passage"—citing *Endlich, Inter.St. § 365*; *Smith v. State*, 28 Ind. 321;

Jones v. Surprise, 4 New Eng.Rep. 292, 294. Acts 1853, p. 107, c. 87, Acts 1865, p. 120, c. 26, Acts 1889, p. 38, c. 28, Acts 1901, p. 121, c. 81, are all statutes of this class, the validity of which has never been called in question. The act of 1889, under the title of "An act declaratory of the meaning of the word 'mining,' as used in chapter 35 of the Revised Statutes of Indiana, now in force," declares "that it was the intent and meaning of the word 'mining,' as used in said chapter, to include the drilling, boring, and operating wells for petroleum and natural gas." In Acts 1901, p. 121, c. 81, under the title of "An act supplemental to an act entitled 'An act concerning taxation,' etc., it is enacted "that the word 'railroad' wherever it occurs in the act concerning taxation, approved March 6, 1891, shall be considered as including every kind of street railroad, suburban railroad, or interurban railroad."

Appellee insists that if the act of March 9, 1903, had not been passed, interurban and suburban railroad companies would have had the right to accept aid from counties and townships under the act of May 12, 1869, even though such railroads were in 1869 wholly unknown. Under the view we have taken of the act of March 9, 1903, the question here propounded becomes immaterial, and we do not decide it, though we concede that there is at least ground for the contention arising under the rule that general statutes give way, or open up, to special statutes upon the same subject. The principle is well illustrated by *Maxwell on Inter. of St.* (2d Ed.) p. 93, as quoted in *Daniels v. State*, 150 Ind. 354, 50 N.E. 74: "The language of a statute is generally extended to new things which were not known and could not have been contemplated by the Legislature when it was passed. This occurs when the act deals with a genus, and the thing which afterwards comes into existence is a species of it."

Our conclusion is that the act of March 9, 1903, is constitutional and valid, and that the judgment of the court below should be affirmed.

Judgment affirmed.

NOTES

1. In *Lockhart et al. v. City of Troy*, 48 Ala. 579 (1872), the action was for an injunction to restrain the City of Troy from collecting a tax levied on the property of certain of its citizens. In affirming the decree of the court below dissolving the injunction, the court examined the question whether the acts out of which the proceedings complained of arose were unconstitutional. The court held that the acts were not unconstitutional, *Peters, J.*, stating at p. 584: "Supplemental acts and healing acts do not necessarily fall into the category of a revised or amended act. A supplemental act merely adds something that was left out of the original act. It does not necessarily revise it or amend it in the more technical sense. An amendment is what may be incorporated into the original on its passage. A supplemental act is an independent law; and a healing act is one that cures some defect in a proceeding which the legislature could have authorized in the first instance."

2. In *People ex rel. Gramlich v. City of Peoria*, 374 Ill. 313, 29 N.E.2d 539 (1940), in upholding an act on the ground that it was not amendatory but supplementary, despite a reference within itself to "this amendatory Act", the court said:

" . . . Part of section 13 of article 4 of the Constitution, *Smith-Hurd Stats.*, provides: 'No law shall be revived or amended by reference to its title only, but

the law revived, or the section amended, shall be inserted at length in the new act.'

" . . . Whether the amendatory act amends prior acts is to be determined not alone by the title, or whether the act purports to be an amendment of existing laws, but by its effect upon prior laws and an examination and comparison of its provisions with the prior law left in force. . . . This same principle is applicable whether the amendatory act purports to be an independent act or to be an act to amend another act by the adding of a new section. If the amendatory act is complete in itself, constituting an entire act of legislation on the subject with which it purports to deal, it is to be deemed good and is not subject to the constitutional provision notwithstanding it may repeal by implication or modify the provisions of the prior law. If the amendatory act merely amends the old law by intermingling new and different provisions or by adding new provisions so as to create out of the old act and the new, when taken together, a complete act and leaves it in such condition that the old act must be read with the new to determine its provisions and meaning, then the act is amendatory of the old law, and the constitutional provision requires that the law so amended be inserted at length in the new act. . . .

"The purpose of the provision quoted from section 13 of article 4 of the Constitution was to avoid the necessity of having to make reference to a prior law to determine and give meaning to an amendatory act."

C. Repeals

TIERNEY v. DODGE

Supreme Court of Minnesota, 1864. 9 Minn. 166, Gil. 153.

MCMILLAN, J. This is an appeal from an order of the district court, denying a peremptory mandamus to the city justice of St. Paul, requiring him to allow an appeal to the district court from a judgment, on conviction for an assault. The penalty imposed by the justice was less than twenty-five dollars.

The Compiled Statutes, defining the criminal jurisdiction of justices of the peace, and regulating its exercises, provides that, "The person charged with and convicted by any such justice of the peace, of any such offense, may appeal from the judgment of such justice of the peace to the district court. Provided, such person shall, within twenty-four hours, enter into a recognizance," etc. Comp. Stat. 526, Sec. 199. The chapter providing for appeals, etc., in criminal cases, contains this further provision: "Every person convicted before a justice of the peace, of any offense, may appeal from the sentence to the district court then next to be held for the same county." Comp. Stat. 777, Sec. 1. These were the provisions of law on this subject in force at the time of the passage of the act incorporating St. Paul, and the several amendments thereto. The act reducing the law incorporating the City of St. Paul and the several acts amendatory thereof, into one act and amending the same, was approved March 20, 1858. Sec. 11, ch. 3, of this act defines the jurisdiction of the justice of the peace for the city, conferring both civil and criminal jurisdiction, and, among other offenses, of assaults; and provides, substantially, that the same proceedings shall be had, where not otherwise directed in said act, as in like cases before justices of the peace under the laws

of the state, with a distinct proviso, as amended in 1860, that, among others, in cases of assault, "no appeal shall be allowed where the judgment or fine imposed, exclusive of costs, is less than twenty-five dollars," and, by the 25th sec. ch. 10 of the act, all acts inconsistent therewith are repealed.

There can be no doubt as to the intention of the legislature in this act; not only is the provision in regard to appeals directly inconsistent with the general law upon the same subject, but the repealing clause expressly includes all acts inconsistent with it. It is evident, therefore, that the general law on the subject of appeals so far as it is inconsistent with the provision in the charter, if this legislation is sustained, is not applicable to cases before the city justice, or, if applicable, is repealed. . . .

[The order of the district court, refusing peremptory mandamus, affirmed.]

NOTES

1. In *Commonwealth v. Sanderson*, 170 Va. 33, 195 S.E. 516 (1938), the question was whether license fees should be charged against a city's chauffeurs. House Bill 339, approved March 26, 1932, relating to licenses generally, provided that no charge be made for chauffeur's licenses issued to the employees of any of the political subdivisions of the State when necessary in connection with operating a motor vehicle owned by the State, its political subdivisions or agencies. House Bill 103, approved March 29, 1932, dealing specifically with chauffeur's licenses, made only four exceptions to the requirement of payment, none of them relating to city chauffeurs. House Bill 103 also contained a so-called "blanket repealer", i.e., a provision repealing all acts or parts thereof inconsistent with that bill. The court held that fees were due from city chauffeurs, pointing out that the Legislature "must have meant something" by the statement repealing all inconsistent acts or parts thereof. Holt, J., speaking for the court, said at p. 517: "The repeal by implication is not favored but, if inevitable, is as effective as is an express statutory mandate", going on to point out that there was a "head-on collision" between the two statutes and in such case "that the last approved by the Governor must prevail. [p. 520]" With regard to the effect of one statute being general, one special, it is said at p. 520: "If a general statute does not repeal an earlier one of special import, then for a stronger reason it would not overrule one thereafter enacted. To apply this principle to the instant case the act of March 29th, which deals only with chauffeurs, cannot be supplanted by an earlier motor vehicle code."

2. *State v. Mangiaracina et al.*, 344 Mo. 99, 125 S.W.2d 58 (1939), involved Sections 4064 and 4065 and Section 7786 of the Revised Statutes of 1929 of Missouri. Section 7786 was a later enactment than the other two sections. The court here adopted a previous ruling in Missouri to the effect that a general statute on a subject and a specific statute on the same subject should be, if possible, harmonized, but where the statutes are inherently repugnant, the special statute prevails and if the special statute is a later enactment, it will be considered as an exception or qualification of the general statute. The opinion continues, at p. 60: "Our General Assembly in the enactment of Sec. 7786 expressly provided that 'all laws or parts of laws contrary to, inconsistent or in conflict with any of the provisions of this act are hereby repealed . . .'. . . . Thus a clear legislative intent to take the larceny or attempted larceny of the automobile here involved out from under the general provisions of Secs. 4064 and 4065 and to treat such larceny as an offense separate and apart from the offense denounced and punishable under the comprehensive terms of Secs. 4064 and 4065 is manifested."

3. With regard to the repeal of legislation enacted by initiative and referendum, see Note: "Power of the Legislature to Amend or Repeal Direct Legislation." 27 Wash.U.L.Q. 439 (1942).

STATE ex rel. LUM v. ARCHIBALD

Supreme Court of Minnesota, 1890. 43 Minn. 328, 45 N.W. 606.

COLLINS, J. This is an appeal from an order directing that a peremptory writ of mandamus issue, addressed to the defendant, an assessor, requiring and compelling him, as such, to proceed with the assessment of real and personal property in certain territory alleged to be a part of Crow Wing county. The controversy arises by reason of the passage of an act entitled "An act relating to the change of county lines of unorganized counties, and annexation of unorganized territory to organized counties," which was approved on February 25, 1887, now known as chapter 119, Gen.Laws of that year; and the passage of another act, approved on February 18th of the same year, entitled "An act to detach certain territory from the unorganized county of Cass and attach the same to Crow Wing county." It is now found as chapter 118, Laws 1887. The appellant contends that the act last mentioned (chapter 118) was repealed upon the passage and approval of the other act, (chapter 119,) and this we regard as the only question needing special consideration. By the several sections of chapter 118, a certain portion of the unorganized county of Cass was detached therefrom, and, subject to the approval of the legal voters of the organized county of Crow Wing, attached to the latter. The proposition was to be submitted to the electors of the organized county at the next general election, and, if approved by a majority of those voting thereon, the governor of the state was required to make proclamation of the fact. There was also another provision of the act in reference to taxes previously levied on property affected by the change, remaining uncollected at the time of its approval by the legal voters.

There are three sections in the law approved February 25th: The first, that no change shall be made in the lines of an unorganized county, and no part thereof shall be annexed to an organized county, "without first submitting the proposition for such change of line or annexation to the electors of the county or counties to be affected thereby," and an adoption of the proposition by a majority of the electors of each county voting thereon; the second, "that all acts or parts of acts inconsistent with this act are hereby repealed;" and the third, (as was also provided in chapter 118,) that the same should take effect from and after its passage. In accordance with the provisions of chapter 118, the question of annexing the territory therein described to Crow Wing county was duly submitted to the legal voters thereof at a general election held in November, 1888, at which time a majority voted in favor of annexation. The electors of Cass county did not vote upon the proposition. The result in Crow Wing was proclaimed by the governor prior to April 2, 1889, and on that day defendant was duly appointed assessor for a portion of Crow Wing

county, including, if chapter 118 was unrepealed, the territory in dispute. Thereafter defendant refused to proceed with the assessment of personal property within this territory, solely on the ground heretofore indicated, that the earlier act (chapter 118) was repealed by implication on the passage of the later, (chapter 119.)

1. Starting out with the proposition, which has become axiomatic, that repeals by implication are not favored, we may safely say, as a reasonable proposition, that a legislature does not intend to effect so important a measure as the repeal of a law, without expressing its intent so to do. Such an interpretation, therefore, should not be adopted unless it be inevitable, and any reasonable construction of the later act which offers an escape from it is more likely to be in consonance with the real intention. It is a rule well founded in reason, as well as in authority, that to give an act not clearly intended as a substitute for another the effect of repealing it, the implication of an intent to repeal must be disclosed by a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict, or liberal construction thereof, which would without destroying its manifest intent and meaning, find for it a reasonable field of operation, preserving at the same time the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject. To justify a court in holding that an act is repealed by one subsequently passed, it must appear that the later provision is certainly and clearly in hostility to the former. If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and it is only in that event, the earlier enactment is repealed. *Wood v. U. S.*, 16 Pet. 342; *State v. Stoll*, 17 Wall. 425; *Chew Heong v. U. S.*, 112 U.S. 536, 5 S.Ct. 255; *People v. Board Suprs. St. Lawrence Co.*, 103 N.Y. 541, 9 N.E. 311; *Rounds v. Waymart Borough*, 81 Pa.St. 395; *Covington v. City of East St. Louis*, 78 Ill. 548; *Iverson v. State*, 52 Ala. 170; *Pratt v. Atlantic & St. Lawrence R. Co.*, 42 Me. 579; *Sedg. St. & Const. Law*, 105; *Smith, St. Law*, 879. Of course, repeal by implication can be effected by inconsistent enactments at the same session of the legislature; but it has been said that statutes enacted at the same session are to be construed to a certain extent as one act, and therefore in such a case there is a much stronger presumption against an intention to repeal which is not expressed than in case of statutes passed at different sessions; and in such cases there should be such an exposition as will give effect to what appears to be the main intent of the lawmaker. *Peyton v. Moseley*, 3 T. B. Bon. 77; *Eckloff v. District of Columbia*, 4 Mackey, 572; *Board of Commrs. of La Grange Co. v. Cutler*, 6 Ind. 354.

In the cases first above referred to, and in the large number of authorities therein cited, may be found instances in which the general rules in respect to repeal by implication have been applied, and it only remains for us to make a like application to the facts in hand. As section 1, art. 11, of the constitution bears upon changes in the lines of organized counties only, the law-makers were not restricted in any

manner when dealing with the county of Cass. But, as chapter 118 affected the boundary lines of the organized county of Crow Wing, the measure had to be formally approved by the electors of that county before the alteration declared by the legislature became a certainty, and this approval was provided for in the act. Without this enactment, the voters of Crow Wing county were helpless. Its passage, whereby the boundary lines of both counties were changed in so far as that could be accomplished by legislation, was quite as essential to the transfer of a portion of the unorganized county to the organized as was the step subsequently to be taken by the legal voters. And when the law-makers considered and determined upon the subject of this change in county lines, fully and finally covering all matters within the scope of legislative authority, we are unable to see why this action was not as complete and of as great force as if neither of these counties had been organized, and the sections providing for a ballot had been omitted. If such had been the case, no one would have contended that there had been a repeal by implication. When enacting chapter 118, the legislative mind was particularly called to Cass county, and that part of its territory which was to be attached to another county, if the electors of the last-mentioned county so willed it by their ballots. The intent in reference to this particular subject was specially manifested and announced, while chapter 119 was general in its application to the unorganized counties of the state. See Dill. Mun. Corp. Sec. 87. Therefore, and without considering the fact that these laws were passed about the same time and at the same session of the legislature, we conclude that both acts may stand, and that the later general law is not in hostility to, and may readily be harmonized with, the earlier, which is special and local.

[Order reversed.]

NOTE

In *State ex rel. City Loan & Sav. Co. v. Moore*, 124 Ohio St. 256, 177 N.E. 910 (1931), an Ohio statute repealed certain legislation and replaced it with a new enactment. During the same session of the legislature another statute was passed expressly repealing the new act and reenacting the abrogated legislation. The Ohio Constitution provided that all statutes, with certain exceptions, shall not be effective until ninety days after filing. The court held that re-enactment, although ineffective as a statute for ninety days, in substance operated as a motion to reconsider. This case is discussed and criticized in 45 *Harv.L.Rev.* 591 (1932).

SPENCER v. THE STATE

Supreme Court of Indiana, 1853, 5 Ind. 41.

[The case appears *infra*, p. 995.]

STATE v. THORNBURY

Supreme Court of Washington, 1937. 190 Wash. 549, 69 P.2d 815.

MILLARD, JUSTICE. Defendant was charged in the superior court for Thurston county with the crime of Sabbath breaking, in that on Sunday, April 11, 1937, at or about the hour of 12:30 o'clock, a. m., he " . . . then and there did willfully and unlawfully sell, offer for sale and expose for sale personal property, to-wit, intoxicating liquors, to-wit, beer and wine."

To that information the defendant interposed a demurrer which was sustained. The State has appealed.

Counsel for respondent contended in the trial court, as they insist in this court, that section 242, chapter 249, p. 963, Laws 1909, Rem.Rev. Stat. § 2494, was repealed by implication by chapter 62, p. 173, Laws of the Extraordinary Session of 1933, Rem.Rev.Stat. § 7306—1 et seq., Known as the "Washington State Liquor Act." The statute (Rem. Rev.Stat. § 2494) defines Sabbath breaking as follows:

"Every person who, on the first day of the week, shall promote any noisy or boisterous sport or amusement, disturbing the peace of the day; or who shall conduct or carry on, or perform or employ any labor about any trade or manufacture, except livery-stables, garages and works of necessity or charity conducted in an orderly manner so as not to interfere with the repose and religious liberty of the community; or who shall open any drinking saloon, or sell, offer or expose for sale, any personal property, shall be guilty of a misdemeanor: Provided, that meals, without intoxicating liquors, may be served on the premises or elsewhere by caterers, and prepared tobacco, milk, fruit, confectionery, newspapers, magazines, medical and surgical appliances may be sold in a quiet and orderly manner. In works of necessity or charity is included whatever is needful during the day for the good order or health or comfort of a community, but keeping open a barber-shop, shaving or cutting hair shall not be deemed a work of necessity or charity, and nothing in this section shall be construed to permit the sale of uncooked meats, groceries, clothing, boots or shoes."

There can be no implied repeal of one act by another unless both acts deal with or relate to, the same subject-matter. Rem.Rev.Stat. § 2494 is a Sunday closing law; it is not a liquor law. It prohibits the sale on Sunday of intoxicating liquor and all other personal property except "that meals, without intoxicating liquors, may be served on the premises or elsewhere by caterers," and other specified articles. The sale on Sunday of Intoxicating liquors is specifically prohibited, as is the sale of uncooked meats, clothing, and other personal property. The Sabbath breaking statute, Rem.Rev.Stat. § 2494, deals with many varied acts (including the sale of intoxicating liquors on Sunday), constituting violations of that statute. The state liquor act has to do with the subject-matter of intoxicating liquor. It does not include the entire subject-matter of the Sabbath breaking statute, therefore it can-

not repeal it by implication. It will be presumed that the Legislature, in enacting the state liquor law, acted with full knowledge of the Sunday closing law. Our state liquor law is silent on the question of Sunday sales by hotels and restaurants. Surely, if the Legislature had intended to repeal the Sunday closing law, it would have done so when it enacted the state liquor statute which deals only with the subject-matter of intoxicating liquors. It does not, as stated above, cover the whole subject-matter of the statute having to do with Sabbath breaking, and, clearly, was not intended to take its place. . . .

Reversed.

NOTES

1. In *Gaston v. Merriam*, 33 Minn. 271 at p. 283, 22 N.W. 614 (1885), Mitchell, J., said: "All laws are presumed to be passed with deliberation, and with full knowledge of existing ones on the same subject; and it is, therefore, a reasonable conclusion that the legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable and irresistible. The court is bound to uphold the prior law, if the two acts may well subsist together."

2. Lindley, J., in *Oudahy Bros. Co. v. La Budde et al.*, 92 F.2d 937 (C.C.A.7th, 1937), said at p. 939: "Familiar is the principle that repeals will not be implied unless there is a positive repugnance between the provisions of the new law and those of the old and that presumption against such intention to repeal is strongest when the two acts are passed not only at the same session but on the same date. [Citation omitted.] Here, indeed, the two subsections are a part of the same section."

3. See commentaries in 12 Wash.L.Rev. 87 (1937); 29 Ky.L.J. 354 (1941) on the state of authorities in Washington and Kentucky.

4. With regard to repeal or amendment implied from a later inconsistent enactment, see Note, 37 Colum.L.Rev. 292 (1937).

5. Repeal by omission is discussed in 15 Tex.L.Rev. 145 (1936).

BENDER v. UNITED STATES

Circuit Court of Appeals of the United States, Third Circuit, 1937.
93 F.2d 814.

Appeal from the District Court of the United States for the District of New Jersey; William Clark, Judge.

Samuel Bender was convicted of knowingly and unlawfully working in a distillery for the production of spirituous liquors upon which no sign bearing the words "Registered Distillery" was placed and kept as required by law, and he appeals.

Reversed and remanded.

BIGGS, CIRCUIT JUDGE. Samuel Bender, the appellant, was tried upon an indictment consisting of four counts. The learned trial judge submitted only the first and third counts to the jury for its consideration. The jury brought in a verdict of guilty upon the third count alone. The third count was as follows: "That on or about the 18th day of April, A.D.1934, at Lafayette in Andover Township and the County

of Sussex, in the State and District of New Jersey and within the jurisdiction of this Court, the said Sam Bender knowingly and unlawfully did work in a distillery for the production of spirituous liquors upon which no sign bearing the words 'Registered Distillery' was placed and kept, as required by law; contrary to the form of the statute in such case made and provided. . . ."

The statute in question was R.S. § 3279, 26 U.S.C.A. § 1182, the pertinent portions of which are as follows:

"Every person engaged in distilling or rectifying spirits . . . shall place and keep conspicuously on the outside of the place of such business a sign, exhibiting in plain and legible letters, . . . the name or firm of the distiller, rectifier . . . with the words: 'Registered distillery', 'rectifier of spirits', . . . as the case may be. Every person who violates the foregoing provision by negligence or refusal, or otherwise, shall pay a penalty of \$500. . . ."

"And every person who works in any distillery, rectifying establishment, or wholesale liquor store, on which no sign is placed and kept, as hereinbefore provided; and every person who knowingly receives at, carries, or conveys any distilled spirits to or from any such distillery, rectifying establishment, warehouse, or store or who knowingly carries and delivers any grain, molasses, or other raw material to any distillery on which such sign is not placed and kept, shall forfeit all horses, carts, drays, wagons, or other vehicle or animal used in carrying or conveying such property aforesaid, and shall be fined not less than \$100 nor more than \$1,000, or be imprisoned not less than one month nor more than six months."

The statute just quoted was derived from an act of Congress passed upon July 20, 1868, 15 Stat. 132, § 18, and was law at least until the passage of the National Prohibition Act, 27 U.S.C.A. § 1 et seq., which the appellant contends repealed the statute just quoted by implication.

The pertinent portion of the National Prohibition Act, which was passed upon October 28, 1919, c. 85, tit. 2, § 17, 41 Stat. 313, 27 U.S.C.A. § 29, is as follows: "Advertising liquor or manufacture, sale, or keeping for sale thereof; exceptions. It shall be unlawful to advertise anywhere, or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the same, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises. But nothing herein shall prohibit manufacturers and wholesale druggists holding permits to sell liquor from furnishing price lists, with description of liquor for sale, to persons permitted to purchase liquor, or from advertising alcohol in business publications or trade journals circulating generally among manufacturers of lawful alcoholic perfumes, toilet preparations, flavoring extracts, medicinal preparations, and like articles: Provided, however, That nothing in this chapter [or Section 341 of Title 18] shall apply to newspapers published in foreign countries when mailed to this country."

We believe that the statute just quoted repealed by implication the statute under which the third count of the indictment in the case sub judice. *United States v. Yuginovich*, 256 U.S. 450, 41 S. Ct. 551, 65 L. Ed. 1043; *Ketchum v. United States*, 8 Cir., 270 F. 416; *Sanford v. United States*, 8 Cir., 274 F. 369; *United States v. Windham*, D.C., 264 F. 376; *Gray v. United States*, 6 Cir., 276 F. 395.

The only question therefore remaining is whether or not R.S. § 3279, 26 U.S.C.A. § 1182, was re-enacted or revived by any subsequent act of Congress or constitutional amendment.

Upon November 23, 1921, Congress passed an act re-enacting the provisions of the revenue laws in respect to manufacture and sale of liquor which had been repealed by the National Prohibition Act. That statute, chapter 134, § 5, 42 Stat. 223, 27 U.S.C.A. § 3, is as follows: "Effect on existing legislation. All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force on October 28, 1919, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of this title."

It is clear, we think, that the last clause of the statute just above quoted could not serve as a re-enactment of R.S. § 3279, 26 U.S.C.A. § 1182, since that statute expressly required the posting of a sign, registered distillery, and the National Prohibition Act expressly prohibits it. *Commercial Credit Co. v. United States*, 6 Cir., 5 F.2d 1, 4.

If it be the fact that the statute which required a distiller to post a sign showing that his place of business was a distillery has been repealed it follows as a matter of logic that a statute making it a crime to work in a distillery upon which no such sign is posted is also repealed.

The National Prohibition Act was itself repealed upon August 27, 1935, 49 Stat. 872, shortly following the repeal of the Eighteenth Amendment. Can it be said that the repeal of the National Prohibition Act and of the Eighteenth Amendment had the effect of reviving section 3279, 26 U.S.C.A. § 1182, at that time, as we have found, repealed by implication? Can a dead act rise again? Rev.St. § 12, 1 U. S.C.A. § 28, provides: "Whenever an Act is repealed, which repealed a former Act, such former Act shall not thereby be revived, unless it shall be expressly so provided."

We are of the opinion that the statute just quoted applies to repeals by implication as well as by express language. *Milne v. Huber*, Fed.Cas.No.9,617. The statute in question, in our opinion, changes the common-law rule that the repeal of a repealing act revived the former act. *Wallace v. Bradshaw*, 54 N.J.L. 175, 23 A. 759.

We are therefore of the conclusion that Rev.St. § 3279, 26 U.S.C.A. § 1182, when repealed by implication was not subsequently revived and that therefore the third count of the indictment against the appellant was founded upon the provisions of a statute which had ceased to exist as law.

Having reached this conclusion we deem it unnecessary to examine further into this case.

The decision of the court below is reversed, and the cause is remanded for further action in accordance with this opinion.

NOTES

1. Concerning effect when act repealing or modifying the common law is repealed, see *infra*, p. 1267.

2. In the following amending acts, changes made from Mason's Minnesota Statutes of 1927, Section 8585, are italicized. Was it necessary to enact either or both of 1934 Ex., chapter 78, and 1935, chapter 295 *infra*, to establish the desired effect of 1933, chapters 262 and 324?

MINNESOTA LAWS 1933

Chapter 262

An act to amend Mason's Minnesota Statutes of 1927, Section 8585, relating to grounds for divorce.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. *Grounds for divorce in certain cases.*—That Mason's Minnesota Statutes of 1927, Section 8585, be amended to read as follows:

"8585. A divorce from the bonds of matrimony may be adjudged by the district court for any of the following causes:

4. Sentence to imprisonment in any state or United States prison or any state or United States reformatory subsequent to the marriage; and in such a case a pardon shall not restore the conjugal rights.

Sec. 2. *Same.*—That Mason's Minnesota Statutes of 1927, Section 8585, be amended by adding thereto a new subdivision designated as Section 8 and read as follows: 8. Continuous separation under a decree of limited divorce for more than 5 years next preceding the commencement of the action.

Approved April 15, 1933.

MINNESOTA LAWS 1933

Chapter 324

An act to amend Mason's Minnesota Statutes of 1927, Section 8585, relating to grounds for divorce.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. *Grounds for divorce.*—That Mason's Minnesota Statutes of 1927, Section 8585, be amended so as to read as follows:

"8585. A divorce from the bonds of matrimony may be adjudged by the district court for any of the following causes:

"1. Adultery.

"2. Impotency.

"3. Cruel and inhuman treatment.

"4. Sentence to imprisonment in any state prison or state reformatory subsequent to the marriage; and in such a case a pardon shall not restore the conjugal rights.

"5. Wilful desertion for one year next preceding the commencement of the action.

"6. Habitual drunkenness for one year immediately preceding the commencement of the action.

"7. Incurable insanity. But no divorce shall be granted upon this ground unless the insane party shall have been under regular treatment for insanity, and

because thereof, confined in an institution for a period of at least five years immediately preceding the commencement of the action. In granting a divorce upon this ground, notice of the pendency of the action shall be served in such manner as the court may direct, upon the nearest blood relative and guardian of such insane person, and the superintendent of the institution in which he is confined. Such relative or guardian and superintendent of the institution shall be entitled to appear and be heard upon any and all issues. The status of the parties as to the support and maintenance of the insane person shall not be altered in any way by the granting of the divorce."

Approved April 20, 1933.

MINNESOTA LAWS, EXTRA SESSION 1933-34

Chapter 78

An act to amend Mason's Minnesota Statutes of 1927, Section 8585. Subdivision 4, as amended by Chapter 324, of the Laws of 1933.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. *Imprisonment to be cause for divorce.*—That Mason's Minnesota Statutes of 1927, Section 8585, subdivision 4 thereof, as amended by Chapter 324 of Laws of 1933, be amended to read as follows:

"4. Sentence to imprisonment in any state or United States prison or any state or United States reformatory subsequent to the marriage; and in such a case a pardon shall not restore the conjugal rights."

Approved January 9, 1934.

See 18 Minn.L.Rev. at p. 466, f.n. 7 (1934).

MINNESOTA LAWS 1935

Chapter 295

An act to amend Mason's Minnesota Statutes 1927, Section 8585 as amended by Laws 1933, Chapter 324, relating to grounds for divorce and repealing Laws 1933, Chapter 262.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. *Grounds for divorce.*—That Mason's Minnesota Statutes 1927, Section 8585 as amended by Laws 1933, Chapter 324, be amended to read as follows:

"8585. A divorce from the bonds of matrimony may be adjudged by the district court for any of the following causes:

"1. Adultery.

"2. Impotency.

"3. Cruel and inhuman treatment.

"4. Sentence to imprisonment in any state or United States prison or any state or United States reformatory subsequent to the marriage; and in such a case a pardon shall not restore the conjugal rights.

"5. Wilful desertion for one year next preceding the commencement of the action.

"6. Habitual drunkenness for one year immediately preceding the commencement of the action.

"7. Incurable insanity, provided that no divorce shall be granted upon this ground unless the insane party shall have been under regular treatment for insanity, and because thereof, confined in an institution for a period of at least five years immediately preceding the commencement of the action. In granting a divorce upon this ground, notice of the pendency of the action shall be served in

such manner as the court may direct, upon the nearest blood relative and guardian of such insane person, and the superintendent of the institution in which he is confined. Such relative or guardian and superintendent of the institution shall be entitled to appear and be heard upon any and all issues. The status of the parties as to the support and maintenance of the insane person shall not be altered in any way by the granting of the divorce.

"8. Continuous separation under decree of limited divorce for more than five years next preceding the commencement of the action.

"9. That Laws 1933, Chapter 262 be and the same hereby is repealed."

Approved April 25, 1935.

3. The New York Law Revision Commission sponsored a bill in the 1947 session of the New York Legislature declaratory of the common law rule of that state that where "two or more acts enacted at the same legislative session, without reference to each other, affect the same statute or portion of a statute, the construction of the statute so affected is a question of law depending on the intent of the legislature, and the order in which the several acts took effect, or became law, is not conclusive." Based on *People ex rel. Chadbourne v. Voorhis*, 236 N.Y. 437, 141 N.E. 907 (1923), and *McMaster v. Gould*, 240 N.Y. 379, 148 N.E. 556 (1925). See (1947) N.Y.Leg.Doc.No.65(N)). The bill was vetoed without explanation.

DUNCAN L. KENNEDY, LEGISLATIVE BILL DRAFTING

81 Minn.L.Rev. 103, 116 (1946).

Repealing acts are of two general types. A repeal by implication is obtained by enactment of contrary provisions, and since the latest statute prevails, the former is of no effect and is repealed by implication, but the former statute is repealed only insofar as it is in conflict with the provisions of the later statute. Repeals by implication are more prevalent when statutes are not kept up to date and in their proper place. If the statutes are not up to date and do not clearly show what is the latest amendment or law on any subject, legislators are more apt to pass laws concerning matters already covered without specifically repealing the prior laws and without taking them into consideration. The result is a multiplicity of laws and repeals by implication. Only the courts can finally decide whether an entire law, or only a part thereof, is repealed. Until the court passes upon it, no one can know whether an implied repeal will stand. Most implied repeals can be prevented by an efficient revisor of statutes who knows the statutory law and is constantly on the lookout for bills containing implied repeals.

In express repeals care must be exercised to fully determine the status of existing matters by virtue of the act to be repealed, and also as to the status of pending matters. Provision would also have to be made to take care of applications for licenses which are pending at the time the repeal would take effect. These results are generally taken care of by means of saving clauses. The repeal of an act takes away from it all force and the act is totally destroyed.

[The same author in "Drafting Bills for the Minnesota Legislature" (1946) at p. 16, says:]

"A common practice in the past, now less frequently followed, was to provide at the close of a bill, 'all acts or parts of acts inconsistent with the provisions of this act are hereby repealed.' This is both unnecessary and confusing. In legal effect it adds nothing, as without such provision all prior conflicting laws or parts of laws would be repealed by implication. Robert Luce states it thusly: 'Why waste ink by so much as declaring that "all acts and parts of acts inconsistent herewith are hereby repealed?" Of course they are. It is elementary that the last word goes.'"

SECTION 5. REVISIONS, CODIFICATIONS, CONSOLIDATIONS AND COMPILATIONS

SMITH v. EAU CLAIRE

Supreme Court of Wisconsin, 1891. 78 Wis. 457, 47 N.W. 830.

By an ordinance passed by the common council of the city of Eau Claire, on March 6, 1889, the grade of a street in said city, known as "Fifth Avenue," was changed, and ordered to be raised above the former grade thereof duly established several years before. The street was filled by the city to the new grade during the spring and summer of 1889. The plaintiff owned a lot fronting on Fifth avenue, on which stood his residence. The lot had been filled with reference to the old grade, and the filling of the street to the new grade raised it above the level of the lot, and thereby damaged the property. The plaintiff presented to the common council a claim for such damages, but the council disallowed the same. He thereupon took an appeal from such disallowance to the circuit court, pursuant to the provisions of the city charter. The court directed the parties to file and serve formal pleadings, and thereupon the plaintiff filed and served his complaint, alleging therein the facts above stated, with the additional fact that the ordinance changing the grade of Fifth avenue was approved by the mayor March 7, and published in the official newspaper of the city April 9, 1889. The city interposed a general demurrer to the complaint, and appeals from an order overruling the same.

LYON, J., (after stating the facts as above.) . . . This brings us to the inquiry, is there any statute which entitles the plaintiff to compensation for the consequential injury to his lot caused by such change of grade? The charter of the city of Eau Claire now in force is contained in chapter 184, Laws 1889. It was published, and took effect, March 30, 1889. The charter in force before that time is contained in chapter 16, P. & L. Laws 1872, entitled "An act to incorporate the city of Eau Claire," approved March 2, 1872, and in certain acts amending the same. The title of chapter 184 is "An act to revise, consolidate, and amend the charter of the city of Eau Claire, approved March 2, 1872, and the several acts amendatory thereof." Chapter 184 contains no provision making the city liable for damages caused by a change of grade of a street. Chapter 16 of 1872 (the old char-

ter) contained such a provision. Is that provision repealed by the new charter? The general rule is that a statute which revises the subject-matter of a former statute works a repeal of such former statute without express words to that effect. *Lewis v. Stout*, 22 Wis. 234. Hence, if chapter 184 contained no express repealing clause, it would operate to repeal chapter 16 by implication, for it revises the whole subject-matter of the latter chapter. But chapter 184 contains a repealing clause, which is as follows: "All acts and parts of acts inconsistent with, and conflicting with, the provisions of this act, are hereby repealed." It was held, in *Lewis v. Stout*, that such a repealing clause, saves all provisions in the old act which are not inconsistent with the revised act. So it was held in that case that a provision in a former statute, requiring a certain bond to run to the governor, was not repealed by a revising act which required the bond to be given, but did not provide to whom it should be executed, and which only repealed acts inconsistent therewith. It is obvious that the provision in the former statute, thus saved, was not inconsistent with the revising statute. But we have no such case here. Chapter 184 of 1889 does not charge the city with liability for consequential damages caused by a lawful change of the grade of a street. Standing alone, it is as complete an immunity from such liability as though it had been expressly enacted therein that the city should not be so liable. The former statute imposed such liability in terms. That the two are inconsistent with each other seems to admit of no doubt.

. . .

The order of the circuit court must be reversed, and that court directed to sustain the demurrer.

CENTRAL OF GEORGIA RY. CO. v. STATE

Supreme Court of Georgia, 1898.

104 Ga. 831, 31 S.E. 531, 42 L.R.A. 518.

LEWIS, J. 1. The latter part of section 2189 of the Civil Code gives the railroad commissioners power to require the location of such depots, and the establishment of such freight buildings, as the condition of the road, the safety of freight, and the public comfort and convenience require. This provision is contained in the act of October 29, 1889 (Acts 1889, p. 132). Under section 2196 of the Civil Code a penalty is prescribed against any railroad company doing business in this state for a violation of the rules and regulations fixed by the railroad commissioners. This section is a codification of section 9 of the act of October 14, 1879 (Acts 1878-79, p. 129). It appears from the record that on January 28, 1896, the railroad commissioners of this state passed an order requiring the Central of Georgia Railway Company to erect a suitable depot building at Forsyth, in Monroe county. The company refused to comply with this order, and suit was instituted by the state, through the attorney general, in Monroe superior court, to recover the penalty provided for in the above section 2196 of the Civil Code. . . .

The wrong done in this case was a failure on the part of the company, through its principal officer, to obey the order of the railroad commissioners. It involved simply an omission of a duty. No agent in Monroe county was charged with this duty, or had anything whatever to do with its performance, so far as the record shows. No disregard, therefore, of the mandates of the railroad commissioners occurred in that county. The wrong was perpetrated by the company through its principal officer, who failed or refused to obey the order in question. The violation, therefore, occurred in the county where the company's principal office is located, and there the wrong was perpetrated. . . . We think, therefore, that the court erred in not sustaining the first ground of the demurrer to the petition.

2. It is contended by counsel for plaintiff in error that there is no law in this state which confers upon the railroad commissioners the power and authority to require a railroad company to erect depot buildings; that the act which undertakes to confer this power, to wit, the act approved October 29, 1889, amendatory of the act of 1879, is unconstitutional, because it contains matter different from what is expressed in the title thereof; and that the act approved August 31, 1891, which undertook to remove the defect in the title in the act of 1879, is itself unconstitutional, because its title does not indicate the matter contained in the body of the act. On the other hand, it is contended by counsel for the state that, the act of 1889 being codified as section 2189 of the new Code, the act of 1895 adopting and making of force that Code cured all those defects, if any, which had existed in the act of 1889. Counsel for plaintiff in error insists, however, that by the adopting act of 1895 the legislature never intended to make anything in the Code law which was not the law before its adoption; and that, even if such was its intention, it did not have the power, under the constitution, to enact in this way new statutes, or any changes or modifications in the existing laws of the state. We will not pause to consider or pass upon the questions raised in reference to the constitutionality of the acts of 1889 and 1891 as originally passed by the legislature, but we will pass over these to consider the more important question as to what validity or force the adopting act of the legislature gave to the provisions in the present Code of 1895. Upon this issue was fought the great legal battle between counsel for the contending parties in this case; and the view we take of this question, which can scarcely be measured in its importance and interest to the profession and the people generally, renders it unnecessary to consider the other constitutional questions touching defects in the titles of the original acts. It is insisted that by the act approved December 19, 1893, providing for the appointment of three commissioners to codify the laws of Georgia, these commissioners were simply empowered to codify and arrange in systematic and condensed form the laws then in force in the state, and had no authority whatever to embody in the Code any new law, or any provision which modified any existing law of the state. No one would hardly pretend that any new matter in the Code derives force or efficacy by virtue of the act of the

commissioners alone. Even if the legislature had attempted to confer upon the commissioners the power to make changes in the law, and to embody in the Code such new matter as they saw proper, such an act of the legislature, in so far as its purpose was to thus create new legislation for the state, would have been an absolute nullity. Enacting and changing laws for a state devolves by the constitution upon the legislative branch of its government, and that branch cannot delegate the power to another. A consideration, therefore, of the duties and powers imposed upon the code commissioners, can throw no light upon what construction should be given an act of the legislature adopting their work. If the codifiers introduced any new matter in the Code, it, of course, amounted to nothing unless it afterwards was enacted into statute by legislative sanction. Where such matter is not inherently unconstitutional,—that is, where it embraces nothing that is not a proper subject-matter of legislative enactment,—there can be no question but that the legislature has the power to enact it into law or not, as it sees proper. When the work of the commissioners was completed, it was laid before the legislature. It had the power to reject that work or to accept it, and in its acceptance it had the power simply to provide for the pay of the commissioners, and the publication of their work for the use of the public; and, if nothing more was done, there would have been a want of legislative sanction to any new matter embodied in the Code, and hence such new matter would never have had any validity. The vital question, then, in this case, is not what the commissioners had the power to do, but what the legislature intended to do with their work. That intention can only be gathered from what the legislature itself has deliberately declared when it finally passed upon the work reported to it by the commissioners. This final action of the legislature is embodied in what is known as the "Adopting Act" of the Code, approved December 16, 1895. Section 1 of that act declares: "That the code of laws prepared under its authority by John L. Hopkins, Clifford Anderson, and Joseph R. Lamar, and revised, fully examined and identified by the certificate of its joint committee, and recommended and reported for adoption, and with the acts passed by the general assembly of 1895 added thereto by the codifiers, be, and the same is, hereby adopted and made of force as the Code of Georgia." This portion of the body of the act is covered by these words in the title, "An act to approve, adopt, and make of force the code of laws prepared under the direction and by authority of the general assembly," etc. A legislative body should always be presumed to mean something by the passage of an act. If, as contended by plaintiff in error, the legislature by this act intended to adopt such provisions in this Code as were law anyway, without any further legislative sanction whatever, then the act in question is absolutely meaningless. It would give no more force or effect to the Code of 1895 than such a work would have carried with it emanating from a private source, and without any legislative warrant or authority whatever. The code of laws designated and identified in the act was adopted and made of force as the Code of Georgia. Not a part of the Code was then made of force, but the entire Code, as compiled

by the commissioners. It would be difficult to conceive how language could more clearly or forcibly express the real intent of the legislature in this matter than the words used in the title and the body of this act. If it means anything, it means a purpose of the legislature to adopt and make of force a code of laws, and hence to breathe into every provision in that code the vitality of a legislative enactment. Any other construction would ascribe to the legislature the folly of declaring, in effect, "We adopt as law in this code everything which would be law anyway without further sanction." It would be just as reasonable for that body to re-enact verbatim et literatim a statute which it recognized and knew to be already of force. Had such been the legislative will, that body would, doubtless, have pursued the same course with reference to the Code of 1895 that its predecessors followed in regard to the Codes of 1868, 1873, and 1882. The Code of 1868, known as "Irwin's Code," and also the Code of 1873, were both the work of private enterprise, their compilation not even having been previously authorized by any act of the legislature. The Code of 1882 was compiled in pursuance of an act of the legislature, but neither this edition nor the other two named received the sanction of an adopting act. After each of these works was completed, it was, by resolution of the general assembly, submitted, the first to a committee of three, and the last two to the attorney general of the state, and each received favorable reports. This was a completion of the works, and all the legislature afterwards did was to order a publication of a given number of volumes, and make appropriation therefor. When, however, the Code of 1895 was reported by the commissioners, and was examined, approved, and favorably reported by a joint committee of both houses of the legislature, that body went a step further, and passed the "Adopting Act" of 1895. . . . There is quite a difference between a code of laws for a state and a compilation in revised form of its statutes. The code is broader in its scope, and more comprehensive in its purposes. Its general object is to embody as near as practicable all the law of a state, from whatever source derived. When properly adopted by the lawmaking power of a state, it has the same effect as one general act of the legislature containing all the provisions embraced in the volume that is thus adopted. It is more than evidentiary of the law. It is the law itself. In 6 Am. & Eng. Enc. Law (2d Ed.) p. 173, it is declared: "The word [code] is used frequently in the United States to signify a concise, comprehensive, systematic re-enactment of the law, deduced from both its principal sources,—the pre-existing statutes and the adjudications of courts,—as distinguished from compilations of statute law only." We quote the following from Black on Interpretation of Laws (page 363): "Although a code or revision may be made up of many provisions drawn from various sources, though it may include the whole or parts of many previous laws and reject many others in whole or in part, though it may change or modify the existing law, or though it may add to the body of law previously in force many new provisions, yet it is to be considered as one homogenous whole, established 'uno flatu.' All its various parts or sections are to be considered and interpreted

as if they were parts of a single statute. And hence, according to a well-known rule, the various provisions, if apparently conflicting, must, if possible, be brought into harmony and agreement. In order to bring about this harmony and agreement, the court which is called upon to interpret the code will look through the entire work, and gather such assistance as may be afforded by a complete survey of it." Whenever the legislature, therefore, employs such words as "adopting a code," no other legitimate or reasonable construction can be given the language itself than an intention to enact and make of force as a statute every provision in the entire work which it has under consideration. Such being the intention, then, of the legislature by the adopting act of 1895, it remains to be considered whether or not this purpose has been legally and constitutionally declared.

3. The present constitution of this state (article 3, § 7, par. 7; Civ. Code, § 5770) declares that "every bill, before it shall pass, shall be read three times, and on three separate days, in each house, unless in cases of actual invasion or insurrection." One attack made upon the adopting act is that it does not contain in its body any of the various provisions of the law which it seeks to declare of force, and that under the constitutional provision above cited it was necessary that these provisions should have been embodied in the act, and should have been read three times before their passage. If this contention be correct, then a large body of our laws, many of which have been enforced for a century, are unconstitutional and void. The act of 1782 revived the colonial statutes by mere reference, and without embodying them in the act itself. The act of 1784 adopted the common law of England. These laws were passed under a constitution which required bills to be read three times in the house and twice in the council; and the common law not only was not so read, but very few, if any, of the legislators knew of all its provisions.

. . . In *Association v. Richards*, 21 Ga. 592, it was held that an act of the legislature incorporating a company by its constitution and by-laws, without embodying the same in the act, was constitutional and valid. On page 613, Lumpkin, J., delivering the opinion, said: "Suppose the legislature were to adopt the Bible as a part of the law of the land. Would the act be void, unless the whole of the Old and New Testament were embodied in the statute? Suppose it were to declare that the Levitical decrees as set forth in the Old Testament should fix the relationship within which marriage might or might not be contracted; or suppose it were to say that Mr. Greenleaf's treatise on Evidence should be the guide of the courts in settling the rules of testimony. It is needless to multiply illustrations. The position is untenable and impracticable. . . . We think the court did right in overruling all the grounds of the demurrer except the first, and we reverse the judgment for not sustaining the demurrer on the ground, alone, that Monroe superior court did not have jurisdiction of this cause of action. Judgment reversed. All the justices concurring.

NOTES

1. Concerning the question of unity of subject matter in codes, see *Johnson v. Harrison*, *infra*, p. 736.

2. Recommendation of the Law Revision Commission to the Legislature Relating to the Compilation of Acts Creating or Validating Public Authorities as a Separate Chapter of the Consolidated Laws. N.Y.Leg.Doc. (1939) No. 65 (I), 3-5. (1939) Rep.Rec. & St.Law Rev.Comm. 387-389.

In a recommendation dealing with public authorities, transmitted to the 1938 Legislature, the Commission pointed out that "There are in existence today twenty-two corporate instrumentalities of the state of New York, generally known as 'authorities', created by act of the Legislature for the furtherance of various self-liquidating public improvements or enterprises, such as parkways, bridges, regional markets and hydro-electric power development systems. The creation of a twenty-third, the New York City Parkway Authority, is now before the Legislature. In addition, there are several authorities created by local action pursuant to general law, of which three—the New York City, Buffalo and Schenectady housing authorities—have been specifically validated by the Legislature.

"At the present time, the acts creating these authorities and defining their powers, as well as the numerous amendments thereto, can be found only by consulting the session laws. It is frequently necessary to refer to six or seven volumes of the session laws for the acts relating to a single authority. This inconvenience would be entirely obviated by assembling, as a new chapter of the Consolidated Laws, the twenty-five or more public authority statutes as last amended."

The Commission recommended in 1938 the compilation of the legislative acts creating or validating public authorities as a separate chapter of the Consolidated Laws. Twenty-six such authorities have been created since 1928, and it is probable that others will be created in the future.

The only question raised with regard to the proposed compilation was a constitutional one, namely whether it would conflict with Article III, section 16, of the New York State Constitution. (This article appears *infra*, p. 420. Ed.) The Commission after considering the question concluded that a mere compilation, without substantive changes, would be constitutional (see Leg.Doc. (1938) No. 65 (R) for Recommendation and Study). However, doubts on the constitutional point persisted, and the bill did not become law.

The constitutional question has now been expressly resolved. By an amendment to the Constitution adopted in 1938, section 16 of Article III was renumbered section 15. Former section 23, renumbered section 21, was rewritten and reads as follows:

"§ 21. Sections fifteen, sixteen, and seventeen of this article shall not apply to any bill, or the amendment to any bill, which shall be recommended to the legislature by commissioners or any public agency appointed or directed pursuant to law to prepare revisions, consolidations or compilations of statutes. But a bill amending an existing law shall not be excepted from the provisions of sections fifteen, sixteen and seventeen of this article unless such amending bill shall itself be recommended to the legislature by such commissioners or public agency."

Section 21 of Article III of the New York State Constitution now makes it clear that section 15 of that article (formerly section 16) does not apply to bills recommended by the Law Revision Commission. . . .

Inasmuch as the exemption from section 15 of Article III of the Constitution, granted by section 21 of that article, does not cover amending bills, unless recommended by the commissioners or public agencies described in section 21, the Com-

mission suggests that, if the Public Authorities Law be enacted, any amendments thereto, unless of a general nature, and applicable to all the authorities included in the consolidation, shall involve no more than a single authority, and shall be entitled in the following form:

"An act to amend the public authorities law, in relation to authorizing Triborough bridge authority to construct a bridge across the East river," etc. A title in the form suggested would comply strictly with the requirements of section 15 (formerly section 16) of Article III of the Constitution. . . .

[The proposed measure became N.Y.Laws 1939, ch. 870.]

Twelve supplemental bills were also introduced, each of which incorporated in the compilation the provisions of another bill before the Legislature at this session amending one of the acts creating a public authority or creating a new authority. Each of these twelve supplemental bills received the same action as the bill whose provisions it incorporated. Five were enacted. Ed.]

3. The New York Public Authorities Law provides: "§ 1600. Construction. This chapter shall not be considered a new act, but a reenactment and a continuation of the several acts consolidated herein; nor shall this chapter affect or impair any right, power or duty conferred or imposed by any such act or any liability or right incurred or action or proceeding taken thereunder."

4. See study, "Constitutionality of Proposed Consolidation of Acts Relating to Public Authorities", N.Y.Leg.Doc. (1938) No. 65 (R) 5-16, (1938) Rep.Rec. & St.Law Rev.Comm., 443-454.

IN RE HALL

Supreme Court of Errors of Connecticut, 1882.
50 Conn. 131, 47 Am.Rep. 425.

PARK, C. J. This is an application by a woman for admission to the bar of Hartford County. After having completed the prescribed term of study she has passed the examination required by the rules of the bar and has been recommended by the bar of the county to the Superior Court for admission, subject to the opinion of the court upon the question whether as a woman she can legally be admitted. The Superior Court has reserved the case for our advice.

The statute with regard to the admission of attorneys by the court is the 29th section of chapter 3, title 4, of the General Statutes, and is in the following words:—"The Superior Court may admit and cause to be sworn as attorneys such persons as are qualified therefor agreeably to the rules established by the judges of said court; and no other person than an attorney so admitted shall plead at the bar of any court of this state, except in his own cause."

It is not contended, in opposition to the application, that the language of this statute is not comprehensive enough to include women, but the claim is that at the time it was passed its application to women was not thought of, while the fact that women have never been admitted as attorneys, either by the English courts or by any of the courts of this country, had established a common-law disability, which could be removed only by a statute intended to have that effect.

It is hardly necessary to consider how far the fact that women have never pursued a particular profession or occupied a particular official

position, to the pursuit or occupancy of which some governmental license or authority was necessary, constitutes a common-law disability for receiving such license or authority, because here the statute is ample for removing that disability if we can construe it as applying to women; so that we come back to the question whether we are by construction to limit the application of the statute to men alone, by reason of the fact that in its original enactment its application to women was not intended by the legislators that enacted it. And upon this point we remark, in the first place, that an inquiry of this sort involves very serious difficulties. No one would doubt that a statute passed at this time in the same words would be sufficient to authorize the admission of women to the bar, because it is now a common fact and presumably in the minds of legislators, that women in different parts of the country are and for some time have been following the profession of law. But if we hold that the construction of the statute is to be determined by the admitted fact that its application to women was not in the minds of the legislators when it was passed, where shall we draw the line? All progress in social matters is gradual. We pass almost imperceptibly from a state of public opinion that utterly condemns some course of action to one that strongly approves it. At what point in the history of this change shall we regard a statute, the construction of which is to be affected by it, as passed in contemplation of it? When the statute we are now considering was passed it probably never entered the mind of a single member of the legislature that black men would ever be seeking for admission under it. Shall we now hold that it cannot apply to black men? We know of no distinction in respect to this rule between the case of a statute and that of a constitutional provision. When our state constitution was adopted in 1818 it was provided in it that every elector should be "eligible to any office in the state" except where otherwise provided in the constitution. It is clear that the convention that framed, and probably all the people who voted to adopt the constitution, had no idea that black men would ever be electors, and contemplated only white men as within any possible application of the provision, for the same constitution provided that only white men should be electors. But now that black men are made electors, will it do to say that they are not entitled to the full rights of electors in respect to holding office, because an application of the provision to them was never thought of when it was adopted? Events that gave rise to enactments may always be considered in construing them. This is little more than the familiar rule that in construing a statute we always inquire what particular mischief it was designed to remedy. Thus the Supreme Court of the United States has held that in construing the recent amendments of the federal constitution, although they are general in their terms, it is to be considered that they were passed with reference to the exigencies growing out of the emancipation of the slaves, and for the purpose of benefiting the blacks. *Slaughter House Cases*, 16 Wall. 36, 67, 21 L.Ed. 394; *Strauder v. West Virginia*, 100 U.S. 303, 306, 25 L.Ed. 664. But this statute was not passed for the purpose of benefiting men as distinguished from women. It grew out of no exigency

caused by the relation of the sexes. Its object was wholly to secure the orderly trial of causes and the better administration of justice. Indeed the preamble to the first statute providing for the admission of attorneys, states its object to be "for the well-ordering of proceedings and pleas at the bar." . . .

The statute finally took its present form in the revision of 1875. It retains the provision that the Superior Court may make rules for the admission of attorneys, and provides that the court "may admit and cause to be sworn as attorneys such persons as are qualified therefor agreeably to the rules established," and restores the provision, dropped in the revision of 1866, that "no person other than an attorney so admitted shall plead at the bar of any court in this state, except in his own cause."

These changes, though not such as to affect the meaning of the statute at any point of importance to the present question, are yet not wholly without importance. The adoption by the legislature of a revision of the statutes becomes, both in law and in fact, a re-enactment of the whole body of statutes; and though in determining the meaning of a statute we are not to regard it as then enacted for the first time, especially if there be no change in phraseology, yet where there is such a change, it follows that the attention of the revisers had been particularly directed to that statute, as of course also that of the legislature, and that with the changes made it expresses the present intent of both. Thus in this case it is clear that the revisers gave particular thought to the phraseology of the statute we are considering, and put it in a form that seemed to them best with reference to the present state of things, and decided to leave the words "such persons" to stand, with full knowledge that they were sufficient to include women, and that women were already following the profession of law in different parts of the country. The legislators must be presumed to have acted with the same consideration and knowledge. It would have been perfectly easy, if either should have thought best, to insert some words of limitation or exclusion, but it was not done. Not only so, but a clause omitted in the revision of 1866 was restored, providing that no "person" not regularly admitted should act as an attorney—a term which necessarily included women, and the insertion of which made it necessary, if the word "persons" as used in the first part of the statute should be held not to include women, to give two entirely different meanings to the same word where occurring twice in the same statute and with regard to the same subject matter.

The object of a revision of the statutes is, that there may be such changes made in them as the changes in political and social matters may demand, and where no changes are made it is to be presumed that the legislature is satisfied with it in its present form. And where some changes are made in a particular statute, and other parts of it are left unchanged, there is the more reason for the inference, from this evidence that the matter of changing the statute was especially considered, that the parts unchanged express the legislative will of to-day,

rather than that of perhaps a hundred years ago, when it was originally enacted.

But this statute, in the revision of 1875, is placed immediately after another with regard to the appointment of commissioners of the Superior Court, the necessary construction of which, we think, throws light upon the construction of the statute in question. That act was passed in 1855, after women had begun, with general acceptance, to occupy a greatly enlarged field of industry, and some professional and even public positions; and it has been held by the Superior Court, very properly, we think, as applying to women, a woman having three years ago been appointed a commissioner under it. Its language is as follows:—"The Superior Court in any county may appoint any number of persons in such county to be commissioners of the Superior Court, who, when sworn, may sign writs and subpoenas, take recognizances, administer oaths and take depositions and the acknowledgment of deeds, and shall hold office for two years from their appointment." Here the very language is used which is used in the statute with regard to attorneys. In one it is, "any number of persons" in the other, "such persons as are qualified." These two statutes are placed in immediate juxtaposition in the revision of 1875 and deal with kindred subjects, and it is reasonable to presume that the revisers and legislators intended both to receive the same construction. It would seem strange to any common-sense observer that an entirely different meaning should be given to the same word in the two statutes, especially when in giving the narrower meaning to the word in the statute with regard to attorneys, we are compelled to give it a different meaning from that which the same word requires in the next line of the same statute.

We are not to forget that all statutes are to be construed, as far as possible, in favor of equality of rights. All restrictions upon human liberty, all claims for special privileges, are to be regarded as having the presumption of law against them, and as standing upon their defense, and can be sustained, if at all by valid legislation, only by the clear expression or clear implication of the law.

We have some noteworthy illustrations of the recognition of women as eligible or appointable to office under statutes of which the language is merely general. Thus, women are appointed in all parts of the country as postmasters. The act of Congress of 1825 was the first one conferring upon the post-master general the power of appointing postmasters, and it has remained essentially unchanged to the present time. The language of the act is, that "the postmaster-general shall establish post offices and appoint postmasters." Here women are not included except in the general term "postmasters," a term which seems to imply a male person; and no legislation from 1825 down to the present time authorizes the appointment of women, nor is there any reference in terms to women until the revision of 1874, which recognizes the fact that women had already been appointed, in providing that "the bond of any married woman who may be appointed postmaster shall be binding on her and her sureties."

Some of the higher grades of postmasters are appointed by the president subject to confirmation by the senate, and such appointments and confirmations have repeatedly been made. The same may be said of pension agents. The acts of Congress on the subject have simply authorized "the president, by and with the advice and consent of the senate, to appoint all pension agents, who shall hold their offices for the term of four years, and shall give bond," etc. At the last session of Congress a married woman in Chicago was appointed for a third term pension agent for the state of Illinois, and the public papers stated that there was not a single vote against her confirmation in the senate. Public opinion is everywhere approving of such appointments. They promote the public interest, which is benefited by every legitimate use of individual ability, while mere justice, which is of interest to all, requires that all have the fullest opportunity for the exercise of their abilities. These cases are the more noteworthy as being cases of public offices to which the incumbent is appointed for a term of years, upon a compensation provided by law, and in which he is required to give bond. If an attorney is to be regarded as an officer, it is in a lower sense.

We have had pressed upon us by the counsel opposed to the applicant, the decisions of the courts of Massachusetts, Wisconsin and Illinois, and of the United States Court of Claims, adverse to such an application. While not prepared to accede to all the general views expressed in those decisions, we do not think it necessary to go into a discussion of them, as we regard our statute, in view of all the considerations affecting its construction, as too clear to admit of any reasonable question as to the interpretation and effect which we ought to give it.

MACKEY v. MILLER.

Circuit Court of Appeals of the United States, 1903. 126 F. 161.

GILBERT, CIRCUIT JUDGE. The appellants contend that the judgment of the District Court is void for the reason that the indictment charges no offense against any law of the United States. Section 6 of Act July 18, 1866 (14 Stat. 179, c. 201), occurs in a chapter which is entitled "An act to further prevent smuggling, and for other purposes." It is as clear as words can make it that it refers only to offenses committed against officers of the customs, their deputies, and persons assisting them in the execution of their duties, and that it has no application to an act done in resistance of an Indian agent in making searches or seizures upon an Indian reservation. It is true that section 5447 of the Revised Statutes (U.S.Comp.St.1901, p. 3678) omits from the prior statute the words "by this act" and "authorized as aforesaid," and it is contended on the part of the appellee that by such omission it was the intention of Congress in adopting the Revision to extend the penalty therein denounced to all cases of resistance to any person authorized by a law of the United States to make searches or seizures. Unaided by the prior act, and unaffected by the marginal notes, there might be grave question whether the language of section 5447 were not sus-

ceptible of interpretation in accordance with this contention. The marginal note, however, defines the section with these words: "Resisting revenue officers, rescuing or destroying seized property," etc. It has been held in New York that the headings to the Revised Statutes of that state, which were passed as one act, formed a part of the body thereof quite as much as the section itself, and that "it was inserted for the purpose of controlling and limiting the scope and application of the general words used in the chapter." *People v. Molineux*, 53 Barb. 15; *People v. Molyneux*, 40 N.Y. 113. And the same was held by the Supreme Court of California concerning the headnotes to the chapters and titles in the practice act of that state. *Barnes v. Jones*, 51 Cal. 303. But, in view of the decision of the Supreme Court of the United States in *Knowlton v. Moore*, 178 U.S. 41, 20 S.Ct. 747, 44 L.Ed. 969, holding that the heading of a revised statute is proper to be considered in interpreting the statute when ambiguity exists, it may be doubted whether the rule of New York and California obtains as to the interpretation of the Revised Statutes of the United States. But, conceding that the marginal note is not an integral part of section 5447, and aside from the question whether or not there is ambiguity in the statute, there is no doubt that it may be referred to as indicating the intention of Congress not to alter by the revision the substantial provisions of the act of July 18, 1866 (14 Stat. 178, c. 201). In *Canan v. Pound Mfg. Co.* (C.C.) 23 F. 184, 23 Blatchf. 173, it was held, in substance, that the use in a revision of language plain enough, if taken by itself, to effect a change in the law, will not be allowed to have the effect, unless the court is satisfied that Congress in fact realized that effect, contemplated it, and actively intended it. That decision was approved in *Bate Refrigerating Co. v. Hammond*, 129 U.S. 151, 169, 9 S.Ct. 225, 229, 32 L.Ed. 645. In *Dominick v. Michael*, 4 Sandf. 409, the court said: "For nearly half a century it has been a cardinal and controlling maxim that in the construction of a revised act a mere change in the language shall not be regarded as evidence of an intention to vary the construction, unless the change is such as to render that intention manifest and certain." In *Goodell v. Jackson*, 20 Johns. 722, 11 Am.Dec. 351, Chancellor Kent declared the law to have been long since settled that "The change of phraseology in the language of a revised act shall not be deemed a change of the law as it stood before the revision, unless such phraseology evidently purported an intention in the Legislature to work a change." Such being the rule which must guide us in the interpretation of the revised statute in question, it is clear that, by adopting the marginal note limiting the scope of the statute to acts done in resistance of revenue officers, Congress affirmed its purpose not to amend or change the original legislation. The reason for the omission of the words "by this act" and "authorized as aforesaid" is found in the fact that section 5447 of the Revised Statutes (U.S.Comp.St.1901, p. 3678) is taken from its place in the original act, which is an act to prevent smuggling and for other purpose, and is inserted as a section in a chapter which deals with "Crimes against the Operation of the Government," and there is no context to which those words would apply.

The judgment of the Circuit Court will be reversed, and the appellants discharged from custody.

NOTES

1. Robert K. Cullen, Revisor of Statutes for Kentucky, in "Mechanics of Statutory Revision," 24 Ore.L.Rev. 1, at p. 2, states the purposes and aims of revision as:

"(1) To determine what statutes are nominally in force, and to obtain accurate copies of such statutes.

"(2) To eliminate, from the body of statutes nominally in force, those statutes and parts of statutes that actually are not in force, by reason of obsolescence, unconstitutionality, implied repeal.

"(3) To bring together, under a logical classification system, those statutes and parts of statutes which, because of similarity of subject matter, properly belong together, and, having done so, to eliminate those statutes that are found to be duplicated or repetitious.

"(4) To simplify and clarify the statutes that remain, by rejecting equivocal and ambiguous words, circuitous and tautological phraseology, and verbose and cumbersome stylizations, and by restating the statutes in clear and perspicuous common language, capable of being understood by every person of whatever avocation who can read with intelligent understanding the American English tongue.

"(5) To arrange the statutes relating to each subject in a logical sequence and according to a consistent plan.

"(6) To publish the statutes in the most convenient and usable form, with such aids to use in the form of numbering, cross reference, tables, indexes, and sub-indexes as will best facilitate the locating of the law on any subject."

2. Wisconsin has had a system of continuous topical revision and annotation as carried on by its Revisor of Statutes since 1910. Nine other states now have adopted this system.

When established in Wisconsin the plan was unique, and experience led to some minor amendments to the original act, to facilitate the work of the Revisor.

Experience in Wisconsin has proved that the work of a highly qualified and efficient Revisor of the Statutes results in:

1. Development of revision experts and a trained expert staff.
2. Continuity of work which leads to clearer, simpler, more compact and complete statutory law.
3. Reduction in bulk of existing statutes.
4. Removal of obsolete statutes.
5. Clarification of the result of judicial construction and application of statutory provisions.
6. Searching out of implied repeals and either rectifying them or making them express.
7. There is a growing practice among lawyers of calling the Revisor's attention to error, omissions, conflicts, and other defects in the statutes and suggesting how the law might be improved. The office has served as an effective clearing house between the lawyers and legislature.
8. Verbosity of statutory language has been reduced.
9. The function of the Revisor is to deal with details—not fundamentals. State policies are for the legislature.
10. Every Wisconsin lawyer who keeps up-to-date on the law buys the volume known as Wisconsin Statutes. The biennial edition keeps the general statutes assembled, makes one body of those laws and reduces the probability of the legislature, enacting duplications or legislating on any subject without knowing of existing statutes.

STATE ex rel. BERGIN v. WASHBURN

Supreme Court of Minnesota, 1947. — Minn. —, 28 N.W 2d 652.

JULIUS J. OLSON, JUSTICE. The court commissioner of Hennepin county died May 14, 1947, thereby creating a vacancy in that office. On May 19, the judges of the district court of that county appointed respondent, Betty W. Washburn, to fill the vacancy. On May 20, the board of county commissioners appointed relator, Tom Bergin. Each appointee promptly qualified by filing with the register of deeds the official bond and oath of office, and each claims to be entitled to fill the vacancy. Therefore, the question is which body had the authority to make the appointment.

Relator claims that L.1913, c. 458, as amended by L.1915, c. 168, Minn.St.1941, §§ 382.01 and 382.02, is controlling, while respondent asserts that M.S.A. 1945 § 489.05, is determinative. That section reads:

"When a vacancy occurs in the office of court commissioner, the judge of the district court of the county shall appoint some competent person to fill such vacancy, who shall give the bond and take the oath by law required, and shall hold his office until the next general election, and until his successor qualifies."

The 1913 act was by its title and terms one "to fix the terms of certain county officers." The offices of clerk of court and court commissioner were not included. The term of office of each of the enumerated officers was to be for four years after the election of 1914, "and said offices shall be filled by election every four years thereafter." Inconsistent acts were repealed. The 1915 act was by its title and context "An Act to amend Chapter 458 General Laws of Minnesota for 1913, entitled 'An Act to fix the terms of certain county officers.'" Section 1 provided that at the general election to be held that year all present county officers, including "*clerk of the district court*" and "*court commissioner*," should be elected that year. The names of the officers italicized were added by the amendment. Section 2 provided that present officials were to hold their offices until 1919 and that their official terms of office "shall be four (4) years and until their successors are elected and qualified, and shall begin on the first Monday in January next succeeding said election, and said offices shall be filled by election every four (4) years thereafter." Section 3 gave to the county board power to fill vacancies, and "Any person now holding any one of the said offices, whether by election or appointment, shall continue in such office until the first Monday in January A. D. 1919, and any appointment made to fill a vacancy in any of the said offices shall be for the balance of such entire term. *All appointments under the provisions of this act, shall be made by the county board.*" (Italics in act.) By § 4, inconsistent acts were repealed. Minn.St.1941, § 382.01, provided that the county officers included in the 1915 act, including the court commissioner, should be elected at the general election in 1918; that their respective terms of office were to begin on the first Monday in January next succeeding their election; and that the "of-

fices shall be filled by election every four years thereafter." Section 382.02 gave to the county board authority to fill vacancies by appointment. "Any appointment made to fill a vacancy in any of the offices named in section 382.01 shall be for the balance of such entire term, and be made by the county board." Finally, the legislature in 1945 reenacted these sections, but omitted the clerk of the district court and the court commissioner from the other county officers, so that the power of the county board to fill vacancies was limited to such other officers. These are the sections that have brought the present controversy before us.

It will be noted that the latest enactment in 1945 contains not a word about appointment to fill the vacancy in the office of court commissioner. In fact, the *court commissioner* is not even mentioned, nor is the clerk of the district court. The only provision as to such appointment is § 489.05, heretofore quoted, which respondent claims fully and unqualifiedly sustains her contention. Also to be noted is the fact that when M.S.A.1945 was adopted the legislature changed of 1945 are to be given effect. When the legislature reached § 489.05, Minn.St.1941, § 382.01, so as to eliminate therefrom the offices of clerk of the district court and court commissioner. As to these offices, the county board no longer has authority to fill vacancies if the statutes of 1945 are to be given effect. When the legislature reached § 489.05, it included and reenacted the previous law without change.

1. As in *Wenger v. Wenger*, 200 Minn. 436, 274 N.W. 517, relator's position is that a revision of an existing statute is presumed not to change its meaning, even if there be alterations in the phraseology, unless such intention to change the law clearly appears from the language of the revised statute. We recognized that rule in the *Wenger* case. However we there concluded that the intention to change clearly appeared, and in so doing we quoted from *In re Estate of Cravens*, 177 Minn. 437, 440, 225 N.W. 398, 399, as follows:

2. "In re-enacting a statute, intention to change meaning may as clearly appear from the omission of old as by adding new language."

This seems particularly apropos here, since the 1913 law had for its purpose the increase of the length of term of certain named county officers from two to four years. As amended in 1915, the act was made applicable also to the clerk of the district court and the court commissioner. The power to appoint officers to these positions was given to the county board, but it will be observed that such "*appointments* [were to be] *under the provisions of this act*," and no more. So the obvious purpose remained as it was, i. e., to fix terms of office at four years as to all named county offices in respect to elections to be later held. Both acts related to elections so as to make the four-year term applicable to all the offices listed in these acts.

Relator cites and relies upon *State ex rel. Evans v. Borgen*, 189 Minn. 216, 248 N.W. 744, 249 N.W. 183, claiming that it "is controlling and decisive of the issue herein." That case was a proceeding in mandamus to compel respondents, the county auditor and the can-

vassing board of St. Louis county, to canvass certain sticker votes alleged to have been cast for relator at the 1932 election for the office of sheriff of that county and to declare him elected to that office. The trial court, on respondents' motion to quash the writ on the ground that the facts alleged did not state a cause of action, granted the motion, and the appeal to this court followed. In disposing of the case here, we quoted L.1913, c. 458, in full, and concluded (189 Minn. at page 218, 248 N.W. at page 745):

"It is too clear for argument that by the last clause of section 2 the only general elections at which votes can be lawfully cast for any of the county officers named in section 1 are those occurring at each four-year interval counting from the general election in November, 1914."

That was the reason for our holding (189 Minn. at page 222, 248 N.W. at page 746):

" . . . There was no vacancy in the sheriff's office of St. Louis county to be filled at the November, 1932, general election, and at that election no votes for that office could be cast lawfully, hence defendants rightly refused to canvass the sticker votes wrongfully cast."

3. There can be no doubt that the question before us lies wholly in the legislative field. What the legislature has authority to enact it obviously has like authority to amend or even to repeal. The facts have been recited. M.S.A. §§ 382.01 and 382.02, omits and eliminates the office of court commissioner. Section 489.05 was reenacted in 1945 when our revised statutes were adopted. See, "An Act providing that the compilation and revision of general statutes of the state of Minnesota of a general and permanent nature," etc., approved March 8, 1945, quoted in Preface to M.S.A.1945, p. 5. Section 1, subd. 1, of the act provides:

4. "The compilation and revision of general statutes of the state of Minnesota of a general and permanent nature, prepared by the revisor of statutes under the provisions of Laws 1943, Chapter 545, and filed in the office of the secretary of state on December 28, 1944, is hereby adopted and enacted as the 'Minnesota Revised Statutes.'"

Thus, the change is one of legislative sanction and action. The statute thus "*adopted and enacted* as the 'Minnesota Revised Statutes'" (italics supplied) must be given effect as "the latest expression of the legislative will."¹

5. The change is a part of the legislative process. We may only apply the law as the legislature has enacted it, and we are only giving effect to the change as the language chosen and used by the legislature made the change. The language is clear and unambiguous, and, as such, there is no room for construction or interpretation. 2 Dunnell, Dig. & Supp. § 1817, and cases there cited. Our latest case is that of *Pierce v. Grand Army of the Republic*, — Minn. —, 28 N.W. 2d 637.

¹ State ex rel. Mergens v. Babcock, 175 Minn. 583, 585, 222 N.W. 285, 286. Cf. 6 Dunnell, Dig. & Supp. § 8927, and cases under notes 20 and 21; M.S.A. § 645.39.

We are of the opinion, and so hold, that respondent is the duly appointed court commissioner of Hennepin county.

Writ discharged.

THOMAS GALLAGHER, J., took no part in the consideration or decision of this case.

NOTES

1. The Preface to Wisconsin Statutes 1939, at p. 6, reads:

"A major rule of interpretation of revision acts is the reverse of the corresponding rule for construing other legislative acts. The general rule . . . is that every legislative act intends some change in the law. . . . The rule (in revision acts) is to the contrary. As to acts which revise or restate the law there is the presumption that no change in substance was intended unless the change in language clearly indicates an intent to change the substance". (See *Becklin v. Becklin*, 99 Minn. 307, 109 N.W. 243 (1906) in accord, and cf. *Platt Institute v. City of New York*, 183 N.Y. 151, 75 N.E. 1119 (1905).)

This paragraph of the Preface was changed in Wis.Stat.1941, and since then has read, in part, as follows:

"Bill No. 255, S., which became chapter 298, laws 1941, created 370.01 (49) of the statutes. Subsection (49) and the note which was appended to the bill read:

"(370.01) (49) Construction of Revised Statutes. A revised statute is to be understood in the same sense as the original unless the change in language indicates a different meaning so clearly as to preclude judicial construction. And where the revision bill contains a note which says that the meaning of the statute to which the note relates is not changed by the revision, the note is indicative of the legislative intent.

"Note: The first sentence of subsection (49) embodies a rule of construction which the supreme court has repeatedly applied, . . .

"The second sentence of subsection (49) give statutory effect to a revisor's note printed in a revision bill. The chief purpose of the system of continuous revision is to remove conflicts and duplications, to free the language of the statutes from redundancy, tautology and verbosity and to delete obsolete and expired provisions and those declared invalid by the court. In short, the purpose is to keep the language of the statutes up to date and as compacted and simple as possible. The recognition proposed to be given to revisor's notes will tend to give the revisor a greater freedom in drafting revision bills and give the legislature a greater assurance as to the effect of such bills."

The New York Law Revision Commission sponsored a bill in the 1947 session of the New York Legislature providing that when a statute is stated to be intended merely to correct or improve the form of the statutes affected by it, it will neither make any change in the legal effect or application of any statute nor affect the operation of any legislative act which is intended to accomplish a change in the law. In the event of conflict between a revision act and any legislation enacted at the same session and intended to make substantive change in the law, the revising act would be deemed repealed by implication. 1947 N.Y.Leg.Doc.No.65(N):

2. Minn.Stat.1945, § 645.05 reads: "The provisions of Revised Laws 1905, so far as they are the same as those existing on March 1, 1906, shall be construed as continuations thereof, and not as new enactments; and references in statutes not repealed to provisions of law which are revised and reenacted therein shall be construed as applying to such provisions as so incorporated in the Revised Laws."

3. Does a revised law differ in effect from an amendment "so as to read as follows"?

MURRELL v. WESTERN UNION TEL. CO.

Circuit Court of Appeals of the United States, 1947. 160 F.2d 787.

SIBLEY, CIRCUIT JUDGE. Appellant Murrell sued appellee in a federal district court for \$1,000, alleging that his action arose under the Act of Congress of June 19, 1934, Sect. 601, 48 Stats. 1101, 47 U.S.C.A. § 601,¹ and Title 47 U.S.C.A. § 8; and that appellee, having as a telegraph company filed its acceptance of the provisions of Sections 1 to 6 and Section 8 of Title 47 of the Code had failed and neglected to speedily and promptly transmit three telegraphic communications after having agreed with appellant for a consideration to do so. The complaint was dismissed on motion because "the penalty created by 47 U.S.C.A. § 8, is for the benefit of, and can be recovered only by the United States; it is not available to an individual." This appeal followed.

Appellant contends that the plain language of section 8 supports his suit; that the preceding section 7 expressly mentions telegrams sent "for the Government and for the general public" ; and that the penalty authorized by section 8 to be sued for in the district court, no plaintiff being specified, is to be understood as recoverable by himself as the party injured and concerned under principles set forth in 25 C.J., Fines, Forfeitures and Penalties, § 98. Appellee contends that the history of the legislation shows that only failure to transmit the telegraphic communications presented by the public functionaries named in it were penalized, and that the United States alone may sue.

The United States Code was not enacted as a statute, nor can it be construed as such. It is only a *prima facie* statement of the statute law. The statutes collected in it did not change their meaning nor acquire any new force by their inclusion. If construction is necessary, recourse must be had to the original statutes themselves. Section 2(a) of the Act of June 30, 1926, 44 Stats. Part 1, page 1.

Section 7 of Title 47 is derived from an appropriation Act which referred to railroad companies which have telegraph lines, and authorized them to transmit telegrams for the Government and for the general public on accepting the restrictions and obligations which by previous legislation had been prescribed for telegraph companies who desired to use the public domain for their wires. It did not amend or change the obligations of telegraph companies. Act of June 23, 1879, 21 Stats. p. 31.

The telegraph companies were first allowed to use the public domain, including post roads, by the Act of July 24, 1866, 14 Stats. 221. The principal obligation then imposed was to transmit certain messages for the United States at such rates as the Postmaster General should annually fix and to give them priority over other business.

¹ Section 601 refers only to the transfer of functions of the Interstate Commerce Commission to Federal Communications Commission.

No penalties were provided for failure, except nonpayment for services.² The Joint Resolution of February 9, 1870, 16 Stats. p. 369, authorized the Secretary of War to transmit meteorological messages by telegraph. Then the Act of June 10, 1872, 17 Stats. 367, provided as to telegraph companies accepting the benefits of the Act of 1866, "If such company, its agents, or employees shall hereafter refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act or by the joint resolution approved February nine, eighteen hundred and seventy . . . (it) shall forfeit and pay to the United States not less than one hundred and not exceeding one thousand dollars for each refusal or neglect aforesaid, to be recovered by an action or actions at law, in any district court of the United States." The intent is here clear to bring within the penalty provision only the failure to transmit the specified government telegraphic communications, and to make the penalty recoverable only by the United States.

This provision was carried into the Revised Statutes of 1873 as Section 5269, reading thus: "Whenever any telegraph company, after having filed its written acceptance with the Postmaster General of the restrictions and obligations required by the Act approved July twenty-fourth, eighteen hundred and sixty-six, entitled 'An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes,' or by this Title, shall, by its agents or employes, refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act, or by this Title or by the provisions of section two hundred and twenty-one, Title 'The Department of War,' authorizing the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notice on the northern lakes and the sea-board of the approach and force of storms, such telegraph company shall be liable to a penalty of not less than one hundred dollars and not more than one thousand dollars for each such refusal or neglect." The Revised Statutes constituted a new statute, and if inconsistent with the older statutes which are incorporated therein, the Revised Statutes control. Revised Statutes, Sect. 5596. But there is no inconsistency here. Although express mention of the United States as the beneficiary of the penalties is dropped, the failures to transmit that are penalized are still carefully restricted to the public messages mentioned in the Act of 1872, being those provided in the Act of 1866 and the Joint Resolution of 1870. "This Title," to wit Title LXV of the Revised Statutes, is for present purposes identical with the Act of 1866, embodying and superseding it; and Section 221 of the Title "Secretary of War" covers the same messages as were dealt with in the Joint Resolution of 1870. Thus all the messages protected by the penalties continued to be only the messages of the United States, and not the messages of private individuals. By necessary inference the United States would be the

² See as to payment 17 Stats. p. 366.

party to sue. The mention of the court in which suit should be brought was restored by the Act of Feb. 27, 1877, 19 Stats. p. 252.

The matter so stood until the United States Code was promulgated. Its compressed language cannot be held to have enlarged these penalties or changed their beneficiary as is here contended.

Judgment affirmed.

NOTES

1. A list of the collections of the statutes of each state and territory of the United States and of the United States appears in Morse, "State Statutes, Revisions, Compilations, and Codes", 34 Law Lib.J. 75 (1941).

2. For a general discussion of statute revision, which distinguishes statute revision, compilations and codification, see J. Franklin Wheeler and Thomas B. Wheeler, "Statute Revision: Its Nature, Purpose and Method", 16 Tulane L.Rev. 105 (1942).

3. As to the purpose and effect of a revision, see "Statutes, 'Revised Statutes'—Constitutionality of Single Enactment and Effect on Prior Statutes," 17 N.Y.U. L.Q.Rev. 479 (1940); Davis, "What is the Effect of a General Statute Revision," 31 Ky.L.J. 274 (1943).

SECTION 6. SPECIAL LEGISLATION

WILLIAM ANDERSON, SPECIAL LEGISLATION IN MINNESOTA

7 Minn.L.Rev. 133, (1922).

1. *The Constitutional Amendment.*—Special legislation was a well known evil in state legislative practice long before the Civil War. It was an abuse from which the people of Minnesota did not escape. Under the organic act of the territory there was, unfortunately, no restriction of any kind upon the passage of special acts by the legislative assembly. Mr. Sibley, who sat for one session in that body, later said that:

"In that session I saw enough to determine me that if ever I had anything to do with the formation of the constitution of a new state, I would place it beyond the power of the legislature to pave the whole country as ours has already done with charters conferring special privileges. . . . It is doubly our duty to tie up the legislature from the power of imposing upon the people of our future state, these charter privileges which have been the curse and bane of all the states."

The question of what could be done to put an end to this abuse was fully debated in the Democratic wing of the Minnesota constitutional convention of 1857, and received some attention also in the Republican wing. In both it was agreed that the special incorporation of private companies should be forbidden. The Democratic group went even farther. During the debate upon the proposal that "No corporations shall be formed under special acts except for municipal purposes," an

amendment was carried to strike out the last four words. In the Republican wing a provision was adopted which retained the exception authorizing special acts for incorporating municipalities. The compromise committee which drew up the constitution upon which both conventions and the people finally agreed, accepted the Democratic provision but restored the words "except for municipal purposes." This was, in brief, the origin of section 2 of article 10 of the Minnesota constitution which, though superseded in fact, is still printed as part of the constitution and was for many years the only important prohibition against special legislation in this state.

As a limitation upon the powers of the legislature, the provision mentioned above was strictly construed. It prohibited the special incorporation of non-municipal corporations and nothing more. In fact, it was a prohibition which prohibited almost nothing. Special legislation increased with almost every session and became finally so great an inconvenience to all concerned that in 1881 Governor John S. Pillsbury strongly recommended to the legislature that it propose an amendment to the constitution to curb the evil if not to end it. The legislature acceded to his request, and at the election that year the voters adopted an amendment which added sections 33 and 34 to article 4 of the state constitution. This amendment was far from being an all-inclusive prohibition. It simply forbade "special or private" laws upon eleven stated subjects, seven of which related to questions of local government, and four of which concerned questions more strictly private. General laws upon these subjects were expressly sanctioned, but such general laws were to be "uniform in their operation throughout the state." In the entire amendment there was nothing to prevent special legislation for cities, nor to prevent the amendment of any previous special act whatever. For these and other reasons this prohibition proved entirely unsatisfactory. Special legislation, while changing somewhat in character, actually increased in quantity. Legislators apparently found themselves unable to resist the demands put upon them, and came to desire some more efficacious measure of relief. The result was the proposal by the legislature of 1891 and the adoption by the voters in 1892 of the present section 33 of article 4 of the constitution. It is one of the most sweeping prohibitions of its kind to be found among the constitutions of the forty-eight states. Section 34 was not changed in 1892. For convenience of reference, both sections are printed herewith.

Practically all of the state constitutions now prohibit special legislation by one method or another, either entirely or as to certain specified matters. It is unfortunate, therefore, that there is no adequate up-to-date treatise on the subject. A complete discussion of special legislation even for the state of Minnesota alone would require a considerable space. Such a comprehensive examination of the subject will not be attempted here. The aim will be to analyze the decisions upon a few important points, and to pay particular attention to any rules laid down in this jurisdiction which seem to be in any sense unique or novel. . . .

III. The Sweeping Clause of the 1892 Amendment.—The 1892 amendment prohibiting special legislation improves upon the 1881 amendment in three important respects. (1) In addition to the specific prohibition of special laws in certain stated cases, the later amendment forbids the enactment of special laws "in all cases when a general law can be made applicable," and declares it to be a judicial question as to whether a general law could have been applicable in any case. This provision is the first sentence of the present section 33. It is herein called the "sweeping clause" and will be discussed in the following paragraphs. (2) It extends very materially the list of named subjects upon which the legislature "shall pass no local or special law." (3) It also adds the clause that "the legislature may repeal any existing special or local law but shall not amend, extend or modify any of the same." The intention very clearly was to close the door to all special legislation upon the subject stated and upon all similar subjects. As has been said above, the doctrine of *ejusdem generis* would require the limitation of the scope of the term "special law" in the first sentence to laws upon subjects closely allied to those named in the second sentence as to which special laws are absolutely forbidden. So construed, the sweeping clause is a sort of dragnet, not designed to catch everything, but only things, similar to those named, which might have been omitted through oversight. For example, it is very clear that the provision against special legislation was not intended to prohibit what is called "class legislation."

It is reasonable to presume that the members of the supreme court at the time of the adoption of the 1892 amendment understood quite as fully as any of their successors the meaning of the amendment and the intentions of its framers. Upon the first argument of the well-known *Cooley* case in 1893 the court made an explanation of the prohibition which has not been improved upon. The facts were that at an earlier date the legislature had created a board of court house and city hall commissioners in and for the county of Hennepin and the city of Minneapolis to construct a combined court house and city hall. Finding itself short of means needed to complete the work, this body procured the passage of an act of the legislature authorizing it by name to borrow additional funds. The county auditor refused to recognize the validity of this act, holding it to be contrary to the new prohibition against special legislation. Thus the litigation arose. Counsel for the commissioners admitted that the act was special, but made a strong point of the fact that the legislature had found it impossible to enact a general act applicable to the situation in Hennepin county. It was one of those cases where a general law could not be made applicable. This argument compelled the court to consider the sweeping clause of the amendment in its relation to other provisions of the section.

Judge Collins wrote for the court that the sweeping clause:

"Is entirely unlike anything that has previously appeared in the fundamental law. . . . It is sufficient to say that we regard it as independent of the sentence which follows, and that the specified

prohibitions enumerated in the second sentence or clause are not subject to or modified by the first, which forbids the enactment of special laws where general laws can be made applicable.

The court recognized that the act in question covered a situation where a general law could not have been made applicable. "The situation was so peculiar that no law, it would seem, could have been framed which would have covered it, and still be a general law in any sense." Hence, if the sweeping clause had been the whole of the prohibition, the law would have been held valid even though special. But the argument of counsel for Cooley had stressed the fact that the act in question came under the express prohibition in the second sentence, which says that the legislature "shall pass no local or special law; regulating the affairs of . . . any county, city," etc. It could not be denied, the court said, that this act did fall under this prohibition, which was unqualified, and was entirely independent of the sweeping clause. Upon the assumption that the act was special, it followed that it was unconstitutional. It is the conclusion of the writer that, as far as it went, this interpretation of the amendment by the court was entirely sound. Though the court came to a different decision in the case upon reargument, it did not retract or modify any portion of what has been here set down.

The framers of section 33 seem to have considered the sweeping clause very important. They put it first in the amendment, and undoubtedly expected important results from it. Upon the first test given it in the courts, this clause was correctly interpreted as a separate and independent part of the prohibition. One would expect, therefore, to find in the decisions during the succeeding thirty years that the clause has been frequently applied to prevent the enforcement of special laws. In the ninety volumes of Minnesota reports from 1893 to date, one should find at least an occasional case in which the court, having determined that a certain special act does not violate one of the express prohibitions against special laws, would turn to consider the validity of the act under the sweeping clause, to determine, in other words, whether the subject is one to which the prohibition of the sweeping clause would apply, and whether a general law could have been applicable in the particular case. What is the surprise of the student, therefore, to find not a single discussion of this clause in any judicial decision from that day to this. The clause appears to be as dead as Caesar.

It is difficult to assign reasons for this neglect of the provision under discussion. To some extent, no doubt, it is due to the fact that the express prohibitions cover so much ground that very few cases arise which are not covered by one or another of them. Perhaps, also, there is misunderstanding as to the nature and significance of the clause. It may be considered either too vague to be concretely useful, or so broadly inclusive as to be dangerous. There is one assertion in a later case which seems to convey the idea that the court itself considers the clause of no effect. The statement is made that the prohibitions of section 33 of article 4 "are specific, not general, and are limited by the

courts to the subjects particularly enumerated." The few authorities cited for this statement do not support it in any way, and since there was no argument of the point in the decision we are left without any reasonable explanation of what the court meant. It is impossible to harmonize the view expressed with the many cases in which examples of "class legislation" upon subjects in no wise mentioned in section 33 have been held to be violative of its provisions. If the court really intended to say that the sweeping clause adds nothing to the more specific prohibitions of section 33, it in effect declared that one portion of the constitution is mere waste of words. This would, of course, be contrary to established rules of constitutional construction, and directly opposed to the well reasoned views in the *Cooley* case. The decision in which the assertion was made will be dealt with in the next section.

Illustrative Provisions

THE CONSTITUTION OF THE STATE OF MINNESOTA, ARTICLE IV

Sec. 33. In all cases when a general law can be made applicable, no special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject. The legislature shall pass no local or special law regulating the affairs of, or incorporating, erecting or changing the lines of, any county, city, village, township, ward or school district, or creating the offices, or prescribing the powers and duties of the officers of, or fixing or relating to the compensation, salary or fees of the same, or the mode of election or appointment thereto, authorizing the laying out, opening, altering, vacating or maintaining roads, highways, streets or alleys; remitting fines, penalties or forfeitures; regulating the powers, duties and practice of justices of the peace, magistrates and constables; changing the names of persons, places, lakes or rivers; for opening and conducting of elections, or fixing or changing the places of voting; authorizing the adoption of legitimation of children; changing the law of descent or succession; conferring rights upon minors; declaring any named person of age; giving effect to informal or invalid wills or deeds, or affecting the estates of minors or persons under disability; locating or changing county seats; regulating the management of public schools, the building or repairing of schoolhouses, and the raising of money for such purposes; exempting property from taxation, or regulating the rate of interest on money; creating corporations, or amending, renewing, extending or explaining the charters thereof; granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever, or authorizing public taxation for a private purpose. Provided, however, That the inhibitions of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated.

The legislature may repeal any existing special or local law, but shall not amend, extend or modify any of the same.

Sec. 34. The legislature shall provide general laws for the transaction of any business that may be prohibited by section one (1) of this amendment, and all such laws shall be uniform in their operation throughout the State.

Sec. 36. . . .

The legislature may provide general laws relating to affairs of cities, the application of which may be limited to cities of over fifty thousand inhabitants, or to cities of fifty and not less than twenty thousand inhabitants, or to cities of twenty and not less than ten thousand inhabitants, or to cities of ten thousand inhabitants or less, which shall apply equally to all such cities of either class, and which shall be paramount while in force to the provisions relating to the same matter included in the local charter herein provided for.

CONSTITUTION OF THE STATE OF NEW YORK

Article I—Bill of Rights

§ 9. (Right to assemble and petition; divorce; lotteries; pool-selling and gambling; laws to prevent.)

No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section. As amended and approved Nov. 7, 1939. Eff. Jan. 1, 1940.

Article III—Legislature

§ 15. (Private or local bills to embrace only one subject to be expressed in title.)

No private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title. Formerly § 16. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.

§ 17. (Cases in which private or local bills shall not be passed; restrictions as to certain laws relating to street railroads.)

The legislature shall not pass a private or local bill in any of the following cases:

Changing the names of persons.

Laying out, opening, altering, working or discontinuing roads, highways or alleys, or for draining swamps or other low lands.

Locating or changing county seats.

Providing for changes of venue in civil or criminal cases.

Incorporating villages.

Providing for election of members of boards of supervisors.

Selecting, drawing, summoning or empaneling grand or petit jurors.

Regulating the rate of interest on money.

The opening and conducting of elections or designating places of voting.

Creating, increasing or decreasing fees, percentages or allowances of public officers, during the term for which said officers are elected or appointed.

Granting to any corporation, association or individual the right to lay down railroad tracks.

Granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever.

Granting to any person, association, firm or corporation, an exemption from taxation on real or personal property.

Providing for the building of bridges, except over the waters forming a part of the boundaries of the state, by other than a municipal or other public corporation or a public agency of the state.

The legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment, may be provided for by general laws. But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities, having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad, be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners.

Formerly § 18. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.

§ 19. (Private claims not to be audited by legislature; claims barred by lapse of time.)

The legislature shall neither audit nor allow any private claim or account against the state, but may appropriate money to pay such claims as shall have been audited and allowed according to law.

No claim against the state shall be audited, allowed or paid which, as between citizens of the state, would be barred by lapse of time. This provision shall not be construed to repeal any statute fixing the time within which claims shall be presented or allowed, nor shall it extend to any claims duly presented within the time allowed by law, and prosecuted with due diligence from the time of such presentment. But if the claimant shall be under legal disability, the claim may be presented within two years after such disability is removed. Derived in part from former § 6 of Art. 7. Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.

§ 20. (Two-thirds bills.)

The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes.

Article X—Corporations

§ 1. (Corporations; formation of.)

Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed. Formerly § 1 of Art. 8. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.

Article IX—Local Governments

§ 11. (Passage of special city laws prohibited; exceptions.)

The legislature shall act in relation to the property, affairs or government of any city only by general laws which shall in terms and in effect apply alike to all cities, except upon the request of the mayor of the city affected concurred in by the local legislative body or upon the request of two-thirds of the elected members of the local legislative body declaring that a necessity exists and reciting the facts establishing such necessity and the concurrent action of two-thirds of the members of each house of the legislature. The legislature may by general laws confer on cities such powers of local legislation and administration in addition to the powers vested in cities by this article as it may, from time to time, deem expedient and may withdraw such powers. The provisions of this article shall not be deemed to restrict the power of the legislature to enact laws relating to matters other than the property, affairs or government of cities. Formerly § 2 of Art. 12. Renumbered, transferred and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.

§ 12. (Power of cities to enact local laws relating to property, affairs or government.)

Every city shall have power to adopt and amend local laws not inconsistent with the constitution and laws of the state relating to its property, affairs or government. Every city shall also have the power to adopt and amend local laws not inconsistent with this constitution and laws of the state, and whether or not such local laws relate to its property, affairs or government, in respect to the following subjects: the powers, duties, qualifications, number, mode of selection and removal, terms of office and compensation of all its officers and employees except of members of the governing elective body of the county in which such city is wholly contained, the membership and constitution of its local legislative body, the transaction of its business, the incurring of its obligations, the presentation, ascertainment and discharge of claims against it, the acquisition, care, management and use of its streets and property, the ownership and operation of its transit facilities, the collection and administration of local taxes authorized by the legislature, the wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or subcontractor performing work, labor or services for it, the government and regulation of the conduct of its inhabitants and the protection of their property, safety and health.

Every city may repeal, supersede or modify any law which was enacted upon and which required, pursuant to the constitution, a message from the governor declaring that an emergency existed and the concurrent action of two-thirds of the members of each house of the legislature, insofar as such law relates to the property, affairs or government of such city, except that no city may, unless hereafter authorized by the legislature, (a) reduce any salary or compensation or change any working conditions or hours of employment if such salary, compensation, working conditions or hours of employment shall have been heretofore approved upon referendum pursuant to law, except upon approval of such reduction or change by a majority of the electors of such city voting thereon, or (b) repeal or supersede any law enacted by the legislature relating to any pension or retirement system or to the making and review of assessments or to the judicial review of dismissals from the civil service.

The provisions of this article shall not be deemed to restrict or diminish the existing powers of any city. Formerly § 3 of Art. 12. Renumbered, transferred and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.

NOTE

See *Economic Power & Construction Co. v. City of Buffalo*, 195 N.Y. 286, 88 N.E. 389 (1909); *The People v. Supervisors of Chautauqua*, 43 N.Y. 10 (1870).

THE CONSTITUTION OF THE STATE OF CALIFORNIA,
ARTICLE IV

Sec. 25. The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

First—Regulating the jurisdiction and duties of Justices of the Peace, Police Judges, and of Constables.

Second—For the punishment of crimes and misdemeanors.

Third—Regulating the practice of Courts of justice.

Fourth—Providing for changing the venue in civil or criminal actions.

Fifth—Granting divorces.

Sixth—Changing the names of persons or places.

Seventh—Authorizing the laying out, opening, altering, maintaining, or vacating roads, highways, streets, alleys, town plats, parks, cemeteries, graveyards, or public grounds not owned by the State.

Eighth—Summoning and impaneling grand and petit juries, and providing for their compensation.

Ninth—Regulating county and township business, or the election of county and township officers.

Tenth—For the assessment or collection of taxes.

Eleventh—Providing for conducting elections, or designating the places of voting, except on the organization of new counties.

Twelfth—Affecting estates of deceased persons, minors, or other persons under legal disabilities.

Thirteenth—Extending the time for the collection of taxes.

Fourteenth—Giving effect to invalid deeds, wills, or other instruments.

Fifteenth—Refunding money paid into the State treasury.

Sixteenth—Releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or person to this State, or to any municipal corporation therein.

Seventeenth—Declaring any person of age, or authorizing any minor to sell, lease, or incumber his or her property.

Eighteenth—Legalizing, except as against the State, the unauthorized or invalid act of any officer.

Nineteenth—Granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity.

Twentieth—Exempting property from taxation.

Twenty-first—Changing county seats.

Twenty-second—Restoring to citizenship persons convicted of infamous crimes.

Twenty-third—Regulating the rate of interest on money.

Twenty-fourth—Authorizing the creation, extension, or impairing of liens.

Twenty-fifth—Chartering or licensing ferries, bridges, or roads.

Twenty-sixth—Remitting fines, penalties, or forfeitures.

Twenty-seventh—Providing for the management of common schools.

Twenty-eighth—Creating offices, or prescribing the powers and duties of officers in counties, cities, cities and counties, townships, election or school districts.

Twenty-ninth—Affecting the fees or salary of any officer.

Thirtieth—Changing the law of descent or succession.

Thirty-first—Authorizing the adoption or legitimation of children.

Thirty-second—For limitation of civil or criminal actions.

Thirty-third—In all other cases where a general law can be made applicable.

NOTES

1. See article analyzing the types of constitutional restrictions against local and special legislation and setting forth the general rules of construction, by Cloe and Marcus, "Special and Local Legislation," 24 Ky.L.J. 351 (1936).

2. Horack and Welsh, "Special Legislation: Another Twilight Zone", 12 Ind. L.J. 109 (1936), 12 Ind.L.J. 183 (1937), trace judicial review of special legislation in Indiana and conclude with a suggested means for handling the problem.

3. See also Note, "Constitutional Prohibition Against Granting or Amending City Charters", Wis.L.Rev. 396 (1941).

4. The Report of the Joint Committee on the Organization of Congress, reported under the authority of the order of the Senate of March 1, 1946, at p. 24:

"1. Self-Rule for District of Columbia

"Recommendation: That Congress divest itself of the duty of governing the District of Columbia and provide for a referendum on adoption of self-government by city charter.

"The Nation cannot afford the luxury of having its national legislative body and the District committees in both the House and Senate perform the duties of a city council for the District of Columbia.

"In order to relieve Congress of this extraneous work-load and enable it to devote full attention to natural legislation, we recommend that a plan for self-rule for the District of Columbia be provided as early as possible.

"We do not assume the responsibility of suggesting what plan should be adopted for handling the municipal affairs of the District, but we do recommend that steps be taken immediately to provide for establishing a commission of Washington residents to prepare a suitable city charter and that it be submitted by referendum to the citizens of the District for their approval or rejection.

"We recommend that Congress authorize this referendum as soon as a satisfactory self-government city charter is drafted and that on its adoption legislation be introduced to make it effective."

The Report of the Special Committee on the Organization of Congress accompanying S. 2177, dated May 31 (legislative day March 5) 1946, states at p. 1:

"The Special Committee on the Organization of Congress, to whom was referred the bill (S. 2177) to provide for increased efficiency in the legislative branch of the Government, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

"The most important amendment made by the special committee was to eliminate from the bill Title VII—Self-Government for the District of Columbia. The Committee on the Judiciary has favorably reported a bill, S. 1942, to incorporate the Federal City Charter Commission. Title VII of S. 2177 and S. 1942 are similar measures, having the same objective of home rule for the District of Columbia. Attainment of this desirable objective will be expedited, we believe, by the enactment of S. 1942."

Accordingly, at p. 40 of this same report, it is said with regard to Title VII:

"This title, which provided for the preparation of a charter designed to provide a form of municipal government for the District of Columbia, and a referendum thereon of District residents, was stricken from the bill by the committee, for the reasons given in its general statement above."

WILLIAMS v. MAYOR AND CITY COUNCIL OF BALTIMORE

Supreme Court of the United States, 1933.
280 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The controversy in these cases hinges upon the validity of a statute of Maryland, adopted by the General Assembly in June, 1931, whereby the property of a particular railroad was made exempt from taxation. Acts of 1931, c. 497.

For an understanding of the merits there is need that the statute be quoted in full:

"An Act to exempt the railroad property of the Washington, Baltimore and Annapolis Electric Railroad Company, or so much thereof as may be used for railroad purposes by said company, its receiver, successors and assigns, from all State taxes and charges, including contributions to the cost of construction of railroad crossings made or to be made under the authority of the State Roads Commission, and from all county and city taxes and charges in the nature of a tax for the years during which the property is so used, but not exceeding two years beginning January 1, 1931.

"Whereas, The Washington, Baltimore and Annapolis Electric Railroad Company did not in the year 1930 earn its operating charges, and it is of the utmost importance for the welfare of the State and particularly the communities served by said railroad, that the operation of said railroad be continued, and

"Whereas, It is in the judgment of the General Assembly of Maryland a wise and sound public policy to encourage the continued operation of said railroad by the exemption herein provided:

"Section 1. Be it enacted by the General Assembly of Maryland, That the railroad property of the Washington, Baltimore and Annapolis Electric Railroad Company, or so much thereof as may be used for railroad purposes by said company, its receiver, successors and assigns, be exempt from all State taxes and charges, including contribu-

tions to the cost of construction of railroad crossings made or to be made under the authority of the State Roads Commission, and from all county and city taxes and charges in the nature of a tax for the years during which the property is so used, but not exceeding two years beginning January 1, 1931.

"Sec. 2. And be it further enacted, That this Act shall take effect June 1, 1931."

At the passage of this act, the Washington, Baltimore & Annapolis Electric Railroad Company was in the hands of a receiver, appointed in January, 1931, by the Federal District Court. For ten years preceding the receivership the gross receipts from its business had progressively declined. In 1930 the total revenues derived from the operation of its line were \$1,347,967.03, and the operating expenses \$1,191,897.32. These expenses were exclusive of taxes and fixed charges, such as interest on its debts. There was a funded debt of more than nine million dollars and an unsecured debt of nearly a million. In 1930, 3,247,534 passengers had traveled on the road, which supplied the only rail service to Annapolis, the capital of the state. Large public interests were involved in keeping the service going.

The mayor and city council of Baltimore, and the mayor, counselor, and aldermen of the city of Annapolis, municipal corporations, challenged the validity of the exemption, and filed proofs of claim with the receiver for taxes overdue. The claim of the city of Baltimore was for real property taxes on the cars, and for franchise taxes or charges under a municipal ordinance. The claim of the city of Annapolis was for taxes on real property and for local taxes or charges owing for the franchise. The District Court upheld the validity of the statute, and disallowed the claims. Upon appeal to the Circuit Court of Appeals for the Fourth Circuit the orders were reversed upon the ground that the statute was invalid under the Fourteenth Amendment of the Federal Constitution and under several provisions of the Constitution of the state. 61 F.2d 374. Writs of certiorari were granted by this court. 287 U.S. 594, 53 S.Ct. 222, 77 L.Ed. 518. The writ in No. 513 brings up the claim filed with the receiver by the City of Baltimore; the writ in No. 514 brings up the claim of the City of Annapolis.

1. There is error in the holding of the Circuit Court of Appeals that the statute of Maryland creating this exemption is a denial to the respondents of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator. *Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937, 29 A.L.R. 1471; *City of Newark v. New Jersey*, 262 U.S. 192, 43 S.Ct. 539, 67 L.Ed. 943; *Worcester v. Worcester Consolidated Street Ry. Co.*, 196 U.S. 539, 25 S.Ct. 327, 49 L.Ed. 591; *Pawhuska v. Pawhuska Oil Co.*, 250 U.S. 394, 39 S.Ct. 526, 63 L.Ed. 1054; *Risty v. Chicago, R. I. & Pac. Ry. Co.*, 270 U.S. 378, 390, 46 S.Ct. 236, 70 L.Ed. 641; *Railroad*

Commission v. Los Angeles R. R. Corporation, 280 U.S. 145, 156, 50 S.Ct. 71, 74 L.Ed. 234.

2. There is error in the holding of the Circuit Court of Appeals that the statute is invalid under the Constitution of Maryland.

Several provisions of that Constitution are invoked by the respondents. They will be considered in succession.

(a) The statute is not repugnant to article 15 of the Maryland Declaration of Rights, wherein it is provided: "That the levying of taxes by the poll is grievous and oppressive and ought to be prohibited; that paupers ought not to be assessed for the support of the Government; that the General Assembly shall, by uniform rules, provide for separate assessment of land and classification and subclassifications of improvements on land and personal property, as it may deem proper; and all taxes thereafter provided to be levied by the State for the support of the general State Government, and by the counties and by the City of Baltimore for their respective purposes, shall be uniform as to land within the taxing district, and uniform within the class or sub-class of improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy; yet fines, duties or taxes may properly and justly be imposed, or laid with a political view for the good government and benefit of the community."

The courts of Maryland hold that the rule of uniformity established by these provisions does not forbid the creation of reasonable exemptions in furtherance of the public good. [Citing cases.] It does not even prohibit an exemption in favor of an individual as distinguished from one for the benefit of the members of a class. All that it exacts in respect of the narrower exemption is the presence of a relation, fairly discernible, between the good of the individual and the good of the community. There must be something more than an arbitrary preference of one among many. *Baltimore City v. Starr Church*, 106 Md. 281, 287, 288, 67 A. 261.

Furtherance of the public good is written over the face of this statute from beginning to end as its animating motive. "It is of the utmost importance for the welfare of the State and particularly the communities served by said railroad, that the operation of said railroad be continued." "It is in the judgment of the General Assembly" that "to encourage the continued operation" of the road by the grant of an exemption will be to give heed to the promptings of "a wise and sound public policy." The exemption is to be confined to that part of the property of the company, which is used for railroad purposes, is to continue only so long as the property is so used, and is to expire in any event at the end of the two years beginning in January, 1931. It is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived. *Otis v. Parker*, 187 U.S. 606, 609, 23 S.Ct. 168, 47 L.Ed. 323; *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U.S. 267, 24 S.Ct. 638, 48 L.Ed. 971; *Sproles v. Binford*, 286 U.S. 374, 388, 389, 52 S.Ct. 581, 76 L.Ed.

1167. The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the Legislature must have its way. *Otis v. Parker*, *supra*. Nor in marking out that field will a court be forgetful of presumptions that help to fix the boundaries. "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." *O'Gorman & Young v. Hartford Fire Insurance Co.*, 282 U.S. 251, 257, 51 S.Ct. 130, 132, 75 L.Ed. 324. There has been no departure from that principle in the judgments of the highest court of Maryland. *Wampler v. LeCompte*, 159 Md. 222, 150 A. 455; *Id.*, 282 U.S. 172, 175, 51 S.Ct. 92, 75 L.Ed. 276.

We are told that the signs of an arbitrary preference are written on the statute because the exemption is confined to this particular insolvent when it might have been extended to all other insolvents engaged in a like business. There is nothing to show that any Maryland railroad other than this one was in the hands of a receiver. The assailants of the statute have the burden of proving everything essential to their case. *Pullman Co. v. Knott*, 235 U.S. 23, 25, 35 S.Ct. 2, 59 L.Ed. 105; *Wampler v. LeCompte*, *supra*. But the result will be no different if other insolvents be assumed. The public policy that made it wise in the judgment of the Legislature to help this particular railroad and keep its business going may have failed altogether in respect of any other railroad, solvent or insolvent. Here was a line carrying millions of passengers, and supplying the only railroad service between the capital of the state and its most populous city. The rescue of such a road might be dictated by the public interest when a road in some other territory might wisely be abandoned to its fate.

We are told that the statute is not to be distinguished in principle from the one considered by the highest court of Maryland in the case of the *Starr Church*, and there condemned as arbitrary. *City of Baltimore v. Starr Church*, 106 Md. 281, 67 A. 261. But we think the distinctions are many and obvious. A religious corporation, the *Starr Church*, had received a gift of wharf property which it leased for profit. The General Assembly passed an act exempting the wharf from taxes so long as it continued in the ownership of the church. The exemption for other churches was confined to a place of worship and a parsonage. The statute did not say that the new exemption was designed to promote the comfort or well-being of the community at large. For all that appeared no such interests were involved. The statute said no more than this, that the exemption would be "a great relief and benefit to said religious body," which was singled out for privileges denied to any other. This preference for one, with no profession of a purpose to advance the common weal and with nothing in the situation to indicate that such a purpose would be served, is the evil that the court denounced.

We are told that the many cases upholding an exemption to a railroad at the time of its formation have no bearing upon this exemption which was granted later on. A charter, so it is argued is a contract, or becomes one when accepted. There is thus a *quid pro quo*. A privilege conferred thereafter is nothing more than a gratuity, and hence an arbitrary preference irrespective of its motive. But this is to misread the cases and misconceive the rationale back of them. The charter exemption to a railroad does not gain validity from the circumstance that a charter is a contract. If the exemption is a valid one, the contract may mean that there will be no power of revocation, though exemptions not contractual are terminable at will. *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 133, 11 L.Ed. 529. Even this difference will be absent if there is a reservation by the state of the power to repeal or change. *Northern Central Ry. Co. v. Maryland*, 187 U.S. 258, 23 S.Ct. 62, 47 L.Ed. 167, affirming *State of Maryland v. Northern Central Ry. Co.*, 90 Md. 447, 45 A. 465. Revocable or irrevocable, the contract will not give validity to what would otherwise be void. *Stearns v. Minnesota*, 179 U.S. 223, 254, 21 S.Ct. 73, 45 L.Ed. 162; *Duluth & I. R. R. Co. v. St. Louis County*, 179 U.S. 302, 21 S.Ct. 124, 45 L.Ed. 201; and cf. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357, 28 S.Ct. 529, 52 L.Ed. 828, 14 Ann.Cas. 560; *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U.S. 372, 375, 376, 39 S.Ct. 117, 63 L.Ed. 309, 9 A.L.R. 1420. To see that this is so we have only to inquire what the consequence would be if a charter exemption were to be given to a mere private corporation, conducted for profit solely like any other business enterprise. Charter or no charter, the exemption would not stand. *City of Baltimore v. Starr Church*, *supra*.

The policy that sustains an exemption in order to keep a crippled railroad going is precisely the same as the one that sustains an exemption to set it going at the start. In the one case as in the other, the state maintains the highways upon which its people are dependent for their economic and social life. *Cole v. La Grange*, 113 U.S. 1, 7, 5 S.Ct. 416, 28 L.Ed. 896. It is idle to say that a railroad, when once it has been organized, is under a duty to go on, and hence that its distress is not important for any one except itself. Science has wrought her wonders, but the time is not yet here when trains will run under the impulsion of duty without more. There is room, indeed, for question whether even the duty is so absolute as the respondents' argument assumes. *Railroad Commission v. Eastern Texas R. R. Co.*, 264 U.S. 79, 85, 44 S.Ct. 247, 68 L.Ed. 569. Certain it is, in any event, that operation may end with the consent of the public service commission when the earnings are inadequate. Code of Public General Laws of Maryland (Bagby's Ed.) 1929 supplement, art. 23, § 380; *Benson v. Public Service Commission*, 141 Md. 398, 118 A. 852. Nor is there need to show a probability of utter cessation or abandonment. Service is likely to be inefficient and even dangerous if operation is continued in the face of an increasing deficit. The state has an interest in seeing to it that railroads shall be run, but an interest also in how they shall be run. The General Assembly, weighing these and other considerations,

has found them adequate to justify a temporary exemption from the burdens of taxation. Nothing in the Constitution of Maryland or in the decisions of her courts enables us to say that there has been clear abuse of power. We may not nullify for doubt alone. There must be something near to certainty. We do not reach it here.

(b) The statute is not repugnant to article 3, § 33, of the Maryland Constitution, wherein it is said that "the General Assembly shall pass no special law for any case for which provision has been made by an existing general law."

The highest court of Maryland has considered this provision, and defined its meaning and effect. The Police Pension Cases, 131 Md. 315, 101 A. 786; *City of Baltimore v. United Railways & Electric Co.*, 126 Md. 39, 94 A. 378; *City of Baltimore v. Starr Church*, supra; *Littleton v. City of Hagerstown*, 150 Md. 163, 132 A. 773; *O'Brian Co. v. County Commissioners of Baltimore County*, 51 Md. 15; *Hodges v. Baltimore Union Pass Ry. Co.*, 58 Md. 603. There has been need, now and again, to develop close distinctions. Our endeavor in what follows is to extract the essence of the decisions and to give effect to it as law.

Time with its tides brings new conditions which must be cared for by new laws. Sometimes the new conditions affect the members of a class. If so, the correcting statute must apply to all alike. Sometimes the new conditions affect one only or a few. If so, the correcting statute may be as narrow as the mischief. The Constitution does not prohibit special laws inflexibly and always. It permits them when there are special evils with which existing general laws are incompetent to cope. The special public purpose will then sustain the special form. *City of Baltimore v. United Railways Co.*, supra. The problem in last analysis is one of legislative policy, with a wide margin of discretion conceded to the lawmakers. Only in cases of plain abuse will there be revision by the courts. *City of Baltimore v. United Railways Co.*, supra, at page 52 of 126 Md., 94 A. 378. If the evil to be corrected can be seen to be merely fanciful, the injustice or the wrong illusory, the courts may intervene and strike the special statute down. *City of Baltimore v. Starr Church*, supra. If special circumstances have developed, and circumstances of such a nature as to call for a new rule, the special act will stand. The Police Pension Cases, supra.

The distinction is neatly pointed by comparing two decisions. In *City of Baltimore v. Starr Church*, supra, the court condemned a special act as a merely arbitrary departure from the rule of uniform taxation. Declaration of Rights, art. 15. It held at the same time that the act was void under another section of the Constitution (article 3, § 33) because no evil had arisen, no circumstances had developed, to give even colorable grounds of reason for the adoption of a special rule. The Police Pension Cases, supra, show the picture from a different angle. There were general laws upon the statute books providing for the grant of pensions to members of the police force, not including matrons. A matron was dismissed for physical disability after many years of service. The Legislature, impressed by the hard-

ship of her position, passed a special act for her relief. The court took the view that here was a special case not provided for or considered in an existing general law, and so upheld what had been done. See, also, *O'Brian & Co. v. County Commissioners of Baltimore County*; *Hodges v. Baltimore Union Pass Ry. Co.*, applying a like rule.

(c) The statute is not repugnant to article 11A, the home rule article, of the Maryland Constitution: "Sec. 4. From and after the adoption of a charter under the provisions of this Article by the City of Baltimore or any County of this State, no public local law shall be enacted by the General Assembly for said City or County on any subject covered by express powers granted as above provided. Any law so drawn as to apply to two or more of the geographical subdivisions of this State shall not be deemed a Local Law, within the meaning of this Act. The term 'geographical sub-division' herein used shall be taken to mean the City of Baltimore or any of the Counties of this State."

The act of exemption is so drawn as to apply to two or more geographical subdivisions of the state, i. e., to Baltimore and Annapolis. It is thus within the powers expressly reserved to the General Assembly. . . .

They were plainly so intended.

4. We have assumed, without deciding, that the respondents, though without standing to invoke the protection of the Federal Constitution, will be heard to complain of a violation of the Constitution of the state.

Their standing for that purpose, at least in the state courts, is a question of state practice (*Columbus & Greenville Ry. Co. v. Miller*, 283 U.S. 96, 99, 51 S.Ct. 392, 75 L.Ed. 861; *Braxton County Court v. W. Va.*, 208 U.S. 192, 197, 198, 28 S.Ct. 275, 52 L.Ed. 450; *Stewart v. Kansas City*, 239 U.S. 14, 16, 36 S.Ct. 15, 60 L.Ed. 120), as to which the federal courts do not exercise an independent judgment.

The Maryland decisions proceed on the assumption that municipal corporations assailing a statute of exemption or other special legislation have an interest in the controversy which entitles them to be heard (*City of Baltimore v. Starr Church*, *supra*; *City of Baltimore v. Allegany County Com'rs*, 99 Md. 1, 57 A. 632), though the reports do not show that their interest was questioned.

In the absence of any argument to the contrary in behalf of the petitioner, we make the same assumption here.

The judgments are reversed.

NOTES

1. For discussions of the use of private legislation by Congress and the constitutional limitations thereon, see Notes, 47 Yale L.J. 712 (1940), 51 Yale L.J. 1358 (1942).

2. The article by Ford, "The Legislative Reorganization Act of 1946," 32 A.B. A.Jour. 741 (1946), contains a section on tort claims against the United States, setting forth in full the means by which they are handled under the Act.

3. Also on the Legislative Reorganization Act of 1946 see Gellhorn and Schenck, "Tort Actions Against the Federal Government," 47 Colum.L.Rev. 722 (1947).

YOUNG MEN'S CHRISTIAN ASSOCIATION OF SEATTLE
v. PARISH

Supreme Court of Washington, 1916.
89 Wash. 495, 154 P. 785, L.R.A.1916D, 272.

MAIN, J. This is an action brought for the purpose of restraining the county assessor of King county from listing for taxation certain real property. The trial resulted in a judgment dismissing the action. From this judgment, the plaintiff appeals.

The appellant, at the time the action was instituted, was the owner of lots 2 and 3 and the east half of lots 6 and 7, in block 21, of Boren's addition to the city of Seattle. This property fronted on the west side of Fourth avenue, in the city of Seattle, and extended from Madison street to Marion street. The appellant had for some years owned lots 2 and 3, and had erected thereon a six-story brick and concrete building, which is known as the Y.M.C.A. building. After this building had been erected, the association acquired two adjacent half lots on the south, facing Fourth avenue, and extending from the main building to Marion street. This latter property was, when acquired, and still is, improved by the east half of the former Stander hotel, a six-story brick and stone structure. Since its purchase by the association, it has been connected with the main building as an annex thereof, and is permanently partitioned off from the unacquired part of the Stander hotel. The entire property thus owned by the association is used for the various activities and departments of the Young Men's Christian Association.

The objects of the association, as set forth in its articles of incorporation, are: "The improvement of the spiritual, mental, social, and physical condition of the young men of Seattle by the support and maintenance of lectures, gospel services, libraries, reading rooms, gymnasium, recreation grounds, etc."

The county assessor of King county was asserting the right to list this property for purposes of taxation upon the tax rolls for the year 1913, when the present action was brought for the purpose of restraining such listing.

The controlling question in the case is whether the statute under which it is claimed the property is exempt from taxation is constitutional or unconstitutional. The statute, Rem. & Bal. Code, Sec. 9098, as amended by chapter 117 of Laws of 1913, p. 351, relating to taxation, after exempting certain other specified property, provides:

"Also all property of Young Men's Christian Associations . . . which shall be wholly used, or to the extent solely used, for the religious purposes of such association." 3 Rem. & Bal. Code, Sec. 9098.

It will be noted that this is an exemption to the association by name, with a limitation that only such of its property as is "wholly used," or

to the extent "solely used" for the religious purposes of such association, shall be exempt.

Section 2 of article 7, of the state constitution, after requiring that the legislature shall provide by law a uniform and equal rate of assessment and taxation upon all property in the state and prescribe such regulations by general law as shall secure a just valuation for the taxation of all the property, provides:

"That the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation."

Under this section of the constitution, all property within the state is subject to taxation, unless it falls within one of the classes mentioned in the constitution and is exempted therefrom by a general law. The question then arises,—Is the statute by which the property of Young Men's Christian Associations is claimed to be exempt a general or a special law? If it is a special law, obviously the attempted exemption is invalid under the constitutional provision quoted. If it is a general law, then it conforms to the constitutional requirement.

The authorities are in substantial harmony upon the rule by which a law is to be tested to determine whether it is general or special. A special law is one which relates to particular persons or things, while a general law is one which applies to all persons or things of a class. A law is general when it operates upon all persons or things constituting a class, even though such class consists of but one person or thing; but the law must be so framed that all persons or things constituting the class come within its provisions. 4 Words & Phrases (2d series), p. 635; *Budd v. Hancock*, 66 N.J.L. 133, 48 A. 1023; *State ex rel. Attorney General v. Miller*, 100 Mo. 439, 13 S.W. 677; *Sutherland, Statutory Construction*, Section 121.

In 4 Words & Phrases (2d series), p. 635, the rule is stated: A special law is one that relates to particular, as distinguished from a general law, which applies to all persons or things of a class.

The rule is stated in *Budd v. Hancock*, *supra*, as follows:

"A law is special in a constitutional sense when, by force of an inherent limitation, it arbitrarily separates some persons, places or things from others upon which, but for such limitation, it would operate. The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes that makes it special, but what it excludes. If nothing be excluded that should be contained the law is general. Within this distinction between a special and a general law the question in every case is whether any appropriate object is excluded to which law, but for its limitations, would apply. If the only limitation contained in a law is a legitimate classification of its objects it is a general law. Hence, if the object of a law have characteristics so distinct as reasonably to form, for the purpose legislated upon, a class by itself, the law is general, notwithstanding it operates upon a single object only; for a law is not general

because it operates upon every person in the state, but because every person that can be brought within its predicament becomes subject to its operation."

Many other authorities could be cited supporting the rule; but as the controversy upon this phase of the case is over the application of the law, rather than its statement, further citation in support of the rule seems unnecessary.

In applying the rule, this court in *Denver v. Spokane Falls*, 7 Wash. 226, 34 P. 926, held that an act of the legislature which attempted to confer upon certain municipal corporations which had previously undertaken to incorporate under an invalid law the right to incorporate under the statute without reference to the population, but solely by reason of their peculiar condition, was a special and not a general law. It was there said:

"As to such communities, is this a general or a special law? It is claimed by the learned counsel for the appellants that it is general, because it applies to all communities in the state similarly situated. But we think that cannot be said to be the exclusive test. If the operation and effect of a statute is necessarily limited to a particular class or number of persons or things, it is as much a special statute, whatever may be its form, as it would be if it applied to but one person or thing only."

In *Terry v. King County*, 43 Wash. 61, 86 P. 210, the court had under consideration a statute which specifically conferred upon King, Pierce, and Spokane, power to contract indebtedness for the purpose of purchasing armory sites and assisting in the construction of armories. No other counties or towns in the state were mentioned in the act. Nor was it possible for any other county, even though its population should equal that of the counties named, to come within its provisions. It was there held that the law was special and not general, citing the previous case of *Denver v. Spokane Falls* supra.

Applying the rule of law stated and its application as appears in the two cases last cited, to the facts in the present case, Was the statute exempting the Young Men's Christian Association general or special? The exemption covers the property of such associations wholly used, or to the extent solely used, for religious purposes of the association. If the property should not be devoted to a religious purpose, then it does not come within the exemption. The effect of the statute is to exempt only the property of Young Men's Christian Associations which is devoted to religious purposes. Under this statute, other property in the state devoted to religious purposes would not be exempt. The property of the class referred to in the statute is that devoted to religious purposes. The association is one organization which devotes property to such purposes. The property of other associations devoted to a religious purpose could not claim the exemption. The statute is special and not general, because it excludes from its operation the property of other organizations which is or may be devoted or set apart for religious purposes.

It would hardly be claimed that a statute exempting the church property of a particular religious denomination by name, and which thus would exclude from its provisions the church property of all other denominations, would be a general law. Likewise a statute which exmpts property of Young Men's Christian Associations only to the extent such property is devoted to religious purposes, as already stated, must necessarily exclude the property of other organizations and associations devoting property to the same purposes. The operation and effect of the statute is limited to one of the organizations which compose a class, and is therefore special. The case falls within the holdings of this court in the cases of *Denver v. Spokane Falls* and *Terry v. King County*, *supra*.

A number of cases are cited in the briefs where the property of Young Men's Christian Associations has been held exempt. In every one of the cases cited, with one exception, the exemptions were under statutes which did not exempt the property of the associations by name, but exempted all property by general language which was devoted to religious, benevolent, or charitable purposes. Had the statute in this state under which this case arose contained some such general language an entirely different question would be presented. The one case referred to as supporting an exemption where the statute applied to a Young Men's Christian Association by name was that of *Young Men's Christian Ass'n v. City of Keene*, 70 N.H. 223, 46 A. 186. In the state of New Hampshire, however, where that case was decided, there was no constitutional provision against the passage of a special law.

In reaching the conclusion that the statutory provision is unconstitutional, we have not overlooked the rule adopted by the previous decisions of this court that a law will be presumed constitutional and valid until the contrary clearly appears, and that it is the duty of the court to sustain the law unless its invalidity is so apparent as to leave no reasonable doubt upon the question. *State v. Somerville*, 67 Wash. 638, 122 P. 324; *State v. Pitney*, 79 Wash. 608, 140 P. 918. Notwithstanding this rule, we see no escape from the conclusion that the statute containing the exemption is special, and therefore, under the constitution, is invalid.

The judgment will be affirmed.

STATE ex rel. ATTORNEY GENERAL v. BOROUGH OF
SOMERS POINT

Court of Errors and Appeals of New Jersey, 1889.
52 N.J.L. 32, 18 A. 694, 6 L.R.A. 57.

DEPUE, J. The borough of Somers Point was incorporated under an act of the legislature, entitled "An act for the formation of borough governments in seaside resorts," approved March 29th, 1878. Pamp. L., p. 232; Rev.Sup., p. 942. The object of the information filed by the

attorney general ex officio is to test the constitutionality of the act under which this municipal corporation was organized.

The contention against the validity of this corporation is founded upon the prohibitory clauses contained in paragraph 11, section 7 of article IV, of the constitution.

The first section of the act provides, "that the inhabitants of any township, which is a seaside resort for summer visitors, embracing within an area not to exceed two square miles taxable property of the amount of one hundred thousand dollars or more, may become a body corporate and politic, in fact and in law, under the title of the borough of, &c., whenever, at a general or special election called for that purpose, it may be so decided by a majority of the votes of the electors of such township or part of a township."

Section second provides that such election shall be called by one of the chosen freeholders of the township in which the district proposed to be incorporated is situate, on written application by persons representing one-tenth of the taxable real estate in such district.

The other sections of the act provide for the election of a mayor and members of a common council and officers, such as clerk, officers of election, assessors, collectors, chosen freeholders, surveyors of the highways, &c., with the powers and duties of such officers in any of the townships of this state. The act also provides for ordinances laying out, opening and improving streets and sidewalks, erecting public buildings, water and gas works, and for the exercise of all those governmental functions which usually pertain to cities and towns. The powers granted to municipalities organized under this act are found in a series of acts contained in the Supplement to the Revision, from pages 942 to 950. They are equal to, and, in some respects, exceed, the powers conferred upon the largest cities in the state.

As applied to legislation of this character a law is special or local, as contradistinguished from general, in the sense of the prohibitory clauses in this paragraph of the constitution, which embraces less than the entire class of persons or places to whose condition such legislation would be necessary or appropriate, having regard to the purpose for which the legislation was designed. A law which so particularizes, and, by such means, is restricted in its operation to persons or places which do not comprise all the objects which naturally belong to the class, is special or local, within the meaning of the constitutional interdiction.^{*}

The act in question is limited to a specified location—situation on the seaside. It is further restricted to places so situate which are the resort for summer visitors, and is applicable only to places within these limitations in which taxable property to an amount of \$100,000 or more is embraced within an area not to exceed two square miles.

Municipal powers and franchises such as this act confers are as appropriate to places in an inland situation as to those located on the seashore, and are as suitable to localities inhabited or frequented by other individuals as to resorts for summer visitors. The act leaves popula-

tion entirely out of view. The machinery to obtain the organization of a borough may be set in motion by "persons representing one-tenth of the taxable real estate in such district," without regard to residence; and if there be population enough to furnish a clerk and two judges of election, who shall be legal voters in the district, the requirements of the act are complied with. If taxable property irrespective of population be a proper classification on which to base a grant of municipal powers of the scope of those granted by this act, such property presents the same characteristics, wherever situate, as it possesses when located in seaside places frequented by summer visitors.

This law is so plainly a special and local law within the constitutional interdict that argument and citation of authorities are unnecessary.

Judgment of ouster from the franchises, &c., should be entered.

STATE ex rel. BOARD OF COURTHOUSE & CITY HALL COM'RS v. COOLEY

Supreme Court of Minnesota, 1893. 56 Minn. 540, 58 N.W. 150.

COLLINS, J. By the provisions of Sp. Laws 1887, ch. 395, a board of commissioners was created with power to acquire certain land for the purpose in the city of Minneapolis and thereon to erect a building to be used, when completed, by the county of Hennepin and said city, jointly, for a county courthouse and a city hall. The issuance of bonds in a specified amount was authorized, that money might be had with which to pay for the land and erect the building. These bonds were to be countersigned by the county auditor. They were issued and sold, the land was acquired, and work on the building progressed until about January 1, 1893. It was then unfinished, and, not having funds sufficient to complete it in accordance with the plans, interested parties secured the passage of an act at the legislative session held in 1893, entitled "An act to provide additional means for completing and furnishing the courthouse and city hall building now in process of erection in the city of Minneapolis, and to authorize the issue and sale of bonds therefor." These bonds were to be in the same general form as those authorized by the statute of 1887, and their issuance and sale were to be governed by the express provisions of that act. Upon presentation, the county auditor, this defendant, refused to countersign these bonds, and this proceeding in mandamus was brought to compel him to perform this alleged duty.

The defendant justifies his course upon the ground that the enactment of 1893 is void, because interdicted by the Constitution, Art. 4, Section 33, relative to special legislation. This section, it must be noticed, was adopted by vote of the people at the general election held in November, 1892, and took effect prior to the passage of the act authorizing the issuance and sale of the bonds in controversy. The sole question before us is whether the legislation upon which the validity of these proposed obligations depends was obnoxious to the constitutional provision. That portion of the section upon which defendant relies

reads as follows: "Sec. 33. In all cases where a general law can be made applicable, no special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and, as such, shall be judicially determined, without regard to any legislative assertion on that subject. The legislature shall pass no local or special law regulating the affairs of or incorporating, erecting, or changing the lines of any county, city, village, township, ward, or school district, or creating the offices, or prescribing the powers and duties of the officers of, or fixing or relating to the compensation, salary, or fees of the same, or the mode of election or appointment thereto, * * *: provided, however, that the inhibitions of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated.

"The legislature may repeal any existing special or local law, but shall not amend, extend, or modify any of the same."

1. The first paragraph of the section is entirely unlike anything that has previously appeared in the fundamental law; while the second, in reference to specific subjects, respecting which there shall be no local or special legislation, is but an enlargement of section 33, prohibiting the enactment of special or private laws relative to various enumerated subjects, as that section was originally adopted and made a part of the constitution in 1881.

But at this time it is not necessary, and would be unwise, to consider or determine the full purpose and scope of the first paragraph, the opening clause, of section 33 as it now stands. It is sufficient to say that we regard it as independent of the sentence which follows, and that the specified prohibitions enumerated in the second sentence or clause are not subject to or modified by the first, which forbids the enactment of special laws where general laws can be made applicable.

2. It seems obvious that the last paragraph of the section, prohibiting the amendment, extension, or modification of existing special or local laws, applies to all special or local laws on all subjects as to which special or local legislation has been prohibited, namely, the various subjects distinctly enumerated in the preceding paragraph. No other effect can be given to this portion of the section.

3. It is also obvious that the case covered by the act of 1893 is not one to which a general law could have been made applicable. A special board of commissioners had been designated to perform certain specified duties, had been authorized to cause certain bonds to be issued and sold, and with the proceeds to purchase a particular tract of land, and to thereon erect a public building for the joint use of the county and city. The land had been secured, and the building partly completed, when, more money being needed, the issuing of additional bonds, to be the obligations of the county, only, was authorized. The situation was so peculiar that no law, it would seem, could have been framed which would have covered it, and still be a general law in any sense. Such a law might have been general in form, if enacted, but, of necessity, would have been special in its operation, and this would

have violated the constitutional inhibition as much as if it were special in form. *Nichols v. Walter*, 37 Minn. 264, 33 N.W. 800.

4. This brings us to the inevitable proposition that, if the act of 1893 falls within any of the specific prohibitions enumerated in the second paragraph of the section, its validity cannot be upheld, and this remark would apply to the original law of 1887, had the existing provision in the constitution been in force when it was enacted. In this connection we have simply to inquire whether this law regulates the "affairs" of a county or city; and the statement heretofore made as to the nature of the original act and that of 1893, which was, in effect, nothing more than an amendment, fully answers the inquiry. Under the law as it stood prior to the legislation of 1887 it was the duty of the county, through its officers, to provide a courthouse, if one was needed. 1878 G.S. ch. 8, Section 86. But this could not have been undertaken jointly with the city. *Borough of Henderson v. County of Sibley*, 28 Minn. 518, 11 N.W. 91. And while our attention has not been called to any charter provision which would authorize the city officials to erect a city hall, their power to provide proper city offices could not well be doubted. Yet by the act of 1887 the duty and power in these matters was taken away from the county and city officers, and conferred upon a special board without the approval of the people of either county or city. We need spend no time in demonstrating that when the legislature authorized and directed the issue and sale of the bonds of each of these municipalities and the erection of a public building for their joint use, to be paid for by taxes which were directed to be levied for that purpose, it attempted a very noticeable regulation of the "affairs" of a county and of a city. Special acts which relate to the government of a municipality are excluded by the words "regulating the internal affairs" of such municipality in the constitution of the state of New Jersey, and it has been held in that state that any attempt to deprive a city of its control of matters which are the subject of its control incidentally, or which have been expressly granted, or to confer upon it additional powers, or to change the manner of exercising the powers already existing, is a regulation of such internal affairs, and inhibited by the constitution. *State ex rel. v. Mayor &c. of Newark*, 40 N.J.L. 71; *Bingham v. Mayor &c. of Camden*, Id. 156; *Freeholders of Hudson Co. v. Buck*, 51 N.J.L. 155, 16 A. 698.

The result of this litigation may prove very unfortunate in the present condition of the building in question, but under the constitutional provision the statute of 1887 could not have been lawfully enacted, and that of 1893 is clearly within the prohibition we have discussed.

Judgment reversed.

On Reargument.

COLLINS, J. When the case was submitted at the last term of this court, counsel for relator conceded, or at least did not deny, that the act under consideration (Laws 1893, ch. 243) was special in operation, as well as in form; but his contention was (1) that it was not an act

"regulating the affairs of any county or city," within the meaning of the Constitution, Art. 4, Section 33, as amended in 1892; but, if it was, (2) that the specific prohibitions enumerated in the second clause of that section are qualified by the provision in the first clause limiting the prohibition against special legislation to cases where a general law can be made applicable. Our decision on both those points was adverse to the relator; and then, assuming, what relator conceded, that the law was special, the conclusion necessarily followed that it was invalid. Hence, if the result should have been different on other grounds, the responsibility can hardly be said to be on the court.

The court is still unanimously of opinion that upon both of the questions presented on the former argument the decision was right; but now, on the reargument, we are confronted, for the first time, with the question whether the act is in fact "special," within the meaning of the constitution.

It may be stated as settled law that a constitutional prohibition against special legislation on a particular subject does not deprive the legislation of the power to divide it into classes, and apply different rules to the different classes, provided only that it adopts a proper basis of classification; and the law is none the less general, in the constitutional sense, because it applies only to one of these classes. To illustrate, the provision against special legislation regulating the affairs of a city does not require that all laws on that subject shall apply alike to all cities in the state, and thus prevent their division into classes for legislative purposes. Provisions against special legislation are to be found in the constitutions of numerous states, some of them having been in force for over forty years, and the courts have uniformly recognized the right of the legislature to divide a subject into classes, the only question generally being whether it had adopted a proper basis of classification. No court has recognized the existence of this power to classify more distinctly than we have. In *Nichols v. Walter*, 37 Minn. 264, 33 N.W. 800, and in *State ex rel. v. Spaude*, 37 Minn. 322, 34 N.W. 164, this court, in both cases speaking through Chief Justice Gilfillan, said that "it must be conceded that when a general law, uniform in its operation, is required, the law is none the less general and uniform because it divides the subjects of its operation into classes, and applies different rules to different classes. For the purposes of efficient and beneficial legislation, it is often necessary to do so." And again: "A law, to be general, need not operate alike upon all the inhabitants of the state, or all the cities or all the villages in the state. To require this would be utterly impracticable. A law is general which operates alike upon all the inhabitants or all the cities or all the villages or other subjects of a class of such subjects. That for the purpose of legislation it may be necessary, and that the legislature may make such classification, is undoubted." The same doctrine is repeated in *State ex rel. v. Sheriff of Ramsey Co.*, 48 Minn. 236, 51 N.W. 112.

Hence a "general law" does not import universality in the subject or operation of the law. "General" is defined by Webster as relating to a

genus; pertaining to a whole class or order. The line of demarcation between general laws and special laws often seems indefinite and difficult to draw; but, if the principles upon which the distinction rests are kept in mind, the difficulty is not nearly so great as might seem. A law is general, in the constitutional sense, which applies to and operates uniformly upon all members of any class of persons, places, or things requiring legislation peculiar to itself in matters covered by the law; while a special law is one which relates and applies to particular members of a class, either particularized by the express terms of the act, or separated by any method of selection from the whole class to which the law might, but for such limitation, be applicable. And in this connection there should be kept in mind the distinction between "public" and "private," and "general" and "special", as the latter terms are used in these constitutional restrictions; for special legislation in the constitutional sense may be either public or private.

The principal as well as most difficult question is, what constitutes a class, or what constitutes a proper basis of classification, for legislative purposes. We do not intend, neither is it necessary for the purposes of this case, to go into anything like a full discussion of this subject of classification, or to do more than to state a few general rules. A very able and exhaustive discussion of the whole subject will be found in the *American Law Register & Review* for September, 1893, in one of a series of articles by Charles C. Binney, Esq., on "Restriction upon Local and Special Legislation in the United States."

It should be noted that in determining whether the legislature has adopted a proper basis of classification, under these constitutional restrictions, the courts have uniformly applied the same tests which they apply in determining whether a law is what is commonly called "class legislation;" that is, legislation which selects particular individuals from a class, and imposes upon them special burdens, from which others of the same class are exempt, and thus denies them the equal protection of the laws. All class legislation is special legislation, although all special legislation is not class legislation, in that sense of the term. The evils aimed to be prevented in the two instances are somewhat different, but the test of the propriety of the method of classification is the same in both.

Hence, in the cases cited, this court, in determining whether an act was "special legislation," applied precisely the same test to the mode of classification which it applied in determining whether an act was "class legislation" in *Lavallee v. St. Paul M. & M. Ry. Co.*, 40 Minn. 249, 41 N.W. 974; *Johnson v. St. Paul & Duluth R. Co.*, 43 Minn. 222, 45 N.W. 156; and numerous other cases.

The fundamental rule is that all classification must be based upon substantial distinctions, which make one class really different from another. As was said in *Nichols v. Walter and State ex rel. v. Spaude*, it must be based upon some natural reason,—some reason suggested by necessity, by some difference in the situation and circumstances of the subjects placed in the different classes, suggesting the necessity of different legislation with respect to them. By necessity is meant prac-

tical, and not absolute, necessity; but the characteristics which will serve as a basis of classification must be substantial, and not slight or illusory.

For example, distinctions due merely to pre-existing repealable special legislation would not, of themselves, constitute a proper basis of classification, for that would tend to perpetuate the very peculiarities which the constitution was designed ultimately to remove. In such cases the legislature can always remove the distinction by merely repealing the special legislation. Neither can classification be based upon existing circumstances only, or those of limited duration, except where the object of the law itself is a temporary one. This rule applies peculiarly to cases where the membership of the class may change in the future, so that new members may acquire the characteristics of the class, and present members lose them. There the law must provide for the future, so that the classification may remain permanent, although the membership of the class may change. Examples of acts obnoxious to this rule are laws classifying cities on the basis of present population.

Cobb v. Bord, 40 Minn. 479, 42 N.W. 396, is an example of the cases where, in a law intended to provide merely for temporary objects, existing or temporary circumstances may be a proper basis of classification. It may be added in this connection that the duration of an act has nothing to do with its character as general or special. If it be general in its application while it continues in force, it is none the less general because limited in duration.

Another rule is that the characteristics which form the basis of the classification must be germane to the purpose of the law; in other words, legislation for a class, to be general, must be evident connection between the distinctive features to be regulated and the regulations adopted. An illustration of a law obnoxious to this rule would be the case supposed in *Nichols v. Walter*, *supra*, where towns situated on rivers are made a class, for the purpose of conferring on them special powers with reference to maintaining schools.

Another rule is that, to whatever class a law applies, it must apply to every member of that class. As was said in *Johnson v. St. Paul & Duluth R. Co.*, *supra*, not only must the law treat alike, under the same conditions, all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions; and as already suggested, if the basis of classification is such that new members of the class may come into existence, the law must be so framed as to include them when they arise. *Nichols v. Walter*, *supra*, furnishes an instance of a law obnoxious to this rule.

Another proposition that may be laid down as beyond question is that, if the basis of classification is valid, it is wholly immaterial how many or how few members there are in the class. One may constitute a class, as well as a thousand, although, of course, the fewer the members, the closer the courts will scrutinize the act to see that it is not an evasion of the constitution.

An illustration of this proposition may be found in acts classifying cities by population. The mere fact that there is only one city, and there may never be another, having the requisite population to belong to a class, will not render the law special. The last proposition to which we will refer is that the character of an act as general or special depends on its substance, and not on its form. It may be special in fact, although general in form; and it may be general in fact, although special in form. The mere form is not material. To illustrate, suppose mountains were one of the subjects on which special legislation was prohibited, and that there was only one mountain in the state; a law referring to that mountain by name would be special in form, but general in fact, according to all the rules.

Or suppose that special legislation was prohibited with reference to the police regulation of the shores of the great lakes; would it be claimed that a law was special in fact because, by its terms, it applied only to Lake Superior? Or would it be any less general because, by its terms, its operation was limited to the counties of St. Louis, Lake, and Cook? Most certainly not.

In most, if not all, of the adjudicated cases, the laws under consideration were general in form, but were assailed as being special in fact; but the test must be the same when the law is special in form, but is claimed to be general in fact.

It only remains to apply these principles to the act under consideration. It is unnecessary to state at length the provisions of the special law of 1887, as these were fully set out in the former opinion; and the law will speak for itself. Under this law, the commissioners had acquired title in themselves to the designated site for a city hall and courthouse. By the provisions of the act, they were to retain this title until the building was completed, and until they had adjusted the accounts between the city and county, in order to charge each with its proper share of the entire cost; and then they were to convey to each its respective share of the property. They had gone on and partially constructed the building, and had expended all the funds thus far provided for that purpose, and, in doing so, had expended two-thirds of these funds on the part of the building designed for the use of the county; and, as the matter stood, nobody but the board had authority to adjust this inequality in the accounts, and that only on the completion of the building. Obviously, the board could not complete the building without more funds, and these could not be obtained without further legislation. The courts might, perhaps, have granted relief by way of adjusting the accounts between the city and the county, and directing a conveyance to each of a part of the unfinished structure; and then, perhaps, steps might have been taken by the city and county, respectively, by which each could finish its part of the structure so as, in the end, to secure a city hall and courthouse in some form. But the present physical conditions were such that, without additional legislation, the building could never be completed; and the difficulties in the way of carrying it on to completion on any other plan than as a joint enterprise were very serious, if not well nigh insuperable. The difficulty

could not be removed by repealing the special act of 1887, for the uncompleted building and the outstanding uncompleted contracts for material and construction would still remain. No legislation more general in fact than the act of 1893 would fully meet the case. If that act had been general in form, it could not be made more general in fact, and still fully cover the situation. Such, in short, was the condition of things under which the act of 1893 was passed, and which it was designed to meet.

It seems to us that, if the other essentials of a proper classification exist, this condition of things constituted such substantial distinctions as, in the language of *Nichols v. Walter*, supra, "to suggest the necessity of different legislation with respect to it." If not, then the legislature is virtually deprived of jurisdiction to legislate on the subject in any form,—a conclusion not to be lightly reached.

Inasmuch as courts will in such cases take judicial notice of all facts bearing on the constitutionality of the law, we know that this is the only case of the kind—the only member of the class—which now exists, or ever can exist; for, under the constitutional amendment of 1892, no other special law like that of 1887 can be enacted. Hence the classification is complete.

Again, the legislation (providing funds to complete the building) is confined to matters connected with and peculiar to the distinctive features of the case; or, in the language of the rule, the characteristics forming the basis of the classification are germane to the purpose of the law.

Finally, as we have already seen, the facts that the law is special in form, and that it applies to only a single object, or, in the language of another rule, that the class consists of only one member, are not important.

Our conclusion is that the act, although special in form, is general in fact, within the meaning of the constitution.

Judgment affirmed.

LEIGHTON v. CITY OF MINNEAPOLIS

Supreme Court of Minnesota, 1946.
222 Minn. 523, 25 N.W.2d 287.

LORING, CHIEF JUSTICE. This action was brought by a taxpayer and freeholder against the city of Minneapolis, the auditor and the treasurer of Hennepin county, and the board of park commissioners of the city, in behalf of plaintiff and all others similarly situated, for a declaratory judgment to determine whether L.1945, c. 486, violates Minn. Const. art. 4, §§ 33, 34, and 36. The act authorizes and empowers each city of the first class of the state now or hereafter having a population of 450,000 inhabitants or more, and now or hereafter brought under a home-rule charter, to levy annually on real and personal property of said city a tax not exceeding one and one half mills on each

dollar of the assessed valuation of said city for the "purpose of acquiring, equipping, maintaining, operating and governing playgrounds and other recreational facilities and conducting recreational programs throughout said City for the public use as a part of the system of parks and parkways of said City," The act requires the imposition of that tax to be made through the city council or chief governing body and its board of park commissioners. Defendants answered, asserting the validity of c. 486 and that classification of cities therein is a valid classification, setting forth, among other things, the greater proportional expense and necessity therefor which exist in cities of that classification over that which exists in smaller cities.

The case was tried by the court, which made findings of fact and conclusions of law in favor of defendants. From the judgment entered, plaintiff has appealed.

The case presents for decision the same questions that were presented to this court in the companion case of *Leighton v. City of Minneapolis*, Minn., 25 N.W.2d 263. All of those questions, except whether population is germane to the subject matter or purposes of this act, are disposed of by the discussion in the companion case. The sole question remaining for decision here is, therefore, whether the classification of cities of 450,000 inhabitants is a classification germane to the subject matter and purposes of the act. The court took considerable evidence and made findings with reference to the matter of classification. It found:

"V.

" . . . That the census report of the United States for the year 1942 shows that the per capita expense of the activities described in said Chapter 486 are much larger in the cities of 450,000 or more inhabitants than in smaller cities, and such expense increases with the size of the city and with the density of population. That said census figures show that all per capita cost of city government increases as the size of the city increases. The court finds that the density of population per square mile in Minneapolis is one and two-thirds times that of St. Paul and five times that of Duluth, St. Paul and Duluth being the other two cities of the first class as described in Section 36, Article 4 of the Constitution. That at the time said Section 36 was adopted, Duluth's population was less than 50,000 inhabitants. That the need for recreational facilities increases with the size of the city and the resulting increase in density of population.

"VI.

"That the tax base in Minneapolis has decreased from \$330,858,640.00 in 1932 to \$266,820,368.00 in 1945 when the act was passed. The court finds from the evidence submitted that the labor cost of the Park Board of the City of Minneapolis increased from 68¾c per hour in 1932 to 96½c per hour in 1945, and that the rate has been set at \$1.05 per hour for 1946, and the labor cost represents over seventy percent of the entire cost of operating the recreational activities of the City of

Minneapolis. That the population of Minneapolis increased from 464,356 in 1930 to 492,370 in 1940, and that the population in 1945, assuming the rate of increase for the last ten years was continued and allowing nothing for the increase in population due to war production, was approximately 497,500.

"VII.

"The court finds that there has been an increasing demand during the years since World War I for more recreational facilities. That many petitions from various parts of the city have been presented to the Board of Park Commissioners asking for additional playgrounds and more recreational facilities, a large number of which have had to be denied for lack of funds. There was some evidence introduced as to the increase in the amount of juvenile delinquency.

"VIII.

"From the testimony presented, and from two important surveys made a considerable number of years apart, the last one being in 1944, it appears that the main activity and practically the only activity of the Board of Park Commissioners is various forms of recreation. That the general park fund arising from a levy of one and one-half mills, which is authorized by the charter, in addition to the amount authorized by the law in question, has in recent years all been used for maintaining recreational activities, and the recreational facilities in the City of Minneapolis, and that due to the decreasing tax base, the increase in population, and the increase in labor cost, the City of Minneapolis has had in effect less and less funds to take care of more and more people with the result that in recent years there has had to be a radical curtailment of service to the public in maintaining recreational facilities and supervision thereof.

"IX.

"There are twenty-two lakes and lagoons in the City of Minneapolis, the waters and shorelines of which have all been taken into the park system of the City of Minneapolis, except part of the shorelines of Cedar Lake, and the Park Board has maintained recreational activities on the shores and on the lakes as far as its funds will permit.

"X.

"It therefore appears from the facts proven in this case and by the facts of which the court will take judicial notice that the reasonable demand of the citizens of said city for increased recreational facilities cannot be furnished by the said Board of Park Commissioners, and that each year the Park Board has less and less money to carry on the said activities with the continued demand for more and more of the same, . . ."

These findings are not challenged as unsupported and could not be attacked here, because there is no settled case. We would take judicial

notice of substantially all of them. It is too obvious to require discussion that the facts as found by the trial court are amply sufficient to sustain the classification made by the legislature.

The judgment is affirmed.

NOTES

1. Two articles concerned with the problems of special legislation peculiar to Minnesota, are Anderson, "Special Legislation in Minnesota," 7 Minn.L.Rev. 133, 187 (1923), Dawley, "Recent Developments in Special Legislation and Municipal Home Rule in Minnesota," 16 Minn.L.Rev. 659 (1932).

2. As may be seen from the principal cases, the problem of special or general legislation is generally reduced by the courts to a question of classification. In *Board of Education of San Francisco v. Alliance Assurance Co.*, 159 F. 994, 999 (1908) the court said: "These general rules have been aptly stated thus: (1) An act applying uniformly to the whole of any single class of individuals or objects, where the classification is founded upon some natural intrinsic or constitutional distinction, is a general law. (2) In order to make the law general, the classification must not be arbitrary, but must be founded upon some natural intrinsic or constitutional distinction, and some reason must appear why the act is not made to apply generally to all classes. (3) Although a law is general when it applies equally to all individuals of a class founded upon a natural intrinsic or constitutional distinction, it is not general if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." The court then continues: "There must be some relation between the differences in class and the difference in the rule of practice involved." That is to say, in a procedural act there must be something in the nature of the action to justify the distinction. See also *In re Becker's Estate*, 20 Cal.App. 513, 129 P. 795 (1912); *In re Elm Street in the City of New York*, 240 N.Y. 72, 158 N.E. 24 (1927).

3. That the classification must be based upon some substantial difference, see *Cooper v. State*, 226 Ala. 288, 147 So. 432 (1933); *Prescott Courner v. Moore*, 35 Ariz. 26, 274 P. 163 (1929); *Crews v. Lundquist*, 361 Ill. 193, 197 N.E. 768 (1935).

4. Statements to the effect that the classification must have some relation to the subject on which the legislation is effective are found in *United States v. Mullendore*, 74 F.2d 286 (1934); *Knowlton v. Walton*, 189 Ark. 901, 75 S.W.2d 811 (1934); *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705 (1929).

5. Read, "Congestion in the Minnesota Legislature Caused by Requirements of Local Government", 23 Minn.Munic. 405 (1938), says:

"Special legislation has resulted in evils in state legislative practices since long before the Civil War, and Minnesota did not escape from them. As a consequence the Constitution was amended in 1881 and again in 1892, resulting in the present Sections 33 and 34 of Article IV. By a line of decision commencing with the well known *Cooley* case in 1893, the Supreme Court has enabled what are in effect special laws to be enacted under the guise of classified general laws. . . .

"Prior to the 1892 amendment two-thirds of all statutes passed in Minnesota were special laws. As compared with that situation, a survey of the legislation of the last five regular sessions, 1929 to 1937 inclusive, shows that out of a total of 2,185 acts comprised in the session laws, 653 or approximately thirty per cent were in substance though not in form special. Most of the laws in that thirty per cent were so classified as to be unassailable on constitutional grounds, but most of them are decidedly objectionable on other bases; they crowded the calendar and diverted

the time and attention of legislators from matters of statewide concern and importance.

"Grouped according to subject matter, these special laws from 1929 to 1937 included: (a) 179 dealing with municipalities; (b) 393 with counties; (c) 83 with courts; (d) 61 with school districts; and (e) 38 with miscellaneous matters. Classifications under group (a) were either as permitted by Section 36 of Article IV of the Constitution or some sub-classification thereof. Classifications within group (b) comprised a great variety, mostly combinations of population, area and assessment values, and reflected both artifice and ingenuity. Analysis of the statutes in group (b) which contains approximately fifty-five per cent of all special laws, shows: the majority dealt with salaries of county officers or miscellaneous matters of a distinctly administrative or managerial character, a few authorized bond issues, a few granted special privileges, and a very few enacted what could properly be called rules of law. Obviously, government of the state cannot be carried on unless some law-making agency enacts this sort of special legislation. But owing to the local character of the matters covered and the varying conditions and needs of different localities, and owing to the serious burden and handicap which state legislators testify is thus imposed on them, it is a grave question whether it is either desirable or necessary that the state legislature should continue to do it. Should not local governing bodies handle this kind of business themselves?

"As Professor William Anderson has pointed out on several occasions, on the whole municipal home rule in Minnesota has worked satisfactorily and has operated to reduce considerably the amount of special legislation concerning municipalities. However, with regard to the 179 classified laws applying to cities and towns from 1929 to 1937, examination leads to the conclusion that pressure upon the Legislature to enact most of them was the consequence of lack of sufficient power in the charters. Only a few of them appear to bear on their faces signs that they were taken to the Legislature because their proponents were reluctant to run the risk of opposition to their passage by the people of the localities to which they applied. It seems to be a safe inference that pressure on the legislature for enactment of special laws concerning municipalities can be relieved (1) by amending Section 36 of Article IV to facilitate amendment of home rule charters; (2) by amending the general laws applying to villages and cities which have no home rule so as, with proper safeguards, to increase their powers; and (3) by placing some restriction upon the legislature with respect to the process of enactment of laws classified according to Section 36.

"Study of the classified acts applying to counties indicates that pressure to enact them results from insufficient power in the county boards and an inevitable inability to adapt the provisions of the general laws governing counties to the various requirements peculiar to each of many different types of localities within the state. It seems to be plain that the general laws governing counties should be amended so as to give county boards greater power than they have now, particularly with regard to county appropriations and salaries. Proper safeguards must, of course, be devised. No real solution of the problem seems likely, however, without setting up at least some measure of county home rule. . . ."

SECTION 7. UNIFORM LAWS

REPORT OF THE MINNESOTA BOARD OF COMMISSIONERS
ON UNIFORM STATE LAWS TO THE MINNESOTA STATE
LEGISLATURE AT ITS 1933 SESSION

I.

National Conference of Commissioners on Uniform State Laws

The statute . . . (Minn.Laws 1911, c. 68) prescribes as follows:

"It shall be the duty of said board to examine the subjects . . . upon which uniformity is desirable; to confer with the commissioners appointed for the same purpose by other states in drafting uniform laws to be submitted for approval and adoption by the several states; and said board of commissioners shall meet annually with the conference of commissioners on uniform state laws for the promotion of uniformity of legislation in the United States, and join with it in such measures as may be deemed by the said board most expedient to advance the objects of said conference."

The Conference of Commissioners on Uniform State Laws referred to in the above statute is now known as the "National Conference of Commissioners on Uniform State Laws." It is an organization effected by commissioners appointed by the various states for the promotion of uniformity of legislation in the different states on all subjects where uniformity is deemed desirable and practicable. Its conferences are held annually at the place of meeting of the American Bar Association and immediately preceding, and its proceedings are briefly reported in the American Bar Association Report, and they are more fully reported in the annual volume of its own proceedings.

The organization drafts bills to make uniform the laws of the different states on various subjects on which uniformity seems practicable and desirable, and recommends them for adoption by the various legislatures.

The National Conference is an organization, legislative in character, in which each of the forty-eight states and five territories is represented by three or more legislative members. Its work is confined to the drafting of model uniform acts for submission to the respective state legislatures. Its 160 or more delegates are appointed on standing and special committees for investigation and report to the general conference; and when the recommendation of a committee is adopted favoring the drafting of a uniform act upon a given subject, the best special talent in the country is enlisted to draft a tentative model act. The tentative act is then submitted to the members and to the country at large for criticism and amendment; and, if it does not meet with general satisfaction, is redrafted and resubmitted, until a final draft is at length produced that meets the general

requirements of a model uniform act. These uniform acts are also approved by the American Bar Association.

One of the best recommendations of the Uniform Acts is the fact that with . . . 580 enactments, no state has ever repealed any Uniform Act which it has once enacted. The acts show their real value by the way in which they meet the test of actual experience and use.

The Uniform Acts . . . approved by the National Conference, are by it recommended for passage in all the states and are also approved by the American Bar Association.

III.

Movement for Uniform State Laws and Their Advantages. Uniformity and Comity. Interstate Compacts.

The natural growth of diversity in the laws of the various states in the nineteenth century was developing to be a serious handicap to the trade and commerce of the country and undesirable in other ways. It was felt that there should be an organization in which the states would all be represented, to consider subjects where uniformity of law was desirable and frame uniform or standard Acts for the states to adopt, and that this would promote uniformity of state laws. As a result, in 1890, the American Bar Association passed a resolution recommending that each state pass a law for the appointment of commissioners to confer with commissioners from other states on the subject of uniformity in the laws of the states. New York was the first state to pass such a law, and provide State Commissioners to promote uniformity. In 1892 the first National Conference of Commissioners on Uniform State Laws was held, at which nine states were represented. An annual meeting has been held in each year since then, the number of states represented increasing; and since 1912 all the states, territories and insular possessions have been officially represented. Minnesota joined the National Conference by the Act of 1911 (Chapter 68, Laws 1911) above referred to.

The Uniform Acts are drafted to serve as well framed legislation as well as to promote uniformity. They represent the best legislative thought in the particular subjects covered. The Commercial Acts, for example, put in well arranged statutory form specific parts of the commercial law, thus giving to business and commerce clear and definite statements of the law in subjects where those qualities are specially desirable, and avoiding the uncertainty and difficulty of ascertainment of the common law, as well as furnishing uniformity. But they do something more, they are modern and up-to-date as well as clear and orderly. They follow the best considered of the more recent cases in stating the law, and indeed sometimes follow mercantile thought in going beyond the decided cases and making desirable changes in the law, which is the proper function of legislation. The need for uniform state laws and their nature are more fully discussed in our 1931 Report on pages 6 to 12.

The advantages of the Uniform Acts may be summarized as follows:

(a) They furnish well drafted models on important subjects, providing good laws for the states to adopt. The experience of men familiar with the laws of all states is utilized to frame the best possible law.

(b) They furnish the advantages of uniformity of law in the states, which could be secured in no other way.

(c) They save the states from federal encroachments by providing to the people the benefit of uniform laws without the need of having the Federal Government step in and extend its activities, correspondingly reducing those of the states. . . .

The Uniform Acts are framed with a view to the general welfare of the people at large, and do not appeal to any special interest. The weakness of our cause in not appealing to any special interest should be its strength in the legislature, and by recognizing the immense importance of the cause of uniform state laws, it can render the state a great service.

Uniformity and Comity

The strength, prosperity and happiness of the United States depend in large degree upon its unity, upon close relations and easy communication and trade between the different states. Uniform laws, like a uniform language, help greatly to bind the country together and make easier the dealings between the people in different sections.

However comity in state laws is necessary, as well as uniformity, in order to secure the essential facility of interstate trade and communications. "Comity" is used here in a broad sense to mean laws friendly and accommodating to the other sister states and not hostile, including of course the technical meaning of "comity" in conflict of laws, as the recognition and enforcement of rights acquired under the laws of another state. Thus if each state adopted laws that were hostile to the other states, interstate relations would be disrupted although such hostile laws were uniform in character. Much of comity in state laws is guaranteed by the United States constitution, there being a wide range of hostile laws which a state cannot constitutionally enact. But there remains a considerable scope for the exercise of comity within permissible state legislation. A number of the Uniform Acts have this principle of comity particularly in view. These include the Uniform Foreign Executed Wills Act, Foreign Probated Wills Act, and Proof of Statutes Act, providing respectively for recognizing the validity of a will when valid under the law of the state where executed, or of the testator's domicile, for admitting a will to probate on presentation of an authenticated copy of the will and of its probate in another state, and for proving the statutes of another state by presenting a printed copy thereof purporting on its face to be published under the authority of the other state.

In some cases the comity is reciprocal only. Thus in the Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases the right granted to another State to compel attendance of witnesses found in the State, depends on the other State reciprocating and granting a similar right.

At the present time the National Conference has under consideration the matter of an Act providing for greater comity in the subject of powers of foreign executors and administrators, especially with regard to their rights to collect and receive assets of the deceased, but with due regard to the rights of local creditors. The initiative in this matter came from the American Law Institute, which in connection with its Restatement of the Law of Conflict of Laws, came to realize the unsatisfactory situation caused by the common law of that subject in forcing numerous unnecessary probatings of estates in different states to collect assets, causing undue trouble and expense especially to small estates. An Act seemed desirable increasing comity between the states.

Interstate Compacts

The important matter of compacts and agreements between states, while separate from uniform legislation in most respects, yet is related to it in that both are efforts by the states, working together, to achieve results without calling for action by the Federal Government. A large range of action is afforded to the states by interstate compacts, giving them the power to deal with river and harbor development, interstate bridges, joint public works, forestation, fishing and hunting regulations and many other matters, where an entire region is affected, including several states, without the necessity of resort to Washington. A regional control and solution of regional problems, not national in scope, is thus afforded through the interstate compact and the affected states acting together. The vigor of the state governments is retained and the national government not called upon. The National Conference of Commissioners on Uniform State Laws through its Committee on Interstate Compacts has put out two comprehensive reports on the subject, one in 1921 prepared by Prof. Wigmore, and one in 1932 prepared by Prof. Landis, giving the present status of the subject. . . .

IV.

Other Organizations in the United States Interested in Uniform State Laws

In addition to the National Conference of Commissioners on Uniform State Laws, there are a number of other organizations in the United States specially interested in such uniformity, to three of which we shall now refer.

(1) American Law Institute

The American Law Institute was organized in 1923, consisting of leading judges, lawyers and professors of law from all parts of the United States, for the purpose of preparing authoritative Restatements of fundamental parts of the common or non-statutory law. The main purpose of preparing the Restatements may have been to make the common law clearer, simpler and better, by stating it in definite and comprehensive form for each subject in a single book, so that it would not be necessary to go through endless decisions to find the law, the restatement to be authoritative and followed by the courts, but not of the binding nature of a statute, the common law's elasticity to meet new conditions being retained. An important purpose of the work, however, was to improve the uniformity of the common law in the various states. The common law has tended to remain much more uniform in the states than statutory law, due to various factors, including its origin for the great majority of states in one source, the common law of England, and the fact that the courts in deciding cases consult in different states the same textbooks and other authoritative works and the decisions of courts in other states. However there has been considerable drifting apart of the states in the common law also, as evidenced by the diverse decisions of their courts on many points; and the Restatement of this law by the American Law Institute is calculated to keep the state courts together by offering them a single authoritative statement of the law which they would be inclined to follow in the absence of a previous decision or statute in the particular state to the contrary. The first of these Restatements, that of the Law of Contracts, is now completed.

The Institute in the careful study which it makes of the law of a particular subject, finds places in that law, where the common law is well established but is not suited to the present times through changes in conditions or other causes, and a change is desirable which can only be accomplished by statute. Also it finds cases where parts of the common law have already been put into statutory form in many states, but with unnecessary and undesirable diversity in the statutes, such as those relating to estates and interests in land. In a number of such instances, the matter has, formally or informally, been called to the attention of the National Conference of Commissioners on Uniform State Laws, which has taken it up with a view to framing a Uniform Act covering the matter, in cooperation with the Institute or with the aid of the legal experts of the Institute working on the subject in question. This cooperation, formal or informal, of the Institute and the National Conference in the framing of Uniform Acts for general adoption by the States in subjects related to the Restatement of the common law by the Institute, is increasing. Included, at present, in addition to the subjects of powers of foreign representatives and estates in land, above referred to, are trust administration, intestate succession and powers of representatives over real estate of the deceased. As the Institute completes the Restate-

ment of a particular subject, the group working on that subject is in a better position to give an opinion as to where and how the common law as set forth in the Restatement may be improved by supplementary statutes, and to make the appropriate recommendations to the National Conference for the framing of Uniform Acts. Cooperation between the Institute and National Conference is facilitated by the fact that a number of persons are members of both organizations. Uniform Acts already put out as a result of the cooperation of the two organizations include, Written Obligations Act, Interparty Agreement Act, Joint Obligations Act and Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases. The first three mentioned relate to the law of contracts and were drafted by Prof. Samuel Williston who was Reporter for the Institute in the Restatement of the Law of Contracts and also Commissioner on Uniform State Laws from Massachusetts.

The efforts of the Institute towards uniformity of laws in its framing of a Model Code of Criminal Procedure, should also be noted.

(2) Governors' Conference

The Governors' Conference is an organization the membership of which consists of the governors of the forty-eight states. Former governors are honorary members. It was organized in 1908 on the call of President Roosevelt, the immediate occasion being to secure cooperation by the governors in a policy of Conservation of Natural Resources. It has met annually since then.

The Articles of Organization, which are short, contain the following:

Article III. "The functions of the Governors' Conference shall be to meet yearly for an exchange of views and experiences on subjects of general importance to the people of the several States, the promotion of greater uniformity in State legislation and the attainment of greater efficiency in State administration."

Part of Article IX. "He (the Secretary) shall, also, so far as possible, cooperate and keep in touch with organizations, societies and other agencies designed to promote uniformity of legislation."

It thus appears that promotion of uniformity of state legislation is one of the important purposes of the Governors' Conference for which it was organized.

The Governors' Conference meets annually for discussion and to hear addresses and exchange views. It does not pass any resolutions; and the governors do not bind the states.

(3) American Legislators' Association

This organization of state legislators throughout the country, formed in recent years, has members from both House and Senate in each state. Its general purpose is to improve legislative conditions through cooperation of legislators in different states; and one of its chief

projects is a meeting of delegates from each state concerned primarily with proposals for interstate compacts and uniform laws. The Director of the Association, is also a member of the National Conference of Commissioners on Uniform State Laws.

V.

Movement for Uniform Laws in Other Countries

. . . .
Canada has a Conference of Commissioners on Uniformity of Legislation in Canada composed of commissioners from each province, similar to that of the United States, whose example it followed. This Conference has put out a series of important Uniform Acts which have been widely adopted in Canada; and in view of Canada's close proximity to and extensive dealings and relations with the United States and especially Minnesota, we believe that a more extended statement about uniform laws in Canada will be of interest and value.

The Canadian Conference on Uniformity of Legislation was organized in 1918, the various provinces providing for the appointment of commissioners to attend the Dominion Conference on recommendation of the Council of the Canadian Bar Association. The Conference consists of commissioners from each of the nine provinces, and has met annually since 1918 at the same place as and just preceding the meeting of the Canadian Bar Association.

The following quotation from the Preface of the 1931 Proceedings of this Canadian Conference indicates its problem, origin and purpose:

"The independent action of the several provincial legislatures naturally results in a certain diversity of legislation. In some cases diversity is inevitable, as, for instance, when the province of Quebec legislates upon subjects within the purview of the Civil Code of Lower Canada and according to principles derived from the law of France, and the other provinces legislate upon similar subjects according to principles derived from the common law of England. In such cases the problem of securing uniformity is confined to the common law provinces. There are, however, many other cases in which no principle of either civil law or common law is at stake, with regard to which the problem of securing uniformity is the same in all the provinces. Both these classes of cases include subjects of legislation as to which it is desirable, especially from the point of view of merchants doing business in different parts of Canada, that legislation should be made uniform throughout the provinces to the fullest extent possible.

"In the United States work of great value has been done by the National Conference of Commissioners on Uniform State Laws. Since the year 1892 these commissioners have met annually. They have drafted uniform statutes on various subjects, and the subsequent adoption of these statutes by many of the state legislatures has secured a

substantial measure of uniformity. The example set by the state commissioners in the United States was followed in Canada when, on the recommendation of the Council of the Canadian Bar Association, several of the provinces passed statutes providing for the appointment of commissioners to attend an inter-provincial conference for the purpose of promoting uniformity of legislation.

"Statutes have been passed in some of the provinces providing both for contributions by the provinces towards the general expenses of the Conference and for payment by the respective provinces of the travelling and other expenses of their own commissioners. The commissioners themselves receive no remuneration for their services.

"The appointment of commissioners or participation in the meetings of the Conference does not of course bind any province to adopt any conclusions reached by the Conference, but it is hoped that the voluntary acceptance by the provincial legislatures of the recommendations of the Conference will secure an increasing measure of uniformity of legislation."

. . . .

The procedure of the Canadian Conference in putting out Uniform Acts, or Model Statutes as they prefer to call them, is similar to that employed in the United States. A committee is appointed to draft an Act on a subject where uniformity is deemed desirable, and reports back the following year with a tentative draft. This is considered at the annual meeting, revised and usually referred back to the Committee for further consideration. After several years of perfecting it, the Act in final form is approved and recommended to the provinces for adoption. Each year the Proceedings of the Conference are issued in printed form and include the Reports of Committees, the final form of Acts approved and the draft form of Acts still under consideration. . . .

NOTES

1. Saeta, "Unified Legislation Cited as Goal of Conference on Uniform State Laws", 15 Calif. State Bar Jour. 359 (1940), states [Footnotes are omitted. Ed.]:

As a result of an "experience" meeting last year, the Conference of Commissioners on Uniform State Laws will make a determined drive, in 1941, when 43 State Legislatures meet, to place the maximum number of uniform acts on the statute books.

As for California, that means the adoption not only of the two acts approved by the Conference this year, namely, the Pistol and the Simultaneous Death Acts but such other acts, for example, as Absence as Evidence of Death, Criminal Extradition, Federal Tax Lien Registration, Fiduciaries, Conditional Sales, Narcotic Drug, and Flag, to cite but a few.

The President of the Conference, William A. Schnader, former Attorney-General of Pennsylvania, besides being a scholar is a stern realist. He was not satisfied with the Conference meeting year in and year out and painstakingly presenting act after act. He wanted to know why the states were not adopting them, why such a disparity existed in the adoption of the acts, from thirty-five in South Dakota to three in Texas (California has adopted seventeen of the Uniform Acts).

As a result of these queries, an afternoon session was set aside to discuss this problem and the Commissioners "let their hair down." It was truly an "experience" meeting; each Commissioner spoke out of the fullness of his heart. They reviewed their work for the past 50 years and found that though the Conference had approved 70 acts, the states had adopted only a small portion of them.

Like the mills of the gods which grind slowly but exceedingly fine, they had turned out only a few acts; but that was because of the infinite patience and loving care that they had lavished upon these 70 brain children. They were proud of the men who fathered their offspring, some of the most distinguished names in jurisprudence, such as Woodrow Wilson, Louis D. Brandeis, James Barr Ames, Samuel Williston, William Draper Lewis and Roscoe Pound. They were also proud of their successors who were carrying on in the high tradition—men who gave freely of their time, effort and skill without compensation and without fanfare; who only asked that the results of their labor be approved.

Despite an era of brass and publicity, these men still believed in the Emersonian dictum of the mouse trap—that somehow or other the public would learn of their efforts to remove friction between states, to level trade barriers, to preserve the independence of states and yet make our dual system of state and federal government work more harmoniously; in other words, to promote unity. Present day orators have just discovered the magic word "unity" but the Conference has been trying realistically to bring about unity during the last 50 years.

They thought that the public would learn that they had no axe to grind, no special interest to serve when they met annually and drafted and redrafted their acts, putting into their work the varied and accumulated experience gathered from Bench, Bar and Law School. Though they claimed no perfection for their acts, indeed a committee was at work trying to eliminate such acts that had become outmoded, yet they felt that their acts represented the sound work of patient disinterested public servants who worked in a judicial climate and would compare most favorably with the results that flowed from the average State Legislature which was hurried, harassed and pressured. Yes, they could look with pardonable pride upon the work of their hands and say—it was good! But alas, they were mistaken! The public was hardly aware of their existence. In the shuffle and turmoil of present complex life they had been overlooked. Bar, business and trade associations who all stood to profit from their work knew little of the effort which went into it, and used the results even less. From that discussion there clearly emerged the conclusion that their product was good but that their method of distribution was bad—that they were poor salesmen. The problem was to move the merchandise from the shelves and place it where it belonged—on the statute books. How? They first turned to the Council of State Governments, their support was sought and obtained. They will cooperate in securing the enactment of the various acts. If this is done a great step will have been taken to secure that unity which is essential in this vast country of ours, operating as it does on a federal and state basis.

Let us not deceive ourselves. The public is becoming aware of the Balkanization of our states, of the existence of trade barriers. Any force that will make trade and commerce flow more smoothly between states, that will reconcile the jealousies and parochialism of the states, that will preserve the balance between federal and state governments, is a force making for unity. . . .

2. See also Kleps, "Uniformity v. Uniform Legislation: Conditional Sale of Fixtures," 24 *Corn.L.Q.* 394 (1939); Perkins, "Uniformity in Uniform Legislation," 6 *Iowa L.Rev.* 1 (1920).

3. See also Faught, "Fifty Years of Progress in Drafting and Enacting Uniform State Laws," 12 *Penn.B.A.Q.* 97 (1941); Thompson, "Growth of Uniform Laws," 5 *Lawyer* 13 (1941); Lawther, "Uniform State Laws," 18 *Tex.L.Rev.* 436 (1940).

4. See the following recommendations by the New York Law Revision Commission that Uniform Acts or parts of them, be adopted with certain adaptations and modifications:

(1) Regulation of Transfer of Corporate Securities, N.Y.Leg.Doc. (1937) No. 65 (I), 7-10. (1937) Rep.Rec. & St.Law Rev.Comm. 135-138.

(2) A Uniform Criminal Extradition Act, N.Y.Leg.Doc. (1936) No. 65 (a) 13-18. (1936) Rep.Rec. & St.Law Rev.Comm. 39-44.

(3) Risk of Loss in Executory Contracts for the Sale of Real Property, N.Y. Leg.Doc. (1936) No. 65 (M), 568. (1936) Rep.Rec. & St.N.Y.Law Rev.Comm. 759-762.

SUTHERLAND v. MEAD

Supreme Court of New York, Appellate Division, 1903.
80 App.Div. 103, 80 N.Y.S. 504.

HATCH, J. This action was brought to recover upon a promissory note made by the defendant Deshong, upon which the appellants were accommodation indorsers. It appeared upon the hearing of the motion that the defendant Palleske was indebted to the appellants upon a promissory note for the sum of \$1,000; that as such note was about falling due, and on the 15th day of April, 1902, Palleske requested the appellants to accept in payment of such note the promissory note executed by Deshong, set forth in the complaint in the action; that they refused so to accept the same unless Palleske could procure it to be discounted, and would deliver the proceeds thereof to the appellants, and for such purpose the appellants indorsed said note in their firm name, and the defendant Palleske took the same, and agreed to return the proceeds thereof to the appellants. Instead of discounting the note, Palleske transferred the same to the plaintiff in the action, who paid thereon the sum of \$150 cash, and, as further consideration, took and held the same as collateral security for an indebtedness then due and owing by Palleske to the plaintiff in a sum exceeding \$3,000, the whole of which still remains due and unpaid. This action was brought by the plaintiff to enforce the note. . . . It is said . . . that the negotiable instrument law has changed the rule in respect to what constitutes consideration for a promissory note; it being claimed that a pre-existing indebtedness is a good consideration, and renders the holder thereof a holder for value of a note taken as security therefor, as against accommodation indorsers, even though the note has been fraudulently diverted from the purpose for which it was given, and the indorsers have received no value. Since 1822, when *Coddington v. Bay*, 20 Johns. 636, 11 Am.Dec. 342, was decided, it has been the settled law of this state that accommodation makers or indorsers of negotiable paper were not liable to a holder thereof, where the same had been fraudulently diverted from the purpose for which it was made, or the indorsement given, and the holder had received it solely as collateral security for an antecedent debt. . . .

Whatever may have been the rule with respect to this question in other jurisdictions, it has been the law of this state, uniformly en-

forced during this period of time, and still is the law, unless the negotiable instrument law has changed the same. Section 51 of such act provides:

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time."

Standing alone, this provision has not changed the existing law. It was always the law of this state that a consideration sufficient to support a simple contract constituted a good consideration for the instrument. This declaration, therefore, upon this subject, added nothing whatever to the law as it existed and had existed from time immemorial. So, also, an antecedent or pre-existing debt constituted value, and was sufficient in consideration of an instrument, either negotiable or otherwise, as between the parties thereto. Moreover, it was always the law that the actual payment and discharge of a pre-existing debt constituted the same a valuable consideration for the transfer of commercial paper, and shut off prior equities existing against it. Such was the rule announced in *Coddington v. Bay*, *supra*, and has since been enforced by the courts of this state. There is nothing contained in this enactment, therefore, which has changed the rule of law respecting the consideration of commercial paper, as it had previously existed; and the language of the statute is quite insufficient to annul the rule which has obtained with respect to the fraudulent diversion of commercial paper, as against accommodation indorsers thereon. Such rule, therefore, cannot be considered as changed, unless it be by virtue of the other provisions of the statute, showing that such defense is cut off, and indicating a clear intent to change the rule.

Section 52 of the negotiable instruments law defines what constitutes a holder for value:

"Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

And by section 55 an accommodation party is made liable on the instrument to a holder for value, although such holder at the time of taking the instrument knew him to be only an accommodation party. Section 91 defines a holder in due course to be a person who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Section 94 defines when the title is defective in the person who has negotiated the instrument as follows:

"When he obtained the instrument, or any signature thereto, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

Section 95 provides that the holder must have "actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." By section 96 the rights of a holder in due course are defined to be:

"A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

By section 98 it is provided:

"Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."

It is evident from these provisions that the Legislature did not intend to wipe out the defenses to a promissory note where the same had been procured from the maker by fraud, or where the indorsement has been given for a specific purpose, and a fraudulent diversion of the paper has been had. If the holder took the same with notice of such facts or circumstances as charged him with notice, or if he parted with no value, it constitutes a good defense to such note. As the definition of value for a promissory note has not added anything to the law upon that subject beyond such as was previously recognized, we ought not to conclude that the Legislature intended to change the rule with respect thereto, nor to permit frauds to be perpetrated thereunder. When the Legislature defines a defective title, it states in express terms that a fraudulent diversion is such. All of these sections can be harmonized, in their entirety, without any subtle refinement of reasoning, by construing section 51 to mean that, to constitute an antecedent or pre-existing debt a valuable consideration in support of a promissory note that has been fraudulently diverted, as valid in the hands of a *bona fide* holder, the latter must have canceled, and, in legal effect, paid and discharged, the antecedent or pre-existing debt. By still holding the debt, he in fact parts with no value. It was not intended thereby that where a debt continued to remain in existence, and enforceable as such, and the note is taken as collateral security for its payment, such debt, undischarged, constitutes a valuable consideration, or the holder of the note one in due course, as against the accommodation maker or indorser who has been defrauded by the negotiation of the instrument. We are not to impute to the Legislature an intent to change a rule of law which has existed in uniform course of enforcement for over three-quarters of a century, without a clear and unequivocal expression so to do. The rules of law which have been laid down in England, covering such question, or the reasons assigned for a different

rule in other jurisdictions in this country, do not furnish controlling reasons for changing the law of this state so as to bring it into harmony with such views, in face of the fact that in the commercial center of this country these rules have been applied for this length of time without damage to business interests or harm to commercial usages, and during its operation a period of commercial activity and prosperity has existed, heretofore unknown in the world's history. We may take judicial notice that the commission appointed to revise and codify the statutes was created, in the main, to codify existing laws, and not make new rules; and certainly it was never intended that settled usages in respect of commercial paper, founded upon decisions covering a period of 80 years, and uniform in application, should be overthrown in the construction of ambiguous and obscure expressions used by such body. The harmony of these provisions of the statute is in no measure disturbed by a construction which causes them to read that an antecedent and pre-existing debt must be paid and discharged, in order to constitute the holder of commercial paper, which has been fraudulently diverted, a bona fide holder, and, as such, capable of enforcing the same as against the accommodation maker or indorser. Merely taking such paper as collateral security for the payment of a pre-existing or antecedent debt does not constitute such debt value, within the meaning of this statute. This matter does not seem to have been the subject of discussion, beyond that had at Special Term in the case of *Brewster v. Shrader*, 26 Misc. 480, 57 N.Y.S. 606, where a different rule was laid down. The authority cited therefor in the opinion is contained in the reviser's note by the author of the law, in which it is stated that section 51 was designed to change the rule in *Coddington v. Bay*, *supra*, and the opinion of James W. Eaton, Esq., instructor upon the law of bills and notes in the Albany Law School, wherein he says, in his published edition of the negotiable instruments law, in referring to section 51, "It is to be inferred that the above statute extends the New York rule to include instruments given merely as collateral security." We are not disposed to adopt this construction of the law. Settled principles ought not to be overturned by imputing a legislative intent where the language upon which it is based is equivocal in expression, and when the language used which it is claimed changes the rule may be naturally harmonized with the decisions of the courts, which have settled the law plainly and conclusively, and with respect to which commercial dealings have been governed in this state for over 80 years. . . .

If these views be correct, it follows that the order should be reversed.

NOTE

The principal case does not represent the present attitude of the New York courts toward the Uniform Negotiable Act. See *McKinney*, Statutes, Bk. 37, § 51, p. 83. In *Kelso & Co. v. Ellis*, 224 N.Y. 528, 121 N.E. 364 (1918), the court speaks of "the habit of bench and bar to look to cases rather than statutes for principles of commercial law until attention is sharply directed to the extent to which the move-

ment for uniformity of laws through legislation has been successful in New York and many other states".

For other examples of the tendency to treat uniform acts as merely declaratory of the common law of the state or to ignore them, see *Farrington v. Fleming Commission Co.*, 91 Neb. 108, 142 N.W. 297 (1913), *McLain and Norvet v. Torkelson*, 197 Iowa 202, 174 N.W. 42 (1919).

UNION TRUST CO. v. MCGINTY

Supreme Judicial Court of Massachusetts, 1912.

212 Mass. 205, 98 N.E. 679, Ann. Cas. 1913C, 525.

RUGG, C. J. The single question presented in this case is whether the accommodation maker of a promissory note is discharged, if the holder, knowing that the note was made for the accommodation of the payee and indorser, by agreement with the indorser upon a valuable consideration, without the maker's consent, extends the time of payment.

Before the enactment of the Negotiable Instruments Act (St. 1898, c. 533; R.L. c. 73, §§ 18-212) one who made a promissory note for the accommodation of another was as between the parties a surety. The holder, who had knowledge of the true relation of the parties, was bound to act toward such accommodation maker as toward a surety in order to preserve his rights against him. Under such circumstances an extension of time to the person ultimately liable, without the consent of the surety, that is the accommodation maker, released the latter. *Guild v. Butler*, 127 Mass. 386, and cases cited at page 389; *Jennings v. Moore*, 189 Mass. 197, 75 N.E. 214. The precise point is whether this rule of law has been changed by the Negotiable Instruments Act.

It is matter of common knowledge that the Negotiable Instruments Act was drafted for the purpose of codifying the law upon the subject of negotiable instruments and making it uniform throughout the country through adoption by the Legislatures of the several states and by the Congress of the United States. The design was to obliterate state lines as to the law governing instrumentalities so vital to the conduct of interstate commerce as promissory notes and bills of exchange, to remove the confusion or uncertainty which might arise from conflict of statutes or judicial decisions amongst the several states, and to make plain, certain and general the controlling rules of law. Diversity was to be moulded in uniformity. This act in substance has been adopted by many states. While it does not cover the whole field of negotiable instrument law, it is decisive as to all matters comprehended within its terms. It ought to be interpreted in such a way as to give effect to the beneficent design of the Legislature in passing an act for the promotion of harmony upon an important branch of the law. Simplicity and clearness are ends especially to be sought. The language of the act is to be construed with reference to the object to be attained. Its words are to be given their natural and common meaning, and the prevailing principles of statutory interpretation are to be employed.

Care should be taken to adhere as closely as possible to the obvious meaning of the act, without resort to that which had theretofore been the law of this commonwealth, unless necessary to dissolve obscurity or doubt, especially in instances where there was a difference in the law in the different states. Approaching the act from this point of view, it is apparent that no relation of principal and surety is established or contemplated by any of its sections. It determines the liability of the various parties to the negotiable instrument on the basis of that which is written on the paper. The obligation of all makers, whether for accommodation or otherwise is to pay to the holder for value according to the terms of the bill or note. Their obligation is primary and absolute. Sections 77 and 208. The act makes no provision for the proof of another and different relation than that expressly undertaken and defined by the tenor of the instrument signed. The fact that one is an accommodation maker gives rise to a duty no less or greater or different to the holder for value than that imposed upon a maker who received value. This is expressly provided by the act, even though such holder knew at the time of making that the maker was an accommodation maker. Section 46. The act further provides in definite terms that the instrument and hence one primarily liable is discharged in one of five different ways (section 136); that is, by payment by the principal debtor, or by the party accommodated, by cancellation, by any other act which would discharge a simple contract, and by the principal debtor becoming the owner at or after maturity. There is no mention here of a discharge of an accommodation party by extension of time. But among the ways in which a party secondarily liable may be discharged is (section 137) an agreement by the holder to extend the time of payment or to postpone his right to enforce the instrument "unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved." Whatever force might attach to the enumeration of ways in which the instrument and consequently parties primarily liable might be discharged, if this provision stood alone, the inference arising from the omission of extension of time from such enumeration and its inclusion among the ways in which persons secondarily liable may be discharged is almost irresistible that the Legislature did not intend that persons primarily liable should be discharged in that manner. These two sections standing side by side, both dealing with the subject of discharge of liabilities of parties, the one mentioning, the other not mentioning, extension of time by the holder as a means of working discharge of liability, cannot be treated as accidental or without significance. It is strong proof of a legislative purpose to change the pre-existing law of the commonwealth. These considerations outweigh the argument adduced from the fact that the "instrument" rather than "parties primarily liable" is the language used in section 136 and from the phrase of clause 4 to the effect that the instrument may be discharged "by any other act which will discharge a simple contract." The act establishes a liability on the part of an accommodation maker, which is not affected by an extension of time given by the holder to any other party to the note, even though as

between such party and the accommodation maker a different relation may subsist in fact from that appearing on the face of the paper. The result is to render somewhat more rigid the rights of the parties as set forth in the written instrument, and so far as the holder is concerned to establish liability to him upon a firm basis, not easily shaken by parol evidence. . . .

This appears to be the view taken without exception by the courts of other jurisdictions which have considered the point. In the interpretation of a statute widely adopted by the states to the end of securing uniformity in a department of commercial law, we should be inclined to give great weight to harmonious decisions of courts of other states, even if we were less clear than we are in this instance as to the soundness of our own conclusion. [Citing cases.]

Exceptions overruled.

NOTES

1. In *Commercial Nat. Bank v. Canal-Louisiana Bank & Trust Co.*, 239 U.S. 520, 36 S.Ct. 194, 60 L.Ed. 417, Ann.Cas.1917E, 25 (1915). Hughes J., said: "It is apparent that if these uniform acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity, and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. It was to prevent this result that the uniform warehouse receipts act expressly provides (§ 57): 'This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.' This rule of construction requires that in order to accomplish the beneficent object of unifying, so far as this is possible under our dual system, the commercial law of the country, there should be taken into consideration the fundamental purpose of the uniform act, and that it should not be regarded merely as an offshoot of local law. . . . We think that the principle of the uniform act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it. . . ."

2. See Beutel, "The Necessity of a New Technique of Interpreting the N. I. L.," 6 *Tulane L.Rev.* (1931).

3. See *Baltimore & O. R. Co. v. First Nat. Bank*, 102 Va. 753, 47 S.E. 837 (1904); and *Wettlaufer v. Baxter*, 137 Ky. 362, 125 S.W. 741 (1910). In the latter case the issue was whether a note which had not been made payable to "order" or to "bearer" was negotiable. The court held that it was not, saying: "The negotiable instrument act is not a new law. It is with few exceptions merely the codification of old laws that were in force and effect by virtue of judicial pronouncement or legislative enactment, and generally uniform. In many of the states, including our own, there was very little statutory law on the subject of bills and notes previous to the passage of this act. Some of these statutes were not uniform, nor indeed were the opinions of the courts altogether in harmony. And so, to remove the confusion and uncertainty that was caused in commercial affairs by the lack of uniformity in legislative enactments and harmony in judicial opinions, a committee of gentlemen learned in the commercial law prepared the negotiable instrument act, not with a view of making any radical changes in the law as generally understood and administered, but to remove the doubt as well as conflict that had in some instances come into existence from difference in statutory laws as well as court opinions. The result of their labors was the present Act, which has become the law in a large

majority of the states. And looking to the intention of the law and the purpose of its preparation and enactment; if there is doubt about the meaning of any of its provisions, and that doubt can be solved by a reference to the law merchant as it was heretofore administered, this law should be looked to, and the act if practicable given such a construction as will make it harmonize with the general principles of commercial law in force before its enactment." But cf. *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 P. 239 (1911), in which a note containing a promise to furnish additional security if the original security depreciated in value was held nonnegotiable. The court said: "The adoption in recent years of the Negotiable Instruments Law by so many of the states was in response to the general desire for uniformity in respect to commercial paper. The application, however, by the courts of legal principles to particular facts has not reached scientific exactness, and never will. It is hardly to be expected, therefore, that the courts of the different states which have adopted the act will always agree in the construction and application of its provisions. Actual uniformity in the law of negotiable instruments will remain a dream more or less iridescent; substantial uniformity is all that can be hoped for. The conclusions we have reached with respect to the instrument in question are in harmony with the former decisions of this court and accord with our view of the proper construction to be given to the language of the statute."

ROGER SHERMAN HOAR, UNIFORMITY OF UNIFORM LAWS

28 Marq.L.Rev. 32 (1944).

A recent amendment of section 11 of the Uniform Conditional Sales Act, Sec. 122.11 of the Wisconsin Statutes, by the Legislature, for the apparent purpose of destroying its uniformity, has run counter to the judicial principle of uniformity of uniform laws, and hence may have failed to achieve non-uniformity.

The principle of uniformity is stated as follows in a very recent opinion of the U. S. Circuit Court of Appeals of the Seventh Circuit, which Circuit embraces Wisconsin:

"In the interpretation of . . . uniform laws, the decisions of other jurisdictions on such points as have not been decided by the courts of the forum, are not merely persuasive, but are as binding as would be a decision of the highest court of the forum."

So important do the Courts consider this principle of uniformity, that it has even been applied to restore to uniformity a section of uniform law which had been mutilated by a legislature.

An example of this occurred in Arizona. Under the authority of Chap. 35 of the Session Laws of 1925, the statutes of that State were codified, and the codifiers unfortunately made no distinction between uniform laws and non-uniform laws in their attempts at "improving" the language. Sec. 5 of the Uniform Conditional Sales Act provided that a contract of conditional sale is void as against rights of certain third parties which attach before the contract is filed, but that filing within ten days after making the sale shall relate back as to intervening rights. The revisers either wholly misinterpreted this ten-day proviso or thought that an idea of their own was better. At any rate,

READ & MACDONALD U.C.B.LEG.

they changed it to read that the contract would be void as to all persons except the buyer, unless filed within the ten days.

The first necessity for judicially interpreting this change arose in a suit in Kansas, rather than in Arizona. A conditional sale contract of an automobile sold in Arizona had been filed in the proper county of Arizona, but not until fourteen days after the sale. The car was then illegally sold by the conditional vendee outside Arizona, and eventually found its way into Kansas, in the hands of a person from whom an assignee of the original vendor sought to replevy it.

The Supreme Court of Kansas applied the principle of uniformity to the Arizona law, in spite of its perfectly clear and categorical non-uniform language, held that the filing had been timely, and awarded the car to the plaintiff.

The same question later came up in another suit, this time in Arizona itself. The Supreme Court of Arizona cited the above Kansas opinion, quoting the syllabus thereof as follows:

"Notwithstanding statute making conditional sale void as to others than buyer if not recorded within ten days, belated recording protects rights of holder as against one acquiring interest after recordation."

The Arizona Court then purported to find an ambiguity in the amended section, and hence an opportunity to construe the section in the interests of uniformity, instead of cutting the Gordian knot as the Kansas Court had done.

The effect of the Castenada case is considerably weakened by the fact that the Arizona revisers did such a poor job that the Supreme Court of Arizona has repeatedly felt called upon to restore the original meaning of the statutes, even as to non-uniform laws. However, I believe that these cases can be distinguished in two respects: (1) the Castenada opinion expressly mentioned and relied upon the doctrine of uniformity; (2) in *all* the cases the Court asserted that a *clearly* intended change would stand, and that they would revert to the original meaning only in event of ambiguity, and yet in the Castenada case the pressure of the doctrine of uniformity caused the Court to call ambiguous an instance of clear change. . . .

FREDERICK W. WHITESIDE, Jr., EFFECT OF ADOPTION OF THE UNIFORM SALES ACT UPON ARKANSAS LAW

1 Ark.L.Rev. 122-124, 128, 131-134, 137-140 (1947).

The Uniform Sales Act became effective in Arkansas nearly six years ago.¹ On only one occasion has the Arkansas Supreme Court made reference to the Act. The case, decided in 1946, was *Hydrotex Industries v. Floyd*,² in which the seller sued for the price of some

¹ Act No. 428, 1941, approved March 31, 1941.

² 209 Ark. 781, 192 S.W.2d 759 (1946).

roofing supplied to the buyer, and the buyer counter-claimed for damages on the ground that the roofing was unfit for the purpose for which it was sold. The seller's attorney contended that the clause of the Uniform Sales Act, providing for the implication of the warranty of fitness, was unconstitutional as an impairment of the obligation of the contract sued upon. The Court disposed of this contention by pointing out that the warranty of fitness for purpose in the particular case could just as well be implied at common law as under the Sales Act. The Court added, however, that it knew of no case in any jurisdiction holding any provision of the Uniform Sales Act unconstitutional and referred to a Michigan case³ as holding that the Act did not interfere with the right to contract.

One might wonder why the Act has thus far been referred to so infrequently by the highest court, since in most states adopting the Act, especially the larger commercial states like New York, courts have cited provisions of the Act much more frequently. One explanation might be simply the habit of lawyers of looking to common law principles. In support of such an explanation it is interesting to note that in several other recent cases the Court applied general principles of the law of sales, recognized in the Sales Act and at common law alike, without express reference to the applicable sections of the Act. Of course, should counsel fail to call the Court's attention to an applicable provision of the Act, the Court might see no occasion to refer to the provision in its opinion. A somewhat different avenue of conjecture suggests that lack of litigation concerning various provisions of the Act does not necessarily point to its lack of usefulness. On the contrary, in many instances reference to a definite and clear provision in the statute (really a codification and clarification of existing, though sometimes rather vague and uncertain, principles already developed by the courts) might conceivably have avoided litigation, or, perhaps, needless appeal to the highest court from an unfavorable determination below. . . .

NOTE

Minn.Stat.1945, § 645.22, reads: "Laws uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them."

³ Kirby v. Gibson Refrigerator Co., 274 Mich. 395, 264 N.W. 840 (1936).

SECTION 8. INTERSTATE COMPACTS

RICHARD HARTSHORNE, INTER-GOVERNMENTAL CO-OPERATION—THE WAY OUT

2 U. of New Jersey L.Rev. 1 (1930).

Some Legal Aspects of Inter-Governmental Cooperation.—There are few unique legal questions raised by the use of the methods of voluntary administrative interaction and uniform reciprocal legislation. However, due largely to the compact and contract clauses in the United States Constitution,⁷ many such points arise in the use of the compact method and such points seem largely unknown alike to the ordinary practitioner of the law and the student of political economy.

Since the foundation of this country there have been some eighty-six separate interstate compacts negotiated. Of these, sixty-eight were with express congressional consent, eighteen without such express consent, of which note will be taken later. Of these compacts, thirty-seven dealt with interstate boundaries, the remainder with the control of navigation, conservation of natural resources, crime, taxation, and certain other joint projects.

It would unduly extend the length of this article to attempt to set forth all of the compacts entered into under all of the above topics. Moreover, this is unnecessary, since lists of such compacts have been set forth in the past in various publications.⁸ But it may be helpful to allude to certain features in existing or proposed compacts, particularly as they affect, or may affect New Jersey.⁹ In the first place the courts have repeatedly stated their views as to the great value of interstate compacts as a means for efficient governmental control. When, after ten years of litigation, the United States Supreme Court finally had before it the case brought by New York against New Jersey, as to the dumping of the Passaic Valley sewer output into New York Bay, that tribunal said that the problem was "One more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the states which are vitally interested, than by proceedings in any court however construed."¹⁰ This view has been several times expressed in other cases before that court.¹¹ From the practical standpoint, when it comes to

⁷ United States Constitution, Article I, Section 10.

⁸ Frankfurter and Landis, *The Compact Clause and the Constitution* (1925) 34 Yale L.J. 685; Report of Committee on Interstate Compacts, Proceedings of National Conference of Commissioners on Uniform State Laws (1921) 297; Ely, *Oil Conservation Through Interstate Agreements* (1933) 166.

⁹ For reference purposes, a list of the compacts in which New Jersey has participated is included as Appendix 1.

¹⁰ *New York v. New Jersey*, 256 U.S. 206, 41 S.Ct. 492, 65 L.Ed. 937 (1921).

¹¹ *Kidd v. Alabama*, 188 U.S. 730, 23 S.Ct. 402, 47 L.Ed. 669 (1903); *Washington v. Oregon*, 214 U.S. 205, 29 S.Ct. 631, 53 L.Ed. 969 (1909); *Minnesota v. Wisconsin*, 252 U.S. 273, 40 S.Ct. 313, 64 L.Ed. 558 (1920).

(F.n. 1 to 6 are omitted. Ed.)

carrying out a course of action, it should be quite evident that all that litigation can do is to have the court determine a set of principles. When it comes to action—the carrying out of principles—then the parties themselves must be guided; and not only an agreement in regard to the principles which are so to guide, but the setting up of an authority so to act, is the most efficient and practical means known. This may be done best by compact.

In ascertaining the legal principles upon which interstate compacts are based, we must primarily revert to the provisions of the federal Constitution which permits them. It is there provided in Article 1, Section 10, clause 1, "No state shall enter into any treaty, alliance or confederation . . .," and in clause 3, "No state shall without the consent of Congress . . . enter into any agreement or compact with another state or with a foreign power." We thus see that a treaty is forbidden, while a compact, with congressional consent, is permitted, in view of the settled doctrine that the states retain the residuum of power not otherwise covered by the Constitution.

The distinction between a prohibited treaty and a permitted compact was well brought out in the leading case of *Virginia v. Tennessee*,¹² where the court had before it the validity of a compact between the two states as to their boundary line. It there said, that the prohibition against treaties, alliances and confederations was directed against "the formation of any confederations tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." Conversely "compacts not compromising the supremacy of the United States over the several states or the equality of the states among themselves may be made with the consent of Congress."¹³ Congress can, of course, grant or withhold its assent within its discretion, so that the federal government has the final word as to the effectuation of any true compact. Of course, there are decisions in certain state courts, which seem to indicate that under some circumstances the assent of Congress to a compact is unnecessary.¹⁴ But none of these cases reached the federal courts, and in those cases in the United States Supreme Court, where there is language indicating that such congressional consent is in certain instances unnecessary, such language is pure dicta, made unnecessary to the decision, by the fact that congressional consent actually existed by implication.¹⁵ In addition, in several of such cases, the facts apparently indicate that there was no real contract or agreement, but merely executive interaction between the states of a cooperative na-

¹² *Virginia v. Tennessee*, 148 U.S. 503, 13 S.Ct. 728, 37 L.Ed. 537 (1893).

¹³ *Randolph, Suits between the States* (1922) 22 Col.L.Rev. 364, 377.

¹⁴ *McHenry County v. Brady*, 37 N.D. 59; *Railroad Co. v. Railroad*, 14 Ga. 327; *Dover v. Portsmouth Bridge*, 17 N.H. 200; *McKay v. New York*, 82 Conn. 73; *Searsburg v. Woodford*, 76 Vt. 370.

¹⁵ *Wharton v. Wise*, 153 U.S. 155, 14 S.Ct. 788, 38 L.Ed. 669 (1894); *Virginia v. Tennessee*, 148 U.S. 503, 13 S.Ct. 728, 37 L.Ed. 537 (1893); *Stearns v. Minnesota*, 179 U.S. 223, 21 S.Ct. 73, 45 L.Ed. 162 (1900); *Louisiana v. Texas*, 176 U.S. 1, 20 S.Ct. 251, 44 L.Ed. 347 (1900).

ture, without the creation of any binding obligation. In any event the doctrine, that even in a very limited class of cases congressional consent is unnecessary, is an extremely dangerous one, as it may perchance invalidate a compact when otherwise fully negotiated. Finally, such a doctrine is to all intents and purposes of purely academic interest, because Congress has never refused, as yet, to ratify or assent to any compact proposed by the states.

Ordinarily, the consent of Congress is given after the compact has itself been negotiated and ratified by the states, so that its terms may be known to the Congress before its cooperation is asked. However, there is apparently nothing in the language of the Constitution which prevents such consent being given in advance, and such consent has been so given by the Congress on more than one occasion. Note to this effect the Crime Control Consent Act,¹⁶ the Federal Forest Conservation Consent, and the federal consent to interstate compacts dealing with boundaries and interstate criminal jurisdiction over boundary waters.¹⁷ It is peculiar that neither of these two latter acts have ever been taken advantage of by the states.

However, such consent need not be express, but may be implied from federal action in other respects. Such was held to be the case in the decision of *Virginia v. Tennessee*,¹⁸ where previous congressional action, creating federal district courts and setting up post offices in the disputed area, was held sufficient to show the intent of Congress to adopt the boundary line, as fixed by the compact between the two states, so that such compact had thus been validly assented to by Congress, even in the absence of any express federal legislative assent. To the same effect see the case of *Wharton v. Wise*,¹⁹ as to the fisheries compact between Maryland and Virginia.

Since, as seen above, ordinary legislation creating post offices and federal judicial districts, which does not expressly refer or consent to a compact, may by implication constitute a valid consent thereto; a fortiori, if ordinary legislation does directly refer to a compact, showing assent thereto, it should constitute a valid consent thereto. Moreover, the Supreme Court has already held that this matter of congressional consent is not a mere matter of form, but is an act by the federal government which is to be effective, if it is to be anything at all.²⁰ If then, in order to make the compact between the states effective, federal aid in the form of supporting legislation is deemed necessary, clearly such legislation will constitute a valid congressional consent to the compact. That federal legislative aid is valid in the enforcement of state policies, has already been determined in a series of

¹⁶ P.L. § 293, 73d Cong., 2d Sess. (1934); 18 U.S.C.A. 7, Sec. 420 (1934).

¹⁷ 36 U.S. Stat. at L. c. 186, Sec. 1, at 961; 43 U.S. Stat. at L. 1215; 36 U.S. Stat. at L. 88.

¹⁸ *Virginia v. Tennessee*, supra note 12.

¹⁹ *Wharton v. Wise*, supra note 15.

²⁰ *Virginia v. West Virginia*, 246 U.S. 565, 38 S.Ct. 400, 59 L.Ed. 1272 (1918).

cases,²¹ though it would not seem that the mere federal power to consent to an interstate compact could add to the federal legislative power on a subject-matter otherwise outside congressional jurisdiction.

A compact between the states is a contract, the obligation of which the states are forbidden by the Constitution to impair.²² While the decision on this point was mere dicta, such was the very basis of the holdings in the series of cases between Virginia and West Virginia, requiring West Virginia to pay its proportion of the debts of the State of Virginia, as they originally stood, in accordance with the compact between the two states.²³ The question, of course, arises, as to whether or not the doctrine is applicable, that the police power is an implied term of any contract entered into by a state, and that, arguendo, the later exertion of the police power by the state, contrary to the express terms of the interstate compact, would not be an impairment of its obligations, but merely the enforcement of such implied term.²⁴ But all of these cases, as to the later exertion by a state of its police power, in apparent contradiction of the express terms of its contract, have been cases where such power was exerted, as to one who was subject to such police power, such as a resident of the state. It would hardly seem that a state's police power could apply to another state or to the United States, both of which are outside its jurisdiction. As to such other sovereignties, the police power of a state does not exist as a sovereign power, but as an ordinary power, such as that which one individual has in dealing with another. As to such powers, contractual obligations are binding. Moreover, the status of a state in regard to the fact that its compacts apply both internally and externally, would seem quite comparable to the status of the federal government in regard to the binding effect of its treaties with a foreign power. While as a matter of national law, the federal government can change its mind at its own volition, as a matter of international law, it is bound to live up to its treaty obligations with another power, and may be held responsible therefor, whether by warlike or peaceful means.²⁵ But, if a state impairs the obligation of an interstate compact, any action of such state accordingly, even within the state itself, would doubtless be held unconstitutional and void as in contravention of the contract clause.

Moreover, an interstate compact would seem to be binding, not only upon the states party thereto, but also upon parties whose rights are

²¹ *Wilson Act*, 26 U.S. Stat. at L. 313; *In re Rahrer*, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572 (1890); *Webb-Kenyon Act*, 37 U.S. Stat. at L. 699; *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326, L.R.A. 1917B, 1218, Ann.Cas1917B, 845 (1917)

²² Federal Constitution, Article 1, Section 10, clause 1; *Wharton v. Wise*, supra note 15.

²³ See 206 U.S. 290, 27 S.Ct. 732, 51 L.Ed. 1068 (1907); 220 U.S. 1, 31 S.Ct. 330, 55 L.Ed. 853 (1911); 241 U.S. 531, 36 S.Ct. 719, 60 L.Ed. 1147 (1916); 11 Wallace 30 (U.S. 1870); see also *Chesapeake & Ohio Canal Co. v. B. & O. Ry. Co.*, 4 Gill & J. (Maryland) 1.

²⁴ *Stone v. Mississippi*, 101 U.S. 814, 25 L.Ed. 1079 (1880).

²⁵ *Head Money Cases*, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884).

subject thereto. For instance, when Virginia and Pennsylvania entered into a compact as to their boundary line, the fixing of such boundary line affected the title to certain private lands. The United States Supreme Court held that such compact was binding in regard to such title.²⁶ However, this question as to the binding effect of such compact on the party states seems almost academic. For no compact will be wisely effectuated in the future without inserting terms providing for its continuance in effect for a fixed period of time, subject to an intermediate right of withdrawal by either party on due notice.

Finally, the right of one state, with congressional consent, to grant to another, jurisdiction, either civil or criminal, and either for the purposes of serving process or otherwise, within the territory of the first state, has been repeatedly adjudicated upon and upheld. Such has been the effect of the decisions of the courts as to the early compact in 1833 between New York and New Jersey as to the Hudson River boundary line,²⁷ and has also been held by the United States Supreme Court and a series of western state courts as to compacts concerning such boundary waters.²⁸

THE STATES COOPERATE

Foreword to The Handbook on Interstate Crime Control, prepared by the Interstate Commission on Crime (1912), 12-13.

More than three-fourths of our states have recently established an improved method of protecting their citizens from crime. This handbook presents that method.

The Interstate Commission on Crime was established on October 12, 1935. On that date, in Trenton, N. J., officially appointed representatives of the states and the federal government met together at the Interstate Conference on Crime. The purpose of the conference was to discuss ways and means of overcoming loopholes in the criminal laws which worked to the advantage of the criminal and against the interests of society. The existence of many of these loopholes in our law-enforcement structure had been brought out at the Attorney General's Conference on Crime held in Washington, D. C., in December

²⁶ *Marlatt v. Silk*, 11 Peters 1 (U.S. 1837).

²⁷ *People v. Central R. R. Co. of N. J.*, 42 N.Y. 293 (1870).

²⁸ *Ferguson v. Ross*, 126 N.Y. 459, 27 N.E. 954 (1891); *Wharton v. Wise*, *supra* note 15; *Wedding v. Meyler*, 192 U.S. 573, 24 S.Ct. 322, 48 L.Ed. 570, 66 L.R.A. 833 (1904); *Nielsen v. Oregon*, 212 U.S. 315, 29 S.Ct. 383, 53 L.Ed. 528 (1909); *McGowan v. Columbia River Packers Ass'n*, 245 U.S. 352, 38 S.Ct. 129, 62 L.Ed. 342 (1917); *Miller v. McLaughlin*, 281 U.S. 261, 50 S.Ct. 31, 74 L.Ed. 602 (1930); *State v. Mullen*, 35 Iowa 199 (1872); *State v. George*, 60 Minn. 503, 63 N.W. 100 (1895); *Roberts v. Fullerton*, 117 Wis. 222, 93 N.W. 1111, 65 L.R.A. 953 (1903); *Brown v. State*, 109 Ark. 373, 159 S.W. 1132 (1913); *State v. Moyers*, 155 Iowa 678, 136 N.W. 896, 41 L.R.A., N.S., 366 (1912); *Lemore v. Commonwealth*, 127 Ky. 480, 105 S.W. 930 (1907); *State v. Cunningham*, 102 Miss. 237, 59 So. 76, Ann.Cas.1914D, 182 (1912); *State v. Kurtz*, 317 Mo. 380, 295 S.W. 747 (1927); *State v. Metcalf*, 65 Mo. 681 (1896); *State v. Seagreaves*, 111 Mo.App. 353, 85 S.W. 925 (1905). See also *Washington v. Oregon*, 214 U.S. 205, 29 S.Ct. 631, 53 L.Ed. 969 (1909).

of 1934, at the call of Attorney General Homer Cummings, whose active interest in crime control has been notable. Immediate attention was first paid to that vast field which has been so aptly dubbed the "No-Man's Land" of crime control, existing intermediate the jurisdiction of a single state and that of the federal government. Such is the case, for instance, in the extradition of defendants and the removal of witnesses from state to state, where the interests of two states are concerned, as distinguished from the interests of the federal government or of a single state. Similar is the situation regarding the control of firearms, where the acquisition of a pistol by a criminal in one state all too often results in its use in a holdup in another state. Both such separate anti-social acts are local, and thus under state, not federal, control, yet they cannot be controlled by a single state, as they occur in different jurisdictions.

At this, the first Interstate Conference on Crime to be held in this country, the official delegates from the states and the federal government agreed to establish the Interstate Commission on Crime as an official organization, representative of all forty-nine of the sovereignties. From that day to this everyone of the 48 states, as well as the Federal Government, has appointed its official representatives to serve on the Interstate Commission on Crime. These Commissioners serve without pay, the expenses of the Commission itself being borne solely by the states themselves. The federal government is actively represented on this commission because of its interest in cooperative crime control, not only among the states themselves, but between the states and the federal government. The point is, that the public cannot be properly protected from crime or other evils without the joint aid of all governmental agencies concerned, and, indeed, unless the interest and support is assured of the public itself.

As the work of the Commission has proceeded, it has become increasingly apparent that there is a definite need for a reference book in the field of interstate crime control, which will have within its covers copies of the uniform laws drafted and recommended by the Commission, the regulations called for thereunder, the legal forms for their proper enforcement, and other similar basic sources of information for ready reference by the great number of officials engaged in the field of crime control. This handbook places in the hands of Federal, State, and local officials, and other interested parties, the material developed along the above lines during the past few years. . . .

Without the pioneer work done in the field of uniform crime legislation by the National Conference of Commissioners on Uniform State Laws, this book could not have recorded all the advances made to date. The uniform commissioners drafted the original uniform extradition act, the uniform witnesses act, the uniform firearms act, and the uniform narcotic drug act. The acts on such subjects, as they appear in this book, are based on these original acts, but embody important changes made in the light of actual experience throughout the United States since their original drafting. The cooperation of the Commissioners on Uniform State Laws and their generous attitude in accept-

ing amendments to their basic legislation is but further evidence of the unselfishness of their service to the public during the past forty years.

In this connection the Commission should publicly record its gratitude to the many law schools of the country with whose aid the Commission was enabled to draft the legislation printed herein, to accord with present crime control conditions. Similarly there should be noted the aid afforded it along their respective lines by the advisory organizations to the Commission, which include the American Institute of Criminal Law and Criminology, American Judicature Society, American Law Institute, American Prison Association, National Probation Association, The Osborne Association, Inc., and The Western Parole and Probation Conference. Further, particular credit should go to the American Legion, the American Bar Association, and the National Association of Attorneys General, not only for their endorsement of the Commission's four-point program, but for their active aid in achieving the unique result of having the whole or part of this program enacted into law by more than half the states of the country within the short space of two years. . . .

NOTES

1. The Interstate Crime Commission prepared model acts on: (1) Fresh Pursuit, (A, Across state lines; and B, Across county and municipal lines); (2) Extradition; (3) Rendition of Witnesses; (4) Interstate Parole and Probation; (5) Arrests; (6) Firearms; (7) Narcotic Drugs. They are all set out, accompanied by model forms, in the Handbook. The accompanying studies and annotations repay careful study by anyone desiring to draft an effective criminal law.

2. The "Handbook on Interstate Crime Control", prepared by the Interstate Commission on Crime (1942) at 58-59:

THE UNIFORM ENABLING ACT

(Contains the exact wording of the Interstate Compact for Parolee and Probationer Supervision)

An Act providing that the state of ——— may enter into a compact with any of the United States for mutual helpfulness in relation to persons convicted of crime or offenses who may be on probation or parole.

Be it enacted, etc.:

Section 1. The governor of this state is hereby authorized and directed to execute a compact on behalf of the state of ——— with any of the United States legally joining therein in the form substantially as follows:

A Compact

Entered into by and among the contracting states, signatories hereto, with the consent of the Congress of the United States of America, granted by an act entitled "An act granting the consent of Congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes."

The contracting states solemnly agree:

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact (herein called "sending state"), to permit any person convicted of an offense within such state and placed on pro-

bation or released on parole to reside in any other state party to this compact (herein called "receiving state"), while on probation or parole, if

(a) Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there;

(b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state: Provided, however, That if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.

(5) That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within such state, the form of execution to be in accordance with the laws of the executing state.

(7) That this compact shall continue in force and remain binding upon each executing state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other state party hereto.

Sec. 2. If any section, sentence, subdivision or clause of this act is for any reason held invalid or to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act.

Sec. 3. Whereas, an emergency exists for the immediate taking effect of this act, the same shall become effective immediately upon its passage.

Sec. 4. This act may be cited as the Uniform Act for Out-of-State Parolee Supervision.

3. The New York Secretary of State certified on February 6, 1947, that the States listed below become signatories to the Interstate Parole Compact authorized by Correction Law, § 224, on the respective dates indicated.

Alabama - - - - -	October 4, 1940	Nebraska - - - - -	September 24, 1937
Arizona - - - - -	September 24, 1937	New Hampshire - - -	September 17, 1937
Arkansas - - - - -	September 15, 1937	New Jersey - - - - -	September 23, 1937
California - - - - -	July 7, 1939	New Mexico - - - - -	August 31, 1937
Colorado - - - - -	September 24, 1937	New York - - - - -	February 15, 1944
Connecticut - - - -	November 6, 1943	North Dakota - - -	December 15, 1941
Delaware - - - - -	September 17, 1937	Ohio - - - - -	September 17, 1937
Florida - - - - -	December 5, 1941	Oklahoma - - - - -	May 22, 1945
Idaho - - - - -	December 4, 1941	Oregon - - - - -	September 14, 1937
Illinois - - - - -	September 22, 1937	Pennsylvania - - -	September 21, 1937
Indiana - - - - -	September 13, 1937	Rhode Island - - -	September 24, 1937
Iowa - - - - -	August 26, 1937	Tennessee - - - - -	June 1, 1939
Kansas - - - - -	September 15, 1937	Utah - - - - -	September 20, 1937
Louisiana - - - - -	September 13, 1939	Vermont - - - - -	September 13, 1937
Maine - - - - -	July 21, 1939	Virginia - - - - -	September 22, 1938
Maryland - - - - -	September 24, 1937	Washington - - - -	September 16, 1937
Massachusetts - - -	September 23, 1937	West Virginia - - -	June 5, 1939
Michigan - - - - -	September 14, 1937	Wisconsin - - - - -	March 21, 1940
Minnesota - - - - -	September 24, 1937	Wyoming - - - - -	September 24, 1937
Montana - - - - -	September 14, 1937		

EX PARTE TENNER

Supreme Court of California, 1942. 20 Cal.2d 670, 128 P.2d 338.

EDMONDS, JUSTICE. The question presented for decision by the petitioner's application for a writ of habeas corpus concerns the constitutionality of the Uniform Act for Out-of-State Parolee Supervision. (Stats. 1937, p. 469; Deering's Gen.Laws, 1937, Act 5783.) He is held by the respondent Chief of Police pursuant to the direction of the Board of Prison Terms and Paroles of the State of Washington as a convict whose parole has been revoked.

It appears that after his conviction of a felony and sentence to serve five years in the Washington State Penitentiary, the petitioner was granted a parole, and, in connection therewith, permission to come to this State. Later, the Board of Prison Terms and Paroles revoked his parole and ordered that he be returned to the penitentiary. Following his arrest upon the order of this board, he filed in the Superior Court a petition for a writ of habeas corpus. Upon the denial of his petition, he applied to the United States Supreme Court for a writ of certiorari. That court denied the writ, but issued its order prohibiting the State of California from removing Tenner, or permitting him to be removed from the state, pending the filing by him of a petition for a writ of habeas corpus in this court and a determination of the issues presented by it.

The Constitution of the United States provides that, without its consent, no state shall enter into any agreement or compact with another state. (Art. 1, sec. 10). Recognizing this constitutional prohibition, in 1934, the Congress of the United States enacted a statute which reads as follows: "The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts." (48 Stats. 909, 18 U.S.C.A. sec. 420, 1941 Supp.)

A majority of the states, including California and Washington, have enacted the Uniform Act for Out-of-State Parolee Supervision, *supra*,

. . .

The petitioner contends that the compact authorized by these statutes is unconstitutional in that it is repugnant to the provisions of Article IV, Section 2, clause 2 of the United States Constitution and to section 5278 of the Revised Statutes of the United States (18 U.S.C.A. sec. 662) providing for the extradition of fugitives from justice. More specifically, the petitioner contends that extradition is the sole means by which an alleged fugitive may be rendered up by one state to another. He also argues that the compact is contrary to the provisions of Article I, section 10, clause 3 of the Constitution of the United States providing that no state shall, without the consent of Congress, enter into any agreement or compact with another state, and, finally, that it deprives the petitioner of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The respondent takes the position that the legislation under attack does not violate any constitutional provision. On the contrary, he justifies the compact as one expressly authorized by the act of Congress relating to agreements between states (*supra*). He also argues that the congressional act may be deemed a statute empowering the states to enter into mutual compacts for the interstate transportation of criminals in aid of the enforcement of their penal laws under the interstate commerce clause of the Constitution. In addition, the respondent contends that the state has the right, under its police powers reserved by the Tenth Amendment to the United States Constitution, to exclude from its borders convicts and fugitives from justice.

The administration of parole is an integral part of criminal justice, having as its object the rehabilitation of those convicted of crime and the protection of the community. Unquestionably such rehabilitation of a parolee may often be facilitated by transferring him to another state, with new surroundings and better opportunities for employment. It is apparent, however, that the success of such out-of-state transfers requires adequate control and intelligent supervision of parolees during the period of their readjustment to civil life. And from the standpoint of the protection of society, there is sound reason for an agree-

ment between states that the authority over parolees should follow them across state lines. The knowledge on the part of the out-of-state parolee that he may summarily be returned to prison for any violation of the rules which he has agreed to obey undoubtedly is an effective check upon any inclination to violate parole.

The compact represents the social policy of both California and Washington in this regard. It is an agreement for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of the criminal laws of each state within the contemplation of the federal legislation and therefore does not violate the prohibition of the Constitution concerning compacts between states.

Nor does the act of the respondent deprive the petitioner of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution. He had his day in court when he was tried and convicted of a felony and sentenced to a maximum term of five years in the Washington State Penitentiary. The parole which he accepted was granted upon the express condition that the Board of Prison Terms and Paroles "may at any time within its discretion and without notice cause the parolee to be returned to the said institution to serve the full maximum sentence or any part thereof." One convicted of crime has the right to reject an offer of parole, but once having elected to accept parole, the parolee is bound by the express terms of his conditional release. *In re Peterson*, 14 Cal. 2d 82, 92 P.2d 890.

The most serious question presented by the petitioner is his contention that Article IV, section 2, clause 2, of the United States Constitution providing for the extradition of criminals and the act of Congress carrying that constitutional provision into effect constitute the sole method by which a parolee whose parole has been revoked may be returned to the state in which he was convicted. . . .

It has been held that a convict whose parole has been revoked is a fugitive from justice within the meaning of this statute, even though he entered the asylum state with the consent of the paroling authorities, and is subject to return to the demanding state by extradition proceedings. *In re McBride*, 101 Cal.App. 251, 281 P. 651; for cases from other jurisdictions see notes in 78 A.L.R. 419, 8 A.L.R. 903.

The validity of legislation in aid of the act of Congress concerning extradition is now well established (*Denison v. Christian*, 196 U.S. 637, 25 S.Ct. 795, 49 L.Ed. 630, affirming 72 Neb. 703, 101 N.W. 1045, 117 Am.St.Rep. 817; *Ex parte White*, 49 Cal. 433; *Kurtz v. State*, 22 Fla. 36, 1 Am.St.Rep. 173; *Ex parte Ammons*, 34 Ohio 518; *Ex parte Romanes*, 1 Utah 23) and it has been held that a state may legislate upon a subject of extradition unprovided for because Congress failed to extend Section 5278 of the Revised Statutes to the full limits of constitutional power. *Innes v. Tobin*, 240 U.S. 127, 36 S.Ct. 290, 60 L.Ed. 562. . . .

Prior to the adoption of the Constitution, the states or colonies regulated the return of fugitives by agreement. If no compact existed between the demanding state and the asylum state, an escaped prisoner

might remain in the asylum state with impunity. The question then is, did the framers of the Constitution intend to prevent the states from entering into agreements for the return of prisoners, or did they intend only to provide a federal procedure which would not necessarily be an exclusive one.

The Supreme Court of the United States succinctly stated the purpose of the constitutional provision concerning extradition in two early cases. In the first of these, after an exhaustive discussion of its history and purpose, the court said: "it is manifest that the statesmen who framed the Constitution were fully sensible, that from the complex character of the government, it must fail unless the states mutually supported each other and the general government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a state, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the state, to repeat the offense as soon as another opportunity offered," (*Kentucky v. Dennison*, 24 How. 100, 16 L.Ed. 717.) "The sole object of the provision of the Constitution and the act of Congress to carry it into effect", the court reiterated a short time later, "is to secure the surrender of persons accused of crime, who have fled from the justice of a state, whose laws they are charged with violating. . . . No purpose or intention is manifested to afford them any immunity or protection from trial and punishment for any offenses committed in the state from which they flee." *Lascelles v. Georgia*, 148 U.S. 537, 542, 13 S.Ct. 687, 689, 37 L.Ed. 549.

Except for Section 2 of Article IV of the Constitution, there would be no question concerning the right of states to provide, by their joint agreement, for the return of a certain class of fugitives, subject, of course, to the constitutional provision regarding interstate compacts. The right created by Article IV, it has been held, is a guarantee of which a state may avail itself to secure the return of an offender against its law. *State v. Parrish*, Ala., 5 So.2d 828, 832; *Ex Parte Roberts*, 186 Wash. 13, 56 P.2d 703. And since the extradition provision is not for the benefit of the fugitive, an asylum state may require the governor to surrender a fugitive on terms less exacting than those imposed by the act of Congress. *State ex rel. Treseder v. Remann*, 165 Wash. 92, 4 P.2d 866, 78 A.L.R. 412. As authority to require the return of fugitives originally existed in the states and remains there except as expressly limited by the Constitution, even in the field of federal extradition, the act of Congress is not exclusive of state action which does not come within its express terms. On the contrary, said the Supreme Court of the United States, it must have been intended to leave subjects within the constitutional power and not provided for by that statute subject to the state authority which then controlled them. (*Innes v. Tobin*, *supra*.) Neither the terms of the constitutional provision nor the act of Congress making it effective indicate that the extradition procedure was intended to be exclusive. . . .

The existence of an independent method of securing the return of out-of-state parolees does not conflict with nor render ineffectual the Federal laws with relation to extradition. The federal method of extradition is always present and may be invoked when necessary to secure the right to return of the fugitive to the demanding state. Also states not party to the interstate compact are free to invoke that procedure to secure the return of fugitive parolees. And if a state has elected to follow the federal procedure and claim the constitutional guarantee, the fugitive of course has the right to insist, on habeas corpus, that the procedure conform to the federal law. Similarly the parolee detained under the interstate compact has the right to complain, by means of habeas corpus, if that law is not complied with by the authorities. But no right exists on the part of the parolee, whose parole has been revoked, to claim that he may only be removed by the method of his choosing. And since the statute applies uniformly to all parolees from states party to the compact, the petitioner may not complain that the statute deprives him of the equal protection of the laws. *Caskey Baking Co. v. Commonwealth of Virginia*, 313 U.S. 117, 61 S. Ct. 881, 85 L.Ed. 1223; *Williams v. Arkansas*, 217 U.S. 79, 30 S.Ct. 493, 54 L.Ed. 673, 18 Ann.Cas. 865; *Field v. Barber Asphalt Pav. Co.*, 194 U.S. 618, 621, 24 S.Ct. 784, 48 L.Ed. 1142; *Missouri, etc. R. Co. v. May*, 194 U.S. 267, 24 S.Ct. 638, 48 L.Ed. 971; *Tinsley v. Anderson*, 171 U.S. 101, 18 S.Ct. 805, 43 L.Ed. 91; *Minneapolis, etc. R. Co. v. Beckwith*, 129 U.S. 26, 9 S.Ct. 207, 32 L.Ed. 585; *Walston v. Nevin*, 128 U.S. 578, 9 S.Ct. 192, 32 L.Ed. 544; *Barbier v. Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923.

For these reasons, the writ is discharged and the petitioner is remanded to the custody of the respondent chief of police.

Carter, J., dissented.

NOTES

1. Frankfurter and Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 *Yale L.J.* 685 (1925), suggests the use of interstate compacts to solve problems presented by the growing social and economic interdependence of states forming distinct regions. An appendix contains the legislative, judicial, and administrative history of intercolonial, and interstate agreements.

2. Dodd, "Interstate Compacts," 70 *U.S.L.Rev.* 557 (1936), 73 *U.S.L.Rev.* 75 (1939), points out the two methods of interstate agreement—reciprocal legislation and contract. After a discussion of the constitutional requirements the first article classifies interstate compacts by subject matter. The second article is addressed more specifically to the use of reciprocal legislation as a means of interstate compact.

3. On the question of the legal limitations on the use of interstate compacts, see Dutton, "Compacts and Trade Barrier Controversies," 16 *Ind.L.J.* 204 (1940); Note, "Legal Problems Relating to Interstate Compacts," 23 *Iowa L.Rev.* 618 (1938).

4. See Starr, "Reciprocal and Retaliatory Legislation in American States," 21 *Minn.L.Rev.* 371 (1937).

5. Concerning procedure for entering interstate compacts, see 21 *A.B.A.Jour.* 89 (1935).

6. See also (cited in Handbook on Interstate Crime Control, 1912):

(1) Randolph: "Suits Against States," 2 Colum.L.Rev. 283 et seq. (1902).

(2) For early studies on interstate compacts, Report of the Committee on Interstate Compacts, Handbook of Commissioners on Uniform State Laws, 1921, pages 297-367.

(3) Dean, "The Interstate Compact—A Device for Crime Repression," Law and Contemporary Problems, vol. I, No. 4, Duke University, pages 460-471, (1934).

(4) Report of Committee on Compacts and Agreements between States, Handbook of Commissioners on Uniform State Laws, 1937, pages 187-206, inclusive. (Note list of all compacts in history of country, with citations. This list does not include the Parole and Probation Compact, as same was concluded shortly after such list was prepared.)

7. For a review of how the Interstate Crime Commission's statutes have fared in the courts, see Note, "Interstate Crime Control—Uniform Acts—Interstate Compacts", 31 Minn.L.Rev. 699 (1947).

8. See Note, "Governmental Techniques for the Conservation and Utilization of Water Resources," 56 Yale L.J. 276 (1947).

Chapter 4

VARIOUS MEANS FOR MAKING LAWS EFFECTIVE

SECTION 1. LIMITATIONS ON EFFECTIVE LAW MAKING

ROSCOE POUND, THE LIMITS OF EFFECTIVE LEGAL ACTION

3 A.B.A.Jour. 55, 27 Int.J.Eth. 150 (1917).

A student of the political institutions of republican Rome is continually impelled to wonder how any people could carry on a great government under a system involving so much division of authority, so many vetoes, so many collegiate magistracies, and so complex a system of checks. In less degree as one studies the British constitution, as it was in the last century, the unwritten constitution, the government by custom and precedent, the respect for traditional lines between authorities and magistracies with large potentialities of theoretical jurisdiction, he can but wonder how an empire could be governed in such loose fashion. Even our American separation of powers and local self-government as they existed in full vigor in the last century nowadays awaken similar reflections in the student of political science. And it must be noted that the Roman system was only possible among a homogeneous, law-abiding people, living a simple life, and broke down in the heterogeneous, undisciplined, luxurious world-state of the Roman empire. Likewise the British system shows signs of great strain under the unwonted conditions of the present century, and our own worked much better in rural, agricultural, pioneer America of the nineteenth century than in the urban, industrial America of today.

What is true of political institutions is no less true of legal institutions. One can but marvel how the Roman law of Cicero's time, with its crude enforcing agencies, its crude methods of reviewing decisions, its crude methods of instructing tribunals as to the law, could ever have maintained itself, much less have developed into a law of the world. It could not have done so, indeed, except among a disciplined, homogeneous people, zealous to know the law and to obey it. For when men demand little of law, and enforcement of law is but enforcement of the ethical minimum necessary for the orderly conduct of society, enforcement of law involves few difficulties. All but the inevitable anti-social residuum can understand the simple program and obvious purposes of such a legal system, and enforcement requires nothing more than a strong and reasonably stable political organization. On the other hand, when men demand much of law, when they seek to devolve upon it the whole burden of social control, they seek to make it do the work of the home and of the church, enforcement of law comes to involve many difficulties. Then few can comprehend the whole field of the law, nor can they do so at one glance. The purposes

of the legal system are not all upon the surface, and it may be that many whose nature is by no means anti-social are out of accord with some or even with many of these purposes. Hence today, in the wake of ambitious social programs calling for more and more interference with every relation of life, dissatisfaction with law, criticism of legal and judicial institutions, and suspicion as to the purposes of the lawyer become universal.

Complaint of non-enforcement begins, indeed, in primitive law, when political authority is weak and there are persons or groups in the community too masterful for the nascent state to control effectively. This situation does not wholly disappear. Even today there are groups which at times prove able to over-awe administrative authorities and to thwart the equal administration of justice. But in general the causes of non-enforcement of law in modern times are more complex. Today, for the most part, they grow out of over-ambitious plans to regulate every phase of human action by law, they are involved in continual resort to law to supply the deficiencies of other agencies of social control, they spring from attempts to govern by means of law things which in their nature do not admit of objective treatment and external coercion.

Whatever ideas jurists may entertain as to law-making, at present the layman's philosophy of law-making is voluntaristic. The layman believes that law may be made. He believes that law is a product of the will of the law-maker. Accordingly, whenever he wills something that he would like to see enforced upon his neighbor, he essays to make law freely. We may grant that there is something to be said for the layman's views as to law-making as a needed reaction from the theories of legislative and juristic futility which prevailed in the nineteenth century. We may grant, if you will, that jurists would do well to acquire some part of the modern faith in the efficacy of conscious effort. Very likely if the lawyer were to acquire something of the layman's voluntaristic theory of law-making, and the layman to absorb some of the lawyer's reliance upon finding law and skepticism as to making law, it might be a useful exchange. But that is another story. The point for our present purpose is that the great activity of modern legislatures has made enforcement of law an acute problem. It has compelled us to turn to all manner of new enforcing agencies, such as inspectors, boards and commissions, while at the same time putting a severe strain upon our old enforcing agencies. In the past we have been much concerned with the abstract justice of legal rules but have been concerned little or not at all as to their enforcement. Today we are almost willing to throw over our hard-won justice according to law in order to bring about speedy and vigorous application of new types of rules securing new interests. For example, modern statutes setting up public service commissions or industrial commissions very generally reject the common-law rules of evidence. Not only this but some of them, at least as interpreted, seem to require commissions to found their awards upon testimony which no common-law court would regard as a sufficient basis for judicial action. Again we are reverting

in some degree to the crude methods of rough-and-ready adjustment of controversies imposed on primitive law by the desire for peace at any price. We have to go back to the tariffs of compositions in primitive codes, to such provisions of the beginnings of law as the "for every nail a shilling" of Ethelbert's dooms, to find an example of mechanical valuations in advance such as form the staple of modern Workmen's Compensation Acts. But our enforcing machinery, staggering under a heavy burden as it is, was not equal to the task of speedy ascertainment of an exact reparation in every case under a novel theory of liability. In other words, the problem how to enforce the law is closely connected with the question how far all that we style law and seek to give effect as law is capable of enforcement; and when we look into the history of the subject we soon come to see that much of this problem of enforcing law is in reality a problem of the intrinsic limitations upon effective legal action.

As the chancellor would have the law of his court in no wise different from the law of God, and hence sought to make all moral duties into legal duties, so today the law-maker would protect all the wider human interests which are clamoring for recognition by putting legal rules behind them and would enact into law everything which an enlightened social program indicates as a desirable ideal. Accordingly, we begin to hear complaint that laws are not enforced and the forgotten problem of the limitations upon effective legal action once more becomes acute. Complaint of non-enforcement of law is nothing new. It is as old as the law and has been heard in this country from the beginning. But it is significant that in America such complaint has been heard chiefly in connection with the extravagant translations of Puritanical ideas of conduct into penal codes, known as blue laws, and the voluminous social legislation of today. It is significant also that the world over such complaint has been heard chiefly in periods when the law was seeking ambitiously to cover the whole field of social control, or in transitions to such periods. It is not an accident that the problem of application and enforcement of law has come to be regarded as the central one in the legal science of Continental Europe. If Anglo-American jurists are still thrashing the old straw of disputes as to the nature of law we must not be deceived. Those who must keep their eyes upon the law in action are discussing application and enforcement no less than the jurists of Europe. Such non-legal volumes as the proceedings of the Association for Labor Legislation and of the National Conference of Charities and Corrections tell the true tale of the significant question for the legal science of today. It is not a mere academic exercise therefore to set forth analytically the limitations inherent in administration of justice according to law, which preclude the complete securing through law of all interests which ethical considerations or social ideals indicate as proper to be secured.

One set of limitations grows out of the difficulties involved in ascertainment of the facts to which legal rules are to be applied. This is one of the oldest and most stubborn problems of the administration of justice. In primitive law there was the danger that debate over the

facts would take the form of the very private war which the law was seeking to put down. Hence the law sought to settle the facts by some mechanical device—by ordeal, or casting lots, or even battle by champions—in other words, by some conclusive test that involved no element of personal judgment on the part of the magistrate and could not be challenged for partiality. The strict law relied on procedural forms for the same reason. Forms prevented dispute. The form was fixed and notorious. Men's ideas might differ as to whether there was something novel, called a substantial right, contained in or behind the form, and if so, as to what it was. But the form allowed no scope for such disputes, and in the beginnings of a legal system as well as in the primitive stage, a chief end is to avoid dispute. In any age or in any place where men are inclined on slight provocation to take the righting of wrongs into their own hands, the law that hesitates is lost. In time the legal system develops a rational mode of trial. Yet trial by jury was at first purely mechanical. And while we should not agree with the Year Books speaking from the days of verdicts on the common knowledge of the vicinage that a man's intent or a woman's age cannot be ascertained by legal trial, the exigencies of trial by jury impose many limitations upon legal securing of important interests. For example, the law is often criticised because it does not protect against purely subjective mental suffering, except as it accompanies or is incident to some other form of injury and within disputed limits even then. There are obvious difficulties of proof in such cases. False testimony as to mental suffering may be adduced easily and is very hard to detect. Hence the courts, constrained by the practical problem of proof to fall short of the requirements of the logical system of rights of personality, have looked to see whether there has been some bodily impact or some wrong infringing some other interest which is objectively demonstrable, and have put nervous injuries which leave no bodily record and purely mental injuries in the same category.

Another set of limitations grows out of the intangibility of duties which morally are of great moment but legally defy enforcement. I have spoken already of futile attempts of equity at Rome and in England to make moral duties of gratitude or disinterestedness into duties enforceable by courts. In modern law not only duties of care for the health, morals and education of children, but even truancy and incorrigibility are coming under the supervision of juvenile courts or courts of domestic relations. But note that the moment these things are committed to courts administrative agencies have to be invoked to make the legal treatment effective. Probation officers, boards of children's guardians and like institutions at once develop. Moreover, one may venture to doubt whether such institutions or any that may grow out of them will ever take the place of the old-time interview between father and son in the family woodshed by means of which the intangible duties involved in that relation were formerly enforced.

A third set of limitations grows out of the subtlety of modes of seriously infringing important interests which the law would be glad to secure effectively if it might. Thus grave infringements of individu-

al interests in the domestic relations by talebearing or intrigue are often too intangible to be reached by legal machinery. Our law has struggled hard with this difficulty. But the result of our action on the case for criminal conversation and alienation of affections, which long ago excited the ridicule of Thackeray, do not inspire confidence nor does the sole American precedent for enjoining a defendant from flirting with the plaintiff's wife assure a better remedy. So also with the so-called right of privacy. The difficulties involved in tracing injuries to their source and in fitting cause to effect compels some sacrifice of the interests of the retiring and the sensitive.

A fourth set of limitations grows out of the inapplicability of legal machinery of rule and remedy to many phases of human conduct, to many important human relations and to some serious wrongs. One example may be seen in the duty of husband and wife to live together and the claim of each to the society and affection of the other. Formerly, so far as the husband was concerned, our legal system secured this interest in three ways, namely, (a) by a marital privilege of restraint and correction, (b) by a suit for restitution of conjugal rights, and (c) by a writ of *habeas corpus* directed to one who harbored the wife apart from her husband. But the privilege of restraint and correction is incompatible with the individual interests of personality of the wife and is no longer recognized. The suit for restitution of conjugal rights, in origin an ecclesiastical institution for the correction of morals, sanctioned by excommunication, has long been practically inefficacious and is now obsolete. And the writ of *habeas corpus* may now be used only when the wife is detained from the husband against her will. Today this interest has no sanction beyond morals and the opinion of the community. This was true also in the classical Roman law, and in modern countries ruled by the Roman law, as in those that are ruled by the common law, the chief security for the interest of husband and wife in the marital relation is simply the moral sense of the community. So little has been achieved in practice by the husband's actions against third parties who infringe this interest, tested in the law by centuries of experience, that the courts have instinctively proceeded with caution in giving them to the wife by analogy in order to make the law logically complete.

Law secures interests by punishment, by prevention, by specific redress and by substitutional redress; and the wit of man has discovered no further possibilities of judicial action. But punishment has of necessity a very limited field, and today is found applicable only to enforce absolute duties imposed to secure general social interests. The scope of preventive relief is necessarily narrow. In the case of injuries to reputation, injuries to the feelings and sensibilities—to the "peace and comfort of one's thoughts and emotions"—the wrong is ordinarily complete before any preventive remedy may be invoked, even if other difficulties were not involved. Specific redress is only possible in case of possessory rights and of certain acts involving purely economic advantages. A court can repossess a plaintiff of Blackacre, but it cannot repossess him of his reputation. It can make a defendant restore a

unique chattel, but it cannot compel him to restore the alienated affections of a wife. It can constrain a defendant to perform a contract to convey land, but it cannot constrain him to restore the peace of mind of one whose privacy has been grossly invaded. Hence, in the great majority of cases substitutional redress by way of money damages is the only resource, and this has been the staple remedy of the law at all times. But this remedy is palpably inadequate except where interests of substance are involved. The value of a chattel, the value of a commercial contract, the value of use and occupation of land—such things may be measured in money. On the other hand, attempt to reach a definite measure of actual money compensation for a broken limb is at least difficult; and valuation of the feelings, the honor, the dignity of an injured person is downright impossible. We try to hide the difficulty by treating the individual honor, dignity, character and reputation, for purposes of law of defamation, as assets, and Kipling has told us what the Oriental thinks of the result. "Is a man sad? Give him money, say the Sahibs. Hath he a wrong upon his head? Give him money, say the Sahibs." It is obvious that the Oriental's point is well taken. But it is not so obvious what else the law may do. If, therefore, the law secures property and contract more elaborately and more adequately than it secures personality, it is not because the law rates the latter less highly than the former, but because legal machinery is intrinsically well adapted to securing the one and intrinsically ill adapted to securing the other.

Finally, a fifth set of limitations grows out of the necessity of appealing to individuals to set the law in motion. All legal systems labor under this necessity. But it puts a special burden upon legal administration of justice in an Anglo-American democracy. For our whole traditional polity depends on individual initiative to secure legal redress and enforce legal rules. It is true, the ultra individualism of the common law in this connection has broken down. We no longer rely wholly upon individual prosecutors to bring criminals to justice. We no longer rely upon private actions for damages to hold public service companies to their duties or to save us from adulterated food. Yet the possibilities of administrative enforcement of law are limited also, even if there were not grave objections to a general regime of administrative enforcement. For laws will not enforce themselves. Human beings must execute them, and there must be some motive setting the individual in motion to do this above and beyond the abstract content of the rule and its conformity to an ideal justice or an ideal of social interest. The Puritan conceived of laws simply as guides to the individual conscience. The individual will was not to be coerced. Every man's conscience was to be the ultimate arbiter of what was right and wrong at the crisis of action. But as all men's consciences were not enlightened, laws were proper to set men to thinking, to declare to them what their fellows thought on this point and that, and to afford guides to those whose consciences did not speak with assurance. Such a conception, suitable enough in a sparsely settled community of pioneers, is quite impossible in the crowded industrial com-

munity of today with its complex organization and clash of conflicting interests. Yet many still think of law after the Puritan fashion. One social reformer told us recently that the real function of law is to register the protest of society against wrong. Well, protests of society against wrong are no mean thing. But one may feel that a prophet rather than a law-maker is the proper mouthpiece for the purpose. It is said that Hunt, the agitator, appeared on one occasion before Lord Ellenborough at circuit, *a propos* of nothing upon the calendar, to make one of his harangues. After the Chief Justice had explained to him that he was not in a tribunal of general jurisdiction to inquire into every species of wrong throughout the kingdom, but only in a court of assize and jail delivery to deliver the jail of that particular county, Hunt exclaimed, "But, my Lord, I desire to protest." "Oh, certainly," said Lord Ellenborough. "By all means. Usher! Take Mr. Hunt into the corridor and allow him to protest as much as he pleases." Our statute books are full of protests of society against wrong which are as efficacious for practical purposes as the declamations of Mr. Hunt in the corridor of Lord Ellenborough's court.

Much advance has been making of late in the art of drafting legislation and in the study of comparative legislation. But in an age of legislative law-making much more is required. The life of law is in its enforcement. The common-law rule came into being through enforcement and application and the situations that brought about its existence determines its life. The statutory rule, on the other hand, is made *a priori*. It is not necessarily a living rule when it is put upon the books. Occasion to apply it judicially may not arise till long afterward. Moreover it is an abstract rule and the situation that led to its existence goes rather to its interpretation than to its validity as a rule. Hence it is not enough for the law-maker to study the form of the rule and the abstract justice of its content. He must study how far cases under the rule are susceptible of proof. He must study how far by means of his rule he may set up a tangible legal duty capable of enforcement objectively by legal sanctions. He must consider how far infringements of his rule will take on a palpable shape with which the law may deal effectively. He must study how far the legal machinery of rule and remedy is adapted to effect what he desires. Last, and most of all, he must study how to insure that someone will have a motive for invoking the machinery of the law to enforce his rule in the face of the opposing interests of others in infringing it.

MORRIS R. COHEN, POSITIVISM AND IDEALISM IN THE LAW

27 Colum.L.Rev. 237, 245-249 (1927).

"He who tries to determine everything by law will foment crime rather than lessen it." Spinoza, *Tract. Theol. Polit.*, c. 20.

II

This brings us to our second limitation of legal idealism, the inevitable imperfections in the human beings that have to make, to enforce, and to obey the law.

We may view the limitations of imperfect human nature (1) from the point of view of the legislator, (2) from the point of view of those who have to obey the law, and (3) from the point of view of those who have to enforce it or operate the legal machinery.

(1) *Inherent Limits of Legislative Power*

The obvious fact which no glorification of law can obscure is that it is made by human beings subject to the limitations of human ignorance and of inadequate sympathy or good will.

(a) The ignorance of the legislator may relate to the end of the law which he helps to bring about. Moved by the demand for the redress of some grievance, the legislature enacts a statute. But changing the law is like making a change in the intricate plot of a highly organized drama. You cannot change one part without other parts being affected in unexpected ways. Legislatures thus seldom have an adequate idea of what they intend to bring about. The Napoleonic Code intended to guarantee that all the children shall have some part of the patrimony. Did its authors have any idea that they were erecting a check to the growth of population?

(b) Assuming that the legislator knows what effect he wants to produce, he may be ignorant of the natural circumstances involved. All sorts of scientific facts have to be assumed in modern legislation. Our southern legislatures feel competent to pass on the truths of biologic evolution and one of our western states came near decreeing some absurd value for *W*. All our state legislatures feel competent to pass on the truths of history to be taught in the public schools. Modern states all contain heterogeneous elements. Hence laws applicable to a vast majority may be absurd for some groups or regions—e.g., trial by jury in those United States possessions inhabited by *Negritos*. Rural legislators do not know or sympathize with urban industrial life and city legislators do not always understand the conditions of farm life.

(c) Of special importance is the imperfect power of the legislature to control the subsequent interpretation of its enactments. The legislature can express its intention only in general terms. It cannot foresee all actual cases. It cannot therefore completely control the interpretation and application of its statutes by courts and adminis-

trators bent on making the law serve other and wider purposes. The legislature generally looks to the removal of a specific abuse while the judge and the jurist must look upon any statute as a part of the whole legal system. Thus the first legislatures that wished to change the common law as to the property rights of married women were repeatedly defeated by courts that persisted in thinking of these statutes in terms of the traditional common law.

(2) *Inherent Difficulties in Forcing Obedience to the Law*

That in a democracy the law is the will of the people is a statement not of a fact but of an aspiration that ought to be true. A great deal of the law is and necessarily must be the work of legislatures, courts and jurists whose work is seldom fully known to the majority of the people. Indeed, as to rules of conduct on which people are fairly unanimous there is no need for the enactment of any law. Enacted law represents the will of some part of the community and the rest obey either out of respect or by force of habitual obedience to regular authority. Yet neither legislatures, courts, or jurists, nor all combined are omnipotent. There is no way of securing perfect obedience where there are strong human motives for disobedience or evasion.

The failure of the law to secure obedience has been historically shown in at least four fields of human life.

(a) In the field of religion. The persistence despite persecution of the Christian churches in the early Roman Empire, of the Jews and Christian dissenters in Russia, England, and elsewhere, shows how persistently small minorities may defy and defeat the law.

(b) In the field of personal morals. This has always been a favorite interest of the law, but its failures in this field are proverbial. It is true that sumptuary laws have often been generally obeyed, e.g., in the Middle Ages. But this happened only so long as they conformed to the general moral feeling of mediaeval society. When they cease to express a strong moral consensus they cease to be effective. Take for instance the case of the New York law which makes adultery a crime. Though many thousands of divorces have been granted for that offence there seem to have been hardly any convictions for the crime. As a criminal law it is a dead letter. Yet any proposal to repeal it would meet with widespread resentment. The majority of the people of New York State emphatically wish the statute book to express their disapproval of adultery. Why, then, has there been no enforcement of it? The answer is to be found in the inherent difficulty of enforcement. It is an unpleasant and unedifying thing to bring into court. Moreover it is extremely doubtful whether convictions would greatly reduce the number of actual offences, or result in more good than harm.

The experience of our national prohibition law and the many evils which its enforcement involves, especially the violation of the law by the very agents of the government, are too flagrant to need anything but bare mention here.

It is interesting, however, to reflect that these evils are not merely contemporary. Long ago a most detached philosopher, Spinoza, wrote the sentence at the head of this paper. He also observed:

"Many attempts have been made to frame sumptuary laws. But these attempts have never succeeded in their end. For all laws that can be violated without doing any one an injury are laughed at. Nay, so far are they from doing anything to control the desires and passions of men, that, on the contrary, they direct and incite men's thoughts the more towards those very objects; for we always strive for what is forbidden, and desire the things we are not allowed to have. And men of leisure are never deficient in the ingenuity needed to enable them to outwit laws framed to regulate things which cannot be entirely forbidden . . . My conclusion, then, is that those vices which are commonly bred in a state of peace . . . can never be directly prevented but only indirectly. That is to say, we can only prevent them by constituting the state in such a way that most men will not indeed live with wisdom (for that cannot be secured simply by law), but will be led by those emotions from which the state will derive most advantage."¹

(c) Similar failure can be seen in the field of economics. The repeated failures of attempts to regulate wages by law, to prohibit mergers or trusts, to prevent railroads from having an economic interest in the products they carry, all illustrate how difficult it is to prevent evasion of the law by those who have a strong interest in doing so.

(d) In the political sphere we need only mention the failure of the Fourteenth and Fifteenth Amendments to the United States Constitution to secure civil and political equality for the negro. Mr. Horwill² has recently called attention to the many ways in which Congress and the Executive evade the provisions of the Constitution, e.g., the failure to reapportion congressional representation after the census of 1920. The most interesting of these evasions is by what he calls "discreet nomenclature," e.g., evading the duty of submitting a law for presidential approval by calling it a concurrent resolution, etc.

There can be no doubt that the framers of the United States Constitution intended the Electoral College to serve as a barrier against the influence of political parties in the election of the president. This purpose has been defeated without changing the constitutional law, by the extra-legal device of the political convention.

(3) *The Limits of Legal Machinery*

Dean Pound has treated this topic with his usual thoroughness in an essay on "The Limits of Effective Legal Action"³ and I may add

¹ Tractatus Polit. 10, 4-6. The same protest against bringing the law into disrepute by saddling on it statutes which cannot be enforced has been eloquently made, by President Butler. See his address before the Ohio Bar Association, at Columbus, Ohio, on January 26, 1923.

² The Usages of the American Constitution (1925).

³ (1917) 27 Int.J.Eth. 150.

only a few remarks. Legal machinery, we must remember, never operates apart from human beings, judges, juries, police officials, etc. The imperfect knowledge or intelligence of these human beings is bound to assert itself. It is therefore vain to expect that the legal machinery will work with a perfection that no other human institution does. We cannot expect results too fine for the discrimination of the ordinary jurymen. A great deal of injustice cannot be prevented by law because the attempt to do so is bound to produce greater evil than it can cure. I think that the action for breach of promise to marry well illustrates this. Apart from the injury to public decency from the fact that this action is so often used purely for blackmail, it is a bad policy for the law to put a monetary value on the marriage promise and to seem in any way to force people into the marriage relation when the churches so strenuously insist that no matter what promises have passed between the two parties there shall be no marriage performed unless both parties are perfectly willing at the time of the ceremony.

It would be foolishness to contend that in the various fields mentioned, law has never been effective. Few injustices are absolutely beyond all human effort, if we are willing to make sufficient sacrifice to remove them. But it is folly to center our attention on some result desirable in itself and ignore the fearful cost of incidental consequences required to attain it.

We conclude then that in view of the necessary limitations of any legal system and the many insuperable difficulties in the way of enforcing all sorts of moral considerations, it is a wicked stupidity that insists on absolute justice regardless of consequences. *Fiat justitia percat mundus* is the device of the fanatic, too lazy to think out the consequences of his position. The more human wisdom is summed up in the saying, *summum ius, summa injuria*.

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NOTE

In Eggleston, "Legal Development in a Modern Community," in *Interpretations of Modern Legal Philosophies* (1947), 168 at 172, the author concludes from his discussion of lawmaking in nineteenth-century England: "(i) That the legislative process of law-making in the modern sense is a scientific process; it is not the mere process of commanding, not the mere exercise of will. It is a particular kind of social act in which certain forces play a part, in which an objective is aimed at, which can be attained if appropriate means are used. Laws will not be made effectively unless we know how to bring about what we decide. (ii) The specific inquiry that we have to make as a starting point is into the existing body of relations which have formal legal expression and which are working as a going concern. (iii) The legislation must be so devised as to establish a new working order which the people accept and in which they act according to the new conditions. . . ."

WILLIAM H. TAFT, THE LEGISLATURE AND THE EXECUTION
OF THE LAWS

12 Rep.Pa.Bar Ass'n 239, 240-245 (1906).

. . . We live in a practical work-a-day world, and our legislation must partake of this same character. The law should be a definite, concrete enunciation of rules of action which the most ignorant can apply to the every day occurrences in their own lives and which there is some reasonable probability that with the instrumentalities at hand, an executive of average energy and courage may be expected to enforce. . . .

. . . When a law is proposed to be enforced in a community a great majority of whom are opposed to its enactment and will be opposed to its enforcement, and when the officers whose duty it will become, to execute the law, are to be elected by that community, the Legislature should hesitate before it adopts it. Of course where a majority of the community is engaged in business or conduct which may be described as *malum in se*—something which is immoral and aimed at the destruction of society, there is no course open to the Legislature but to denounce the business or conduct by criminal laws and provide for their effective enforcement whatever the obstructing difficulties. Such a case was presented when the government of the United States determined to stamp out polygamy in Utah, but that is an extreme case. . . .

I am far from saying that no laws ought to be adopted which will not enforce themselves, or which will not be violated because nobody has a motive or desire to violate them; but the point which I wish to suggest is that legislators in adopting a law do not generally give sufficient consideration to the practical questions whether under all the conditions, it is likely to be enforced. In some cases, such considerations ought not to prevent the enactment of a law on the general subject, but may properly lead to such a re-framing of its provisions so as to provide a method of its enforcement which will make less probable its becoming a dead letter. In many communities, it is certain that the imposition of a tax or the requirement of a high license for the saloon business, will be much more effective to restrict the evil than absolute prohibition. One has to encounter, in questions of this character, the argument that it does not do for the State and the public in its laws to make "a covenant with hell or a league with the Devil," but such an argument appeals more to excellent high minded but impracticable idealists than to practical statesmen charged with carrying on a government and dealing with actual conditions. There is a decided difference between licensing prostitution or gambling which can not be at all justified, on the one hand, and prohibiting every one in a community from selling or taking a drink of beer, or wine or whiskey on the other. It is not the duty of the legislator in law to formulate an ideal system of morality and pass criminal statutes to punish those who do not live up to that high ideal. . . . The function of the

Legislature is chiefly to restrain the evils arising from the interference with one man's pursuit of happiness by the act of another. It is to secure the greatest good for the greatest number. It is to lay down practical rules of action, easily comprehended, directed to restraining evils and injuries. It is to offer equal opportunities for the improvement of the people rather than to command it by positive law, to be enforced by threatened or actual punishment. It is to furnish the means of maintaining justice, and then to let individualism have its sway in working out character and in adding to the sum of human happiness. The theory that by legislation the State can successfully command people to be righteous in the higher sense is at the bottom of much unsuccessful and obsolete legislation that stands as a monument to the obstacle that hearts overflowing with enthusiastic love for their race but without practical judgment have offered to real progress. The making and operation of laws are not proper subjects for the consideration and action of a tyro, however high his aim or pure his motive. Successfully to understand the science of practical lawmaking requires close observation of the nature, customs and traditions of the people to be affected by the laws, the degree of efficiency of the persons to be charged with their execution, the method by which such executives are to be selected, the difficulties with which those violating the laws may be brought to justice, and many other circumstances bearing directly on the question whether the law enacted is to be thrown into the scrap heap of nugatory and defunct acts of the Legislature, or is to become a living force and instrumentality for the betterment of the people of the State. . . . The tendency of Legislatures in the enactment of such laws is to pass them and then rid themselves of the responsibilities for their enforcement by saying that the duty of enforcement rests on the executive and not on the legislative branch. It is a counterpart of the tendency of Legislatures of modern days to pass laws without much regard to the constitutional restrictions upon their powers on the theory that the question of the validity of the law has somehow been shifted from their shoulders to the judicial branch of the Government, as if the Constitution which they swear with uplifted hand to uphold was not as binding upon the legislators as it is upon the judges of the courts.

Before this audience of lawyers I need hardly dwell on the pernicious effect of the enactment of a law which is not to be constantly and uniformly enforced. It brings all laws into disrepute. It leads to fitful and sporadic efforts to execute it which, of course, make it operate unjustly because it is made to affect only the few exposed to its penalties during the spasm of virtue on the part of the executive. It offers to an unprincipled executive an opportunity to wreak vengeance on his enemies, or to blackmail the unfortunate. It makes those who violate it and escape its penalties indifferent to the observance of other laws which, but for the sense of immunity thus engendered, they would not be tempted to transgress. Ineffective laws are a serious danger to the body politic and social. . . .

JOHN DICKINSON, LEGISLATION AND THE
EFFECTIVENESS OF LAW.

37 Rep.Pa.Bar Ass'n 337, 346-355 (1931).

II

First of all, as to whether some of the results that we are today attempting to accomplish by legislative regulation can be accomplished in that way. At this point we run squarely athwart another of those broad crystallizations of public opinion which, like the idea that we have too much legislation, is the common coin of discussion and debate, and forms the more or less unconscious premise of a great many views about legislative matters. I refer to the idea that a great deal of our regulatory legislation is not merely futile but harmful because, as we say, it is impossible to make men moral or honest or good by governmental *fiat*. Of course it is impossible to do so, but granting this, are we justified in going forward from this premise to the conclusion that all or much of our regulatory legislation attempts to accomplish the impossible? We need rather to ask whether the purpose of regulatory legislation is in fact to make men moral and honest, or whether it may not have other objects which fall more definitely within the range and scope of possible accomplishment.

If we examine the bulk of our regulatory legislation it should be abundantly clear that a great deal of it has no relation whatever to questions of morality or honesty, but is simply designed to insure that particular acts shall be done in a particular way, in one way rather than some other possible way, in order that other persons who are likely to be affected by the acts in question may have a basis for what to expect, may know what to count on, and may thus be enabled to shape their conduct accordingly. This is illustrated, for example, by the vast volume of traffic regulations. No question of morality is involved in whether it is to be lawful for the driver of an automobile to make a lefthand turn at a corner or whether the rear light of a vehicle is to be red or green. The driver is made to do one thing rather than another not because one is morally good and the other morally evil, but in order that other persons may have a reasonable basis for expectation as to which of the two things he will in fact do, and may thus keep out of his way. The same purpose underlies many of the requirements of our corporation laws and laws regulating the marketing of agricultural and manufactured products. Their design is not to make men good but to supply individuals with a basis of expectation, and therefore with reasonable grounds of action in a world where methods of action change so rapidly that standard types of conduct upon which others can rely have slight chance to grow up and acquire the force of customs.

In a simple society where most men are engaged in the same types of activity and where these remain stereotyped from generation to generation, standards of conduct can become rooted as customs so that no deliberate and artificial regulations are necessary. But in a

changing society where individuals are constantly shifting from one narrowly specialized activity to another, and where the methods and technique of any given activity are subject to constant change and improvement, customs have small opportunity to become well-established and individuals are not in a position to have customs ingrained in them by habit. We often hear it said that many matters which we attempt to deal with by law should properly be left to custom. So far as custom can operate it is certainly a more reliable and effective agency for guiding expectations of conduct than law can ever be, but we do not sufficiently realize that custom is essentially the product of a slow-moving and static society and that its effectiveness is paralyzed when change goes forward at such a rate that customs have no time to form, much less to take root.

So far we have been speaking of legislative regulations which have no direct reference to issues of morality, but much of our regulatory legislation does go further and concerns itself with questions of fair dealing, justice, honesty, carefulness and the like. Admitting that these moral qualities cannot be legislated into human beings by *fiat* of the State, does it necessarily follow that such legislation is futile and meddling? In other words, where legislation holds men to certain standards of conduct which have moral implications, must it be said that the purpose of such legislation is to instill into them the moral qualities on which such standards are based, and that since moral qualities cannot be created by law, the legislation is therefore bad? I know of no subject on which there is more widespread confusion than this, or where over-simplification of thought is more in evidence.

Perhaps the most direct way of clarifying the issue is to consider the ordinary common law rules as to fraud and negligence. The conception of fraud certainly carries with it strong moral implications, just as the conception of negligence carries with it an implication of the mental attitude which we describe as carefulness. Is it proper to say that the object of the legal rules which establish liability for fraud and negligence is to instill into individuals the qualities of honesty and carefulness? Even if indirectly and in the long run they may possibly have some tendency to promote that result, it seems clear that their primary object is a different one. Primarily their object is simply to provide that certain types of external conduct shall be followed by certain legal consequences of a deterrent character. They do not aim, in other words, to produce an honest frame of mind on the part of dishonest persons, or a careful frame of mind on the part of careless persons. They merely give notice that if conduct does not measure up to a certain external standard of honesty or carefulness, consequences will ensue of a character probably regarded as undesirable by the person who fails to meet the prescribed standard. In other words, the aim of the law is not to accomplish the hopeless task of altering human character, but merely to insist on conformity of conduct to a standard deemed advisable for the protection of the other individuals who compose the community. If an individual fails or refuses to measure up to that standard, all that the law can do and all that it

undertakes to do is to make him pay a penalty. There is no reason to suppose that this task is impossible or that the resulting protection to the community is rendered nugatory simply because it happens to be impossible for the law to instill morality into the culprit.

The problem of the legislator is therefore misconceived, and the central difficulty of regulatory legislation obscured, by simply saying that law cannot make men honest or moral, and letting the matter go at that. The real difficulty is a different one. It is the difficulty of determining how high a standard of conduct regulatory legislation can reasonably require with any hope of being effective. It is impossible for law to hold men to conformity with a standard so much more strict than that to which they are willing to conform that the difficulties of enforcement will prove insuperable. This is the problem of what may be called the effectiveness of law. Are there any considerations which enable the legislator to determine in advance what standards of conduct can be made effective by governmental action and what standards on the other hand men will refuse to conform to in spite of the threat of penalties?

On this point it is usual to say that no legal standard will or can be effective which is in advance of the general and customary habits and practices of the community—that law, in other words, cannot be in advance of usage. I suggest that here again we are in the presence of an over-simplification. In a rough way, the view just stated is sound, but only if reduced to the tautology that a law cannot be enforced if it cannot be enforced. Consider the difficulty of determining what we mean when we talk of the existing practice or usage beyond which law cannot advance. In a complex modern society, made up of numerous layers of individuals differing widely in training, intelligence and occupation, there is the widest range of usage on many of the matters with which law has to deal, and a wide variety of views and opinions as to what is just and fair and careful in any given set of circumstances. How shall we tell which special brand of usage or opinion out of this variety and diversity is the “normal” one beyond which law may not advance? Shall we try to count noses and allow a temporary majority always to prevail? Is not the usage of an active and aggressive minority often on the way to being imitated and thus becoming the usage of next year’s majority? How shall we say that there is a usage at all where the matter in question concerns only a small part of the community and where there are differences of usage within even that restricted group? In short, when we talk of usage we are dealing not with something fixed and stable, but with a fluid, changing, complex phenomenon which alters under our eyes while we are attempting to ascertain it, and this is why we get so little real or substantial aid when we seek the proper standard for the effectiveness of law in a supposed normal standard of extra-legal practice. . . .

Nor need the practice to which the law lends its aid and which it seeks to enforce necessarily be the practice which at the moment is the practice of the majority. The practice of the numerical majority at any given moment is often hopelessly in the rear of the soundest

and best considered practice. If all that law could ever effectively accomplish were to put its force behind the practice of the numerical majority, its influence in perhaps the largest number of instances would be to obstruct rather than promote improvement. Whether or not and how far law can effectively lend its support to enforce standards in advance of the usage of the numerical majority is not a question which can be solved by a formula, but one which depends for its solution on all the circumstances of the particular case. If for one reason or another the practice of the majority is not something seriously insisted on, but rather casual, superficial, and unassociated with positive conviction, law can undertake to insist on a higher standard with excellent prospects of successful enforcement. Again, where there is a determined and powerful minority insisting on the legal enforcement of the new standard, the enforcement can often be made successful even in the face of somewhat determined resistance by the majority. In other words, to put the matter in the form of what looks like a truism, but a truism the full meaning of which often fails to be appreciated, the possibility of the successful enforcement of a law depends on the comparative strength of the forces supporting or opposing the particular law at the time. The thing which is often overlooked is that there are other forces besides the force of mere numbers, for example the force of economic power and social position, and above all the shifting forces of ideas and opinions, which, either accidentally or as a result of manipulation, may convert a majority of resistance today into a majority of acquiescence tomorrow, or *vice versa*. The influence of these forces frequently makes possible in the course of time the effective enforcement of a law which was at variance with majority practice when it was adopted; and it is this possibility, and this possibility alone, which enables law to be an instrument of social improvement and progress.

From what I have said it follows that some resistance to law is to be expected as a frequent and natural occurrence. Too often it seems to be assumed as a result of our dislike for some particular statute that if a law arouses resistance it is *ipso facto* a failure and that the measure of non-enforcement resulting from resistance to a law is a conclusive argument that the law has no place on the statute books. To take such a view is to succumb once more to the fallacy of over-simplification. No law is or can be enforced 100 per cent. If it could be, it would indicate such perfect conformity to the standard prescribed by the law that the law would be entirely superfluous. The enactment of a law prescribing a particular standard indicates that there are individuals whose conduct does not conform to that standard and who can be expected to employ all means in their power to evade conforming to the law. Such efforts are bound in many instances to be successful as long as law has to be administered by fallible human beings. The question of the effectiveness of a law is therefore always one of degree. It depends upon a balance between the skill of the enforcement agency and the social and economic forces supporting the law on the one hand as compared with the strength of the forces opposing the law on the

other. Sometimes this balance is so much in favor of the latter forces that there is a comparatively low degree of enforcement. Where this is the case today it is not necessarily true that it will also be the case tomorrow. Propaganda, education, changes in men's interests and methods of acting may lead in time to the fairly complete enforcement of a statute which at the outset met with much successful resistance. Or the same process may work in the opposite direction. Thus Sunday laws which a hundred years ago were enforced with a high degree of effectiveness are enforced much less effectively today.

If we grasp the fact that no law can properly be expected to meet with full and complete enforcement, but that enforcement is always a matter of degree, the whole problem of enforcement is set in a somewhat different light from that in which it is commonly viewed in public discussion. It means in the first place that no law can be expected to accomplish precisely the purpose and results which it was enacted to accomplish. Non-enforcement, to the extent that it is present, operates as a deflecting force producing a result somewhere intermediate between the situation existing prior to the enactment of the law and the result which would be produced by complete enforcement. This intermediate result varies from time to time with the varying degrees of enforcement which follow from shifts in the balance between the forces favoring and the forces opposing the law. No law produces precisely the same results today that it produced yesterday or will produce tomorrow. This means, for one thing, that even a law that is very badly enforced does not leave the situation exactly as it found it. Take for example laws against gambling and vice. No one can doubt that the percentage of enforcement of such laws is comparatively low. On the other hand, no one can doubt that the situation with respect to gambling and vice is different under such laws from what it would be in the absence of the laws. The practices at which the laws are aimed are conducted in a different way and to a different extent because of the laws. This operation of a partially enforced law to deflect a practice into a new form may create a situation which satisfies the dominant forces in the community somewhat better than the situation which would exist in the absence of the law. On the other hand it may bring with it what are regarded as new evils. Whether the good outbalances the evil is always a question which has to be answered for each particular case at a particular time and moment of enforcement and the answer always depends on the nature of the forces which happen at that time to be operating for and against the law in the particular community.

It is sometimes assumed that legislation of certain definite kinds is doomed in advance to meet with so much resistance and to be so difficult of enforcement that it is bound to produce more evil than good. Thus it is no doubt true that legislation which undertakes to regulate practices that can be indulged in by anyone and everyone, like gambling, or spitting on the streets, is more difficult to enforce than legislation affecting the conduct of only a small part of the community like banks and insurance companies. Nevertheless experience indicates

that it is too much to assume that the former sort of legislation is always futile. Everything depends on the balance of forces at work within the community for or against the legislation. Thus within the last few years Turkey has apparently succeeded in effecting by legislation a complete revolution in the usages of the people in matters of dress and religion, precisely the kind of matters which it would be most plausible to argue lie completely beyond the sphere of legislative effectiveness. Of course the reason is that this legislation has been supported by vast social changes and by a revolutionary wave of opinion which has undermined and paralyzed the forces of opposition. The same thing was true in France at the time of the French Revolution. On the other hand in India where such forces have not yet been able to work successfully, it has proved futile or inadvisable to attempt on any considerable scale to eradicate popular customs by law.

If we thus come to the conclusion that in the last analysis the effectiveness of law depends not so much on the nature of the subject-matter dealt with as on the particular forces of support or opposition which from time to time make for or against the enforcement of the law, it seems impossible to say that legislation is futile merely for the reason that it deals with this or that subject-matter. One potent argument for the proposition that we have too much legislation thus falls to the ground because it is no longer possible to say that all legislation dealing with certain classes of subject-matter is *ipso facto* futile. What we need rather is to say that legislation is useless if no honest and sincere attempt is made to enforce it; but when that is the case the blame belongs to the administrative departments charged with enforcing the law, and not to the Legislature which enacted it.

NOTES

1. George W. Wickersham, "The Program of the Commission on Law Observance and Enforcement," 16 A.B.A.Jour. 654, 655-656 (1930):

Reasons for Lawless Attitude of the American Public

It must be confessed that the general attitude of mind of the average American is not law-abiding. Perhaps this is not unnatural. With forty-eight states, besides the Federal Congress, grinding out laws annually, or biennially; with statute laws already in existence filling some thirty-five hundred volumes of more than a million and a half pages (according to a writer in the Journal of this Association), any general acceptance of statute law as imposing a moral obligation upon the citizen could hardly be expected.

Suggestion More Potent Than Compulsion

Yet with proper guidance, an extraordinary degree of cooperation with authority in securing general observance of statutory requirements can be developed in the American public. The art of suggestion may be more potent than legislative mandates bristling with penalties for disobedience. We all can recollect the amazing acceptance of Mr. Hoover's request during the war that the public on certain days abstain from the use of their automobiles in order to conserve gasoline for war purposes, and the self-imposed restriction made in response to his request as Food Administrator, in the use of sugar and wheat flour, to the same end. In these cases, no law was enacted. Public thought was focalized on the problem of winning the

war. The authorities suggested a means whereby all might contribute to that great end, and almost without exception, every one fell in with the suggestion and sacrificed personal taste, convenience or pleasure to help achieve the desired result. My ordinary daily life furnishes me constantly with a more recent example of similar response to suggestion: As trains on the Long Island Railroad bearing their load of regular commuters coming from country or suburban homes to the city of New York, approach the tunnels leading under the East River, a guard hurries through the cars calling out: "All windows down, please"; sometimes without the "please." Whereupon, the complaisant passengers themselves close the windows, an operation which is not always easy, and sit in a close and stuffy atmosphere, five, ten, sometimes more minutes, until the train plunges into the darkness of the tunnel. None of them are employes of the railroad company. There could be no compulsion laid upon any of them to comply with a request which otherwise would require the services of several trainmen; but, recognizing that closing the windows is a reasonable measure of safety, they respond promptly to the demand.

Do not these examples suggest the possible effect of educating public opinion to the need of particular legislation, and the value of endeavoring to develop on the part of the community at large an attitude of cooperation with the authorities in observance of the laws of the land? It requires no argument to convince the larger part of our people of the moral forces of the laws against murder, assault, robbery, theft and other fundamental enactments for the protection of life, liberty and property. But the complexities of modern life require much more regulation than these in order that the intricate mechanism of civilized society shall function. . . .

Prevailing Spirit of Lawlessness

That the individual and minority groups must accept and abide by the restraints so imposed is obvious. Otherwise, lawful government breaks down and we have anarchy. The remedy of those who object, is to appeal to the same authority as that which enacts, for rescission or modification. There can be no individual right to elect what laws one will or will not obey. A crime is the violation of a law. But there seems to be a spirit abroad among our people, very manifest at times, to "beat the law" so long as they "can get away with it." One sees it constantly in the drivers of motor cars who slip by when the stop signal has flared; who speed across a railroad track when the warning bell is ringing and the gates lowered; or who "step on the gas," when no officer of the law is in sight, despite the clearly advertised speed limit of 35 miles an hour. One sees it when returning European travelers try to slip through the customs lines without declaring watches or jewelry they are carrying in pockets, and in many other instances. All this results from the fallacious notion that the individual may freely disregard any law he doesn't like. Yet the whole theory of our law necessarily rests upon the right of the state to subordinate the individual to the public weal.

Liberty and Law

"Public policy," Justice Holmes once said, "sacrifices the individual to the general good"; and, he added, "*No society has ever admitted that it would not sacrifice individual welfare to its own existence.*" In the last analysis, public opinion operating upon the law makers must determine when the general welfare requires legislative restraint upon individual action. And good citizenship must acquiesce in the law as it is for the time being.

After all, as Judge Cardozo has so clearly demonstrated in lectures from which I have already quoted, "Liberty in the most literal sense is the negation of law, for law is restraint and the absence of restraint is anarchy. On the other hand, anarchy by destroying restraint would leave liberty the exclusive possession of the strong or the unscrupulous. . . . So once more we face a paradox."

The solution of this paradox should not be left wholly to the social philosophers and the economists. It falls more directly within the ambit of legal philosophy. Judge Cardozo in his lectures, and in his judicial opinions has done much to clarify thought on the subject. There can be nothing more unsound scientifically than merely to denounce statutes as unwarranted invasions of private personal rights, without analysis of the reasons for the enactment, the causes which induced legislative action; the need of some regulation of conduct, or the absence of it. On the other hand, there can be nothing less reasonable than for lawmakers to assume that the American public will accept and obey all statutes merely because the legislature has enacted them. To secure the maximum compliance with law, it must be reasonably adapted to its purpose and the need for its enactment must be made clear.

2. See also Pound, "Enforcement of Law," 20 Green Bag 401 (1908); Pound, Courts & Legislation," IX The Modern Legal Philosophy Series, 202, 215-217; 7 Am.Pol.Sci.Rev. 361 (1915); Wigmore, "Problems of Law," 65-101 (1920); Pollock, "Judicial Caution and Valour," 45 L.Q.Rev. 293 (1929).

3. Arnold, "Law Enforcement—An Attempt at Social Dissection," 42 Yale L.J. 1, 8-12 (1932), states (footnotes have been omitted): . . .

"The first important thing to be noted about "Law Enforcement" is that while it always appears to be very closely related to the problem of public order and safety, actually it has very little to do with it. Its effect is rather on the public utterances of those interested in the criminal law and on the appearance of the judiciary to the public. In order to understand this we must recognize that there are two very distinct problems of Criminal Administration: (1) the keeping of order in the community, and (2) the dramatization of the moral notions of the community.

"The first is primarily a police and prosecutor's problem, little concerned with and only incidentally affected by any governmental philosophy. General satisfaction with or acceptance of the economic system plus a good set of policemen is probably more important in preserving peace than any code of criminal law. Given reasonable approximation of such a condition, the problem of the police and prosecutor is the suppression of the occasional dangerous individual. For this purpose the ideal that all laws should be enforced without a discretionary selection is impossible to carry out. It is like directing a general to attack the enemy on all fronts at once. It conveys no idea whatever as to the next appropriate action. The prosecutor therefore must look at the criminal law, not as something to be enforced because it governs society, but as an arsenal of weapons with which to incarcerate certain dangerous individuals who are bothering society. He will be confronted with a long line of offenders caught in the net who are unimportant, but who must be disposed of. His choice will be either to make reasonable compromises with them, or else to clog the machinery with relentless prosecution of comparatively harmless persons. There also will be dangerous and important criminals who are sentenced under some minor count because there is not sufficient evidence to convict them of the crime for which they are apprehended, and whose ignorance of the strength of the prosecutor's case makes them believe a guilty plea to a lesser offense is a wise compromise. Or they may be restrained under some entirely different law, or vagrancy statutes. The fact that there are more laws than he can ever enforce is not a handicap, but an aid to the prosecutor because it gives him so many offensive weapons against any particular individual. Obsolete laws may be revived and used for purposes that their authors never dreamed of, to sink into obscurity again when the particular individual has been put behind the bars. The prosecutor wants to win cases, and to restrain individuals. The ideal of Law Enforcement, distrustful bargaining, demanding uniform sentences, and putting the emphasis on laws rather than on individuals, sinks into the background.

"The second function of Criminal Law administration, to dramatize the moral notions of the public, is probably the most important function of the criminal courts, as distinguished from the prosecutor, because they work in the limelight of public observation. We may illustrate this by two cases, one in which Al Capone, against whom no sufficient evidence of bootlegging or racketeering had been found, was sentenced under a tax law; and another in which an admitted whiskey ring, against whom there were all sorts of evidence was freed by the Supreme Court of the United States. In the Capone case a compromise was at first reached on perfectly justifiable grounds, known to the Federal Judge and approved by the Attorney General of the United States. Subsequent advertisement of his good fortune by Capone himself made this compromise impossible because it conflicted with the ideal of law enforcement. It became necessary and under the circumstances quite justifiable for the Federal Judge to repudiate the compromise and to announce from the bench that there could be no bargaining with the Federal Court. The expediency of this announcement from the point of view of the dramatic function of criminal courts is obvious in spite of the fact that statistical studies indicate that it would be quite impossible to conduct the criminal business of the Federal Court without something which can only be distinguished from bargaining by logical hairsplitting. Capone was then sentenced for violation of the income tax laws, but the penalty was obviously based on his supposed violations of other laws. The prestige of the state seemed somehow involved in his conviction. There was a general impression that an acquittal would cause respect for the law to suffer a very serious setback leading to all sorts of vaguely imagined calamities. The actual incarceration of Capone may have had some effect on the criminal situation in Chicago, but certainly very little elsewhere. Yet the case was considered of the utmost importance on the criminal problem all over the country; it was hailed as a triumph of Law Enforcement. People generally felt better because of the emotional significance of this vindication of 'Law' against its enemies. It was as important as a spectacular victory in a war, in which some one who wore epaulettes and bore the title of general had been captured.

"In the same way when the admitted whiskey ring was freed by the Supreme Court of the United States because of an invalid search, we were furnished with a symbol of the conflicting ideal that government should not enforce laws by unreasonable searches no matter what they find. A moment's reflection would indicate that the temper of the police commissioner is of much more significance on governmental interference with rights of respectable citizens than appellate court utterances. The testimony of any district attorney will bear out the assertion that persons who consciously rely upon these utterances are almost always criminals who deserve to be convicted. Third degree methods may flourish even in an atmosphere of appellate court condemnation. But the function of courts here is not directed toward the practical solution of the problem with which they can have little to do. They are engaging in a public ceremonial in celebration of an ideal. For this purpose, the more deserving the accused is of punishment, the more striking is the exemplification of the emotional lesson. Thus the prestige of the government in enforcing laws is vindicated in one case while a ceremonial in memory of individual freedom from law enforcement is celebrated in another. The task of keeping these two shows going at the same time without losing the patronage or support of the constitution for either is then left to the legal scholar. The result is the development of substantive criminal law with conflicting details which are puzzling to persons who do not understand the unexamined popular assumptions which lie in the background.

"The dramatic ideal of 'Law Enforcement' as it has become part of the political consciousness of today shares the frailty of all ideals in that when reduced to logical statement instead of being expressed emotionally or poetically it disappears. The best statement which we can make of it would run about as follows. Laws

(particularly criminal laws) are peculiarly sacred things. Whatever their merit intrinsically or by whatever political chicanery they may have been passed, they must be respected or enforced. Laws must be respected so that they may be enforced and enforced so that they may be respected. If any single law is not enforced it leads to disrespect for all laws, which in turn leads to the non-enforcement of all laws. The original notion of respect for a 'Law' which is above the King was invented as a justification for revolt against constituted authority acting in an arbitrary way. Today it becomes the emotional compulsion not to revolt against constitutional authority acting in an arbitrary way.

"These circular notions, sometimes learnedly and at other times oratorically or poetically expressed, are constantly moulding our criminal administration and our ideas of its reform. In the struggle over prohibition they have compelled the wets as well as the drys to demand enforcement. So fixed is the notion in the popular mind that parents often hide commonplace liquor violations from their children because they are unable to formulate a philosophy which will justify their conduct even to themselves. They do not want to be a 'malign influence' causing disrespect for government as Lord Coke was when he made his famous statement that there was a law above any constituted authority. A politician who today would publicly advocate the disregard of any law would be a dangerous radical, because such an open statement of a well known fact would disturb the structure of our government.

"It is curious to note that as the ideal of Law Enforcement becomes more and more abstract and mystical it has less and less to do with actual enforcement. This is illustrated by the fact that it attaches itself to some laws and not to others in a way which seems almost accidental. Generally, the laws or the instances which cause the most violent emotions of law enforcement in the public mind are those of the least social significance. The creed is notably absent in so-called civil cases, and even from criminal penalties in the field usually designated as civil law. We do not find it attached to negligence, breaches of contract, public utility rate-making, corporate mergers, unfair competition, etc. Attorneys who arrange devices by which their incorporated clients may avoid the implications of such laws are able to maintain positions of impregnable respectability. If they assisted in the operations of a bootlegging syndicate, their social positions would be much less secure. To a man from Mars, however, unaccustomed to our emotional atmosphere, it might seem that the prestige of the state might just as well be involved in public utility rate making provisions as in the occasional incarceration of a bootlegger. The important difference which he would fail to see is that the case of the bootlegger is much simpler, less important, and more easily understood by the man on the street, and therefore offers better material for drama in which conflicting ideals are alternately demonstrated."

4. See Nutting, "Definitive Standards in Federal Obscenity Legislation", 23 Iowa L.Rev. 24 (1937).

SECTION 2. A SPECIMEN REGULATORY STATUTE

AN ACT

To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes. (1933, c. 38, 48 Stat. as amended by 1934, c. 404, 48 Stat.; 15 U.S.C.A. § 77a et seq.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

Short Title

Section 1. This title may be cited as the "Securities Act of 1933."

Sec. 2. Definitions

When used in this act, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security. . . .

Sec. 3. Exempted securities

(a) Except as hereinafter expressly provided, the provisions of this act shall not apply to any of the following classes of securities:

(1) Any security which, prior to or within sixty days after May 27, 1933, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days;

(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any

State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories, or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States, or any certificate of deposit for any of the foregoing, or any security issued or guaranteed by any national bank, or by any banking institution organized under the laws of any State or Territory or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or Territorial banking commission or similar official; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve bank;

(9) Any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;

Exempted Transactions

Sec. 4. The provisions of section 5 shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not with or through an underwriter and not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the last date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

(2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders.

Sec. 5. Prohibitions relating to interstate commerce and the mails

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(Licensing effect)

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this subchapter, unless such prospectus meets the requirements of section 10, or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 10.

Sec. 6. Registration of securities and signing of registration statement

(a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of this subchapter. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

(b) At the time of filing a registration statement the applicant shall pay to the Commission a fee of one one-hundredth of 1 per centum of the maximum aggregate price at which such securities are proposed to be offered, but in no case shall such fee be less than \$25.

(c) The filing with the Commission of a registration statement, or of an amendment to a registration statement, shall be deemed to have taken place upon the receipt thereof, but the filing of a registration statement shall not be deemed to have taken place unless it is accompanied by a United States postal money order or a

certified bank check or cash for the amount of the fee required under subsection (b).

(d) The information contained in or filed with any registration statement shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photostatic or otherwise, shall be furnished to every applicant at such reasonable charge as the Commission may prescribe.

Sec. 7. Information required in registration statement

(Publicity—Specific regulations authorized)

The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A, and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B; except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement. If any such person is named as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Commission dispenses with such filing as impracticable or as involving undue hardship on the person filing the registration statement. Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

Sec. 8. Taking effect of registration statements and amendments thereto

(Stop orders)

(d) If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or

omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such stop order, the Commission shall so declare and thereupon the stop order shall cease to be effective.

(Power to investigate)

(e) The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

(f) Any notice required under this section shall be sent to or served on the issuer, or, in case of a foreign government or political subdivision thereof, to or on the underwriter, or, in the case of a foreign or Territorial person, to or on its duly authorized representative in the United States named in the registration statement, properly directed in each case of telegraphic notice to the address given in such statement.

NOTE

In *Jones v. Securities and Exchange Comm.*, 298 U.S. 1, 56 S.Ct. 654, 80 L.Ed. 1015 (1936), it was held that a proceeding by the Securities Exchange Commission to determine whether a stop order should be issued is analagous to a suit in equity for an injunction, and should be governed by like considerations. *Id.*

Sec. 9. Court review of orders

(a) Any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission shall certify and

file in the court a transcript of the record upon which the order complained of was entered. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

Sec. 10. Information required in prospectus

(Publicity requirement. Omitted. Ed.)

Sec. 11. Civil liabilities on account of false registration statement

(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of

the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(Clauses (b) to (d) are omitted. Ed.)

(e) The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit

or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

Sec. 12. Civil liabilities arising in connection with prospectuses and communications

Any person who—

(1) sells a security in violation of section 5; or

(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Sec. 13. Limitation of Actions

(Omitted. Ed.)

Sec. 14. Contrary Stipulations Void

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

Sec. 15. Liability of Controlling Persons

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

Sec. 16. Additional remedies

The rights and remedies provided by this act shall be in addition to any and all other rights and remedies that may exist at law or in equity.

Sec. 17. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 3 shall not apply to the provisions of this section.

Sec. 18. State control of securities

Nothing in this act shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

Sec. 19. Special powers of Commission

(Authority to make regulations and forms—Publication of regulations—Immunity for conformity)

(a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this act, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this act. Among other things, the Commission shall have authority, for the purposes of this act, to pre-

scribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but insofar as they relate to any common carrier subject to the provisions of section 20 of Title 49, the rules and regulations of the Commission with respect to accounts shall not be inconsistent with the requirements imposed by the Interstate Commerce Commission under authority of such section 20. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. No provision in this act imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(Oaths and subpoenas)

(b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this act, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

Sec. 20. Injunctions and prosecution of offenses

(a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this act, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this act, or of any rule or regulation prescribed under authority thereof, it

may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the district court of the United States for the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

(c) Upon application of the Commission the district courts of the United States, the United States courts of any Territory, and the district court of the United States for the District of Columbia, shall also have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this act or any order of the Commission made in pursuance thereof.

Sec. 21. Hearing by Commission

(Records)

All hearings shall be public and may be held before the Commission or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

Sec. 22. Jurisdiction of offenses and suits

(Judicial enforcement)

(a) The district courts of the United States, the United States courts of any Territory, and the district court of the United States for the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this act. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this act brought by or against it in the Supreme Court or such other courts.

(Proceedings for contempt)

(b) In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(Amnesty)

(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Sec. 23. Unlawful representations**(Prevention of misuse of registration)**

Neither the fact that the registration statement for a security has been filed or is in effect nor the fact that a stop order is not in effect with respect thereto shall be deemed a finding by the Commission that the registration statement is true and accurate on its face or that it does not contain an untrue statement of fact or omit to state a material fact, or be held to mean that the Commission has in any way passed upon the merits of, or given approval to, such security. It shall be unlawful to make, or cause to be made to any prospective purchaser any representation contrary to the foregoing provisions of this section.

Sec. 24. Penalties

Any person who willfully violates any of the provisions of this act, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this act, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall

upon conviction be fined not more than \$5,000 or imprisoned not more than five years, or both.

Sec. 25. Jurisdiction of other Government agencies over securities

(Saving clause)

Nothing in this act shall relieve any person from submitting to the respective supervisory units of the Government of the United States information, reports, or other documents that are now or may hereafter be required by any provision of law.

Sec. 26. Separability of provisions

If any provision of this act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this act, or the application of such provision to persons or circumstances other than those as to which is held invalid, shall not be affected thereby.

Schedule of information required in registration statement

SCHEDULE A

(Publicity)

(1) The name under which the issuer is doing or intends to do business;

(2) the name of the State or other sovereign power under which the issuer is organized;

(3) the location of the issuer's principal business office, and if the issuer is a foreign or territorial person, the name and address of its agent in the United States authorized to receive notice;

(4) the names and addresses of the directors or persons performing similar functions, and the chief executive, financial and accounting officers, chosen or to be chosen if the issuer be a corporation, association, trust, or other entity; of all partners, if the issuer be a partnership; and of the issuer, if the issuer be an individual; and of the promoters in the case of a business to be formed, or formed within two years prior to the filing of the registration statement;

(5) the names and addresses of the underwriters;

(6) the names and addresses of all persons, if any, owning of record or beneficially, if known, more than 10 per centum of any class of stock of the issuer, or more than 10 per centum in the aggregate of the outstanding stock of the issuer as of a date within twenty days prior to the filing of the registration statement;

(7) the amount of securities of the issuer held by any person specified in paragraphs (4), (5), and (6) of this schedule, as of a date within twenty days prior to the filing of the registration statement, and, if possible, as of one year prior thereto, and the amount of the securities, for which the registration statement is filed, to which such persons have indicated their intention to subscribe;

(8) the general character of the business actually transacted or to be transacted by the issuer;

(9) a statement of the capitalization of the issuer, including the authorized and outstanding amounts of its capital stock and the proportion thereof paid up, the number and classes of shares in which such capital stock is divided, par value thereof, or if it has no par value, the stated or assigned value thereof, a description of the respective voting rights, preferences, conversion and exchange rights, rights to dividends, profits, or capital of each class, with respect to each other class, including the retirement and liquidation rights or values thereof;

(The remainder of Schedule A and all of Schedule B are omitted. Ed.)

SECTION 3. SANCTIONS GENERALLY

A. *Definitions*

SIR JOHN W. SALMOND, JURISPRUDENCE

London: 1930. 8th ed. by Manning. Sweet & Maxwell, Ltd. 23.

The instrument of coercion by which any system of imperative law is enforced is called a sanction, and any rule so enforced is said to be sanctioned. Thus physical force in the various methods of its application is the sanction applied by the state in the administration of justice. Censure, ridicule, and contempt are the sanctions by which society (as distinguished from the state) enforces the rules of positive morality. War is the last and most formidable of the sanctions which in the society of nations maintains the law of nations. Threatenings of evils to flow here or hereafter from Divine anger are the sanctions of religion, so far as religion assumes the form of a regulative or coercive system of imperative law.

A sanction is not necessarily a punishment or penalty. To punish law-breakers is an effective way of maintaining the law, but it is not the only way. The state enforces the law not only by imprisoning the thief, but by depriving him of his plunder and restoring it to the true owner; and each of these applications of the physical force of the state is equally a sanction.

SIR WILLIAM BLACKSTONE, 1 COMMENTARIES

Oxford: 1765. The Clarendon Press. Intro. Sec. 2, p. 56.

With regard to the *sanction* of laws, or the evil that may attend the breach of public duties, it is observed, that human legislators have for the most part chosen to make the sanction of their laws rather *vindictory* than *remunatory*, or to consist rather in punishments, than in actual particular rewards. Because in the first place, the quiet enjoyment and protection of all our civil rights and liberties,

which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good. For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are entrusted with the care of putting the laws in execution.

NOTE

For a comparison of the principal schools of jurists with regard to the question what makes law obligatory, see Pound, "Outlines of Lectures on Jurisprudence," (1943) p. 31, item III.

B. Availability

TIGNER v. STATE OF TEXAS

Supreme Court of the United States, 1940.

310 U.S. 141, 60 S.Ct. 879, 84 L.Ed. 1124; rehearing denied 310 U.S. 659, 60 S.Ct. 1092, 84 L.Ed. 1422.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is an appeal under § 237(a) of the Judicial Code, as amended, 28 U.S.C. § 344(a), 28 U.S.C.A. § 344(a), to review a judgment of the Court of Criminal Appeals of Texas sustaining the constitutionality of a Texas anti-trust law, and therefore upholding an indictment under it. Appellant was charged with participation in a conspiracy to fix the retail price of beer. Such a conspiracy is made a criminal offense by Title 19, Chapter 3, Art. 1632 et seq., of the Texas Penal Code. Because the provisions of this law do not "apply to agricultural products or live stock * * * in the hands of the producer or raiser", Art. 1642, Tigner challenged the validity of the entire statute and sought release in the local courts by habeas corpus. His claim has been rejected by the Texas Court of Criminal Appeals. 132 S.W.2d 885. Essentially his contention is that the exemption granted by the Texas statute falls within the condemnation of *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 22 S.Ct. 431, 46 L.Ed. 679, as offensive to "the equal protection of the laws" which the Fourteenth Amendment safeguards. If that case controls, appellant contends, the Texas Act cannot survive and he must go free.

The court below recognized that the exemption was identical with that deemed fatal to the Illinois statute involved in *Connolly's* case. But it felt that time and circumstances had drained that case of

vitality, leaving it free to treat the exemption as an exercise of legislative discretion. A similar attitude has been reflected by the Supreme Court of Wisconsin, *Northern Wis. Co-operative Tobacco Pool v. Bekkedal*, 182 Wis. 571, 593, 197 N.W. 936, and appears to underlie much recent state and federal legislation. Dealing as we are with an appeal to the Constitution, the Connolly case ought not to foreclose us from considering this exemption in its own setting.

The problem, in brief, is this: May Texas promote its policy of freedom for economic enterprise by utilizing the criminal law against various forms of combination and monopoly, but exclude from criminal punishment corresponding activities of agriculture?

Legislation, both state and federal, similar to that of Texas had its origin in fear of the concentration of industrial power following the Civil War. Law was invoked to buttress the traditional system of free competition, free markets and free enterprise. Pressure for this legislation came more particularly from those who as producers, as well as consumers, constituted the most dispersed economic groups.¹ These large sections of the population—those who labored with their hands and those who worked the soil—were as a matter of economic fact in a different relation to the community from that occupied by industrial combinations. Farmers were widely scattered and inured to habits of individualism; their economic fate was in large measure dependent upon contingencies beyond their control. In these circumstances, legislators may well have thought combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen. At all events legislation like that of Texas rested on this view, curbing industrial and commercial combinations, and did not visit the same condemnation upon collaborative efforts by farmers and stockmen because the latter were felt to have a different economic significance.²

Since Connolly's case was decided, nearly forty years ago, an impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. The states as well as the United States have sanctioned cooperative action by farmers; have restricted their amenability to the anti-trust laws; have relieved their organizations from taxation. See, e.g., Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. § 291, 7 U.S.C.A. § 291; Clayton Act, 38 Stat. 730, 731, 15 U.S.C. § 17, 15 U.S.C.A. § 17; § 101 (1) of the Internal Revenue Code, 53 Stat. 33, 26 U.S.C.A.Int.Rev.Code, § 101 (1). Such

¹ See 2 Beard, *The Rise of American Civilization*, pp. 254-343; Buck, *The Granger Movement*, passim; Hicks, *The Populist Revolt*, passim; Sheldon, *Populism in the Old Dominion*, pp. 17-20. Compare the letter of Mr. Justice Miller in *Fairman*, Mr. Justice Miller and the Supreme Court, p. 67. For the background of the Texas legislation see Finty, *Anti-Trust Legislation in Texas*, a collection of articles published in the *Galveston News* during the summer of 1916; Nutting, *The Texas Anti-Trust Law: A Post-Mortem*, 14 *Tex.L.Rev.* 293.

² See Seager and Gulick, *Trust and Corporation Problems*, pp. 149-95, 339-85.

expressions of legislative policy have withstood challenge in the courts. *Liberty Warehouse Co. v. Burley Tobacco Growers*, 276 U.S. 71, 48 S.Ct. 291, 72 L.Ed. 473.³ Congress and the states have sometimes thought it necessary to control the supply and price of agricultural commodities within their respective spheres of jurisdiction, and the constitutional validity of these measures has been sustained. *Mulford v. Smith*, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092; *United States v. Rock Royal Co-op.*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446; *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469.

At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws.⁴ These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers. The equality at which the "equal protection" clause aims is not a disembodied equality. The Fourteenth Amendment enjoins "the equal protection of the laws", and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature. Connolly's case has been worn away by the erosion of time, and we are of opinion that it is no longer controlling.

Another feature of Texas anti-trust legislation is relied on by Tigner to invalidate the criminal statute under which he is being prosecuted. Beginning with the first enactment in 1894, the Texas anti-trust laws have had a complicated and checkered history. At present there are two statutes directed at combination and monopoly; the one under which Tigner was indicted, and another, subjecting to civil penalties the same conduct at which the challenged criminal law is aimed. Title

³ The state court cases are collected in *United States v. Rock Royal Coop.*, 307 U.S. 533, 563, 564, 59 S.Ct. 993, 1008, 83 L.Ed. 1446. See Hanna, *Law of Co-operative Marketing Associations*, pp. 26-111. Compare *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 418, 34 S.Ct. 612, 621, 58 L.Ed. 1011, L.R.A.1915C, 1189; *International Harvester Co. v. Missouri*, 234 U.S. 199, 34 S.Ct. 859, 58 L.Ed. 1276, 52 L.R.A., N.S., 525; *Aero Mayflower Transit Co. v. Georgia Public Service Comm.*, 295 U.S. 285, 55 S.Ct. 709, 79 L.Ed. 1439.

⁴ See, for instance, the findings and declarations of policy embodied in the *Agricultural Adjustment Act of 1938*, 52 Stat. 31, 120, 202, 215, 586, 775, 7 U.S.C.A. § 1281 et seq. Compare Seager and Gulick, *op. cit. supra*, note 2, pp. 322-23; Black, *Agricultural Reform in the United States*, pp. 1-61, 337-49; Nourse, Davis and Black, *Three Years of the Agricultural Adjustment Administration*, *passim*; Nourse, *Marketing Agreements Under the A. A. A.*, pp. 315-49. Compare, as to railroad and express consolidations, § 5(9) of the *Interstate Commerce Act as amended*, 41 Stat. 456, 482, 49 U.S.C. § 5(8), 49 U.S.C.A. § 5(8); as to bituminous coal, see § 4(d), pt. I of the *Bituminous Coal Act of 1937*, 50 Stat. 72, 77, 15 U.S.C.A. § 832(d).

126, Revised Civil Statutes, Vernon's Ann.Civ.St.Tex. art. 7426 et seq. From such civil proceedings, which the Attorney General initiates, no exemption is given to farmers and stockmen. Appellant urges that the divergence between civil and criminal laws relating to the same conduct undermines the validity of the exemption in the criminal statute and thus invalidates the whole of it. This argument is but a minor variation on appellant's main theme. It amounts to a claim that differences substantial enough to permit substantive differentiation in formulating legislative policy do not permit differentiation as to remedy.

How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis. Such judgment as yet is largely a prophecy based on meager and uninterpreted experience. How empiric the process is of adjusting remedy to policy, is shown by the history of anti-trust laws in Texas and elsewhere. The Sherman Law originally employed the injunction at the suit of the government, private action for triple damages, criminal prosecution and forfeiture. Later the injunction was made available to private suitors.⁵ In the case of combinations of common carriers the Sherman Law is qualified by the Interstate Commerce Act, 49 U.S.C.A. § 1 et seq., *Keogh v. Chicago & N. W. R. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183, and in the case of shipping combinations, by the Merchant Marine Act, 46 U.S.C.A. § 861 et seq., *United States Nav. Co. v. Cunard S. S. Co.*, 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed. 408. In its own groping efforts to deal with the problem of monopoly, the Texas legislature has in the course of nearly half a century invoked a dozen remedies.⁶ When Iowa superimposed upon its general anti-trust law an additional penalty in the case of fire insurance combinations, this Court sustained the validity of the statute. *Carroll v. Greenwich Insurance Co.*, 199 U.S. 401, 26 S.Ct. 66, 50 L.Ed. 246.

Legislation concerning economic combinations presents peculiar difficulties in the fashioning of remedies. The sensitiveness of the economic mechanism, the risks of introducing new evils in trying to stamp out old, familiar ones, the difficulties of proof within the conventional modes of procedure, the effect of shifting tides of public opinion—these and many other subtle factors must influence legislative choice. Moreover, the whole problem of deterrence is related to still wider con-

⁵ See the Sherman Law, as amended, and supplementary enactments, in 15 U.S.C. §§ 1, 2, 4, 6, 9, 11, 15, 16, 21, 23, 25, 26, 15 U.S.C.A. §§ 1, 2, 4, 6, 9, 11, 15, 16, 21, 23, 25, 26.

⁶ See Nutting, *op. cit. supra*, note 1, pp. 296-97. For the remedies now prevailing, see Texas Penal Code, Arts. 1635, 1637, 1638; Revised Civil Statutes, Arts. 7428-7437, Vernon's Ann.Civ.St. arts. 7428-7437.

siderations affecting the temper of the community in which law operates. The traditions of a society, the habits of obedience to law, the effectiveness of the law-enforcing agencies, are all peculiarly matters of time and place. They are thus matters within legislative competence. To say that the legislature of Texas must give to farmers complete immunity or none at all, is to say that judgment on these vexing issues precludes the view that, while the dangers from combinations of farmers and stockmen are so tenuous that civil remedies suffice to secure deterrence, they are substantial enough not to warrant entire disregard. We hold otherwise. Here, again, we must be mindful not of abstract equivalents of conduct, but of conduct in the context of actuality. Differences that permit substantive differentiations also permit differentiations of remedy. We find no constitutional bar against excluding farmers and stockmen from the criminal statute against combination and monopoly, and so holding, we conclude that there was likewise no bar against making the exemption partial rather than complete.

Affirmed.

MR. JUSTICE McREYNOLDS is of opinion that the judgment below should be reversed.

SECTION 4. PENALTIES

AMERICAN BAR ASSOCIATION. REPORT OF THE SPECIAL COMMITTEE ON LEGISLATIVE DRAFTING; APPENDIX B

40 Rep.A.B.A. 569-594 (1915).

1. INTRODUCTION

Recent legislation in this country discloses a commendable tendency to provide for its enforcement through administrative education of and co-operation with the persons affected instead of relying upon the fear of prosecution for its violation as the sole stimulus to compliance.

In some instances discretionary power to extend the time for compliance with a statutory requirement has been conferred upon an administrative board or commission. Such a provision gives greater opportunity for the use of co-operative methods of enforcement and if not abused tends to mitigate the hardship frequently involved in strict compliance with the letter of regulatory legislation. For an example, see the Federal Car Coupling Act (United States Stats. L, Vol. 36, 238).

The fact remains, nevertheless, that it is the potential power of the penalty or other means of compelling compliance or punishing violation that invests with authority those upon whom is imposed the duty of enforcement, and insures respectful attention and obedience to their orders and suggestions. The importance of the penalty cannot be measured by the frequency with which it is imposed. Indeed, the

necessity for its use as a means of enforcement tends to vary almost in inverse ratio to its effectiveness.

The term "penalty" is used throughout this topic in its broader sense of punishment of any sort, from forfeiture of money to imprisonment or death; but the scope of the topic is limited to the consideration of drafting problems. The comparative desirability of various ways and means of securing the most effectual enforcement of statutes, including such modified forms of penalties as condemnation, abatement, avoidance of contracts, or forfeiture of licenses and charters, are discussed only incidentally.

The obvious importance of the penalty suggests the need for careful phraseology of its provisions, but the difficulties of the drafter of such provisions are greatly increased by the fact that his work must stand not only the tests applied to all statutes, but also the much more rigorous scrutiny under the rule of strict construction which the courts apply to penal statutes.

2. AMOUNT OF PENALTY.

A full discussion of the considerations which go to determine the amount or size of a particular penalty is beyond the scope of this report. There is, however, a broad principle which determines the limits within which should fall the amount of the penalty for the violation of any legislative mandate. The maximum should exceed by a sufficient margin any possible advantage which might accrue to the offender from a violation of the law, and should not be so low as to permit its being looked upon as a mere license or price for the privilege of violation. On the other hand, the minimum, if any, should not be so high as to be under any circumstances incommensurate with the gravity of the offense, thus offering a strong inducement to a court or jury to seize upon a possibly insufficient justification for finding in favor of a defendant.

If the amount of the penalty is or may, through increase or accumulation, become very large, the constitutional guarantee of due process of law must be kept in mind. The Supreme Court of the United States has held that there is an unconstitutional denial of due process if the right to an adequate judicial review can be exercised only at the risk of having to pay penalties so great that it is better to yield to orders or requirements of uncertain validity than to ask the protection of the law. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R. A., N.S., 932, 14 Ann.Cas. 764; *Wadley Southern Railroad v. Georgia*, . . . 235 U.S. 651, 35 S.Ct. 214, 59 L.Ed. 405.

3. FIXED OR FLEXIBLE PENALTY.

The advantages of a flexible over a fixed penalty are obvious. The legislator can take into consideration only abstract culpability, and only a person familiar with the circumstances of each particular case is in a position to know the possible modifying or extenuating circum-

stances of that case and to make the most advantageous use of such knowledge in effecting the ultimate purposes of the law. . . .

The very advantage of the flexible penalty, viz., variation of its amount under circumstances of varying culpability, necessitates, however, a determination by some one as to its amount in each case. In the case of the criminal penalty the drafter will find no need to provide for such a determination because criminal procedure is well adapted to the administration of flexible penalties, and it is within the well-recognized powers of the judge to fix the amount of such a penalty. . . .

If a flexible civil penalty is found advisable, the means for the determination of its amount must be thoroughly considered. The most obvious alternatives are either to leave to the prosecuting attorney or other officer charged with its administration the determination of the amount by bringing an action for an amount within the maximum and minimum limits fixed by the statute, or to expressly confer upon the court having jurisdiction of the action the power to determine the amount in much the same manner as a criminal court imposes a sentence. . . .

Where an offense is of a kind that may be committed by either a person or a corporation and the punishment includes imprisonment, the amount of the fine should be made sufficiently flexible to permit the court to impose upon a corporate offender a fine commensurate with the imprisonment to which an individual may be sentenced. . . .

4. INCREASED PENALTY FOR SECOND AND SUBSEQUENT OFFENSES.

The principle of increasing the penalty for violations repeated after a penalty has once been incurred is well established. Its justification is found in the evident insufficiency of their warning already given; the contempt of the offender in persisting in violation shows the need of greater severity. Many problems are involved, however, in providing an effective system of increasing penalties for successive violations.

What constitutes a "second" or "subsequent" offense? Is it a second "violation" or a second "conviction"? It has been held that the manifest purpose of such provisions is to increase the penalty for offenses because of persistence in violating the law and that the term "second offense" must mean "second conviction" *Carey v. State*, 70 Ohio St. 121. The term "offense" has been so generally used and interpreted in this sense of "conviction" that it has probably acquired that technical meaning for the purpose of such provisions; but the careful drafter will leave no room for doubt as to the nature of the previous violation which is to justify a future increase in the penalty. In addition to the possibility of doubt as to whether offense means conviction, distinctions might also be drawn and are in fact drawn in some European countries between a conviction, followed by sentence and execution of the sentence, and a conviction without sentence or a conviction and sentence without execution. . . .

Where the penalty is made to vary for several classes of successive offenses as first, second, third, etc., care must be taken to avoid such description of the last class as might leave subsequent offenses unpunished; e.g., section 1275 of the New York Penal Law, providing penalties for violation of the labor law after specifying a penalty for first and second offenses, proceeds—"for a third offense, by a fine of not less than \$250 or by imprisonment, etc.," without indicating any punishment for a fourth or subsequent violation. There should be inserted in the description of the class subject to the maximum penalty, some such word as "subsequent" or "succeeding"; e.g., in the statute just quoted, the language should have been "a third or subsequent offense."

5. CUMULATIVE PENALTIES.

In addition to, or as a substitute for, increased penalties for subsequent violations after a penalty has been imposed for a first violation, the legislature may want to impose a cumulative penalty for several distinct violations or for a continuing violation arising from a course of action or from a condition maintained in defiance of the statute. The term "cumulative penalty" is here used to indicate a multiple or aggregate penalty computed by multiplying the penalty prescribed for one offense by the number of separate offenses.

The "cumulative penalty" involves two principal problems: (1) whether the alleged offense constitutes one or several violations of the statute, i.e. whether the offense described by the statute is, in the language of the courts, continuing or separate, and (2) whether, admitting that there have been several distinct violations, there can be a recovery of but one penalty or of that penalty cumulated by multiplying it by the number of distinct offenses.

Whether the offense is continuing or separate, and hence whether one or several penalties have been incurred prior to a given time, depends entirely upon the language of the statute. The legislature has the power to specify definitely what constitutes a violation of the provisions of a statute, and it may provide that each such violation shall incur a separate penalty and that such penalty shall be cumulative. . . .

Where the drafter is assured that the legislature desires to impose a cumulative penalty, he can make the legislative intention effective by observing the following rules:

(1) It should be distinctly stated that the penalty is to be imposed for "each" or "each and every" offense or violation.

(2) The provisions defining the requirement or prohibition of the statute should be so drafted as to clearly indicate just what constitutes such an offense or violation. The importance of this rule is indicated by a recent statute which carefully provides "that each act of dentistry shall be deemed a separate offense," but fails to indicate what constitutes an "act of dentistry."

(3) Where the act or omission penalized is in its nature continuing, some such provision as that "each day during which the violation

continues shall constitute a separate offense" should be used to indicate when an offense is completed for the purpose of incurring the penalty. . . .

6. COMPARATIVE DESIRABILITY OF CIVIL OR CRIMINAL PENALTY.

Penalties may be divided into two great classes, civil and criminal, and a decision between these two forms must always be made by the careful legislator. Many considerations, such as local conditions, the general character of the persons or corporations which are subject to the particular law, the established practice or custom in the jurisdiction, etc., will inevitably enter into the determination, but there are some considerations which indicate the comparative desirability of one form or the other.

A criminal penalty, especially if it permits a sentence of imprisonment, may prove a greater deterrent and more to be feared. A civil penalty, or even a fine, if not too large in amount and seemingly commensurate with the gravity of a minor offense, is sometimes treated as a mere license for the privilege of violating the law. Regulatory legislation very often applies particularly to persons or corporations to whom a money penalty means little as compared with personal imprisonment for even a short period. This consideration, however, also has its limitations, for it must be remembered that if an offense is one which may appear to the average court or jury as technical or formal and not particularly culpable, so that they are reluctant to brand a defendant as a criminal, judgment may more readily be obtained against him in a civil action. . . .

On the other hand, however, the practice in civil actions may increase the chances of a recovery. The slightest preponderance of evidence is sufficient to support a verdict in a civil case, while in a criminal case the evidence must be such as to convince beyond reasonable doubt. In some jurisdictions an added advantage is afforded by the fact that a less than unanimous agreement of a jury is sufficient for a verdict in a civil case.

There can be no remission or suspension by the court of a penalty recovered in a civil action; and in only a few of our constitutions does the pardoning power of the executive extend to the remission of civil penalties or forfeitures. Even under these constitutions, it would probably be construed as limited to penalties recovered directly by the state. The importance of this consideration has been shown in cases where minor courts not in sympathy with the purposes of a law have had jurisdiction of offenses under it. In certain counties in New York during the canning season, sentences for violations of the law regulating hours of labor have been remitted or suspended as soon as imposed.

A civil penalty insures to the department or official charged with the enforcement of a law, the right of appeal and an opportunity to secure a determination of disputed questions of constitutionality, validity and interpretation. In the case of criminal penalties, it is sometimes difficult to obtain such a final determination from the high-

est court in jurisdictions in which the state has no appeal from an acquittal, and it has happened not infrequently that the enforcement of a law which has eventually been upheld has been practically nullified for a long period through the adverse decisions of lower courts in directing verdicts of acquittal.

A requirement of the keeping of account books, time books, etc., and of the making of reports by those subject to the provisions of a regulatory statute is frequently an important part of the machinery for its enforcement. On the other hand, most of our constitutions contain the guarantee that no person shall in a criminal case be compelled to be a witness against himself, and if the penalty for the violation of such an act is a criminal one, there exists the possibility that important provisions essential to the administration of the act may be held unconstitutional. *People ex rel. Ferguson v. Reardon*, 197 N.Y. 236, 90 N.E. 829, 27 L.R.A.,N.S., 141, 134 Am.St.Rep. 871. This constitutional guarantee is expressly limited to criminal cases in the Constitution of the United States and in all but about six of the state constitutions.

It may sometimes happen that the interests of the public or of those who have been damaged by an offense might be furthered by a compromise (e. g., full restitution if prosecution is discontinued) more than the interests of justice would be furthered by pushing the prosecution. A provision for a civil penalty gives the prosecuting officer an opportunity to make such a compromise not afforded under a criminal penalty.

While it may at times be difficult to decide the question of policy as between a civil and a criminal penalty, there is no excuse for failing to clearly indicate the form of the penalty and thus passing on to the courts an unnecessary problem of interpretation. In the present development of our jurisprudence, every action or prosecution must fall on one side or the other of the line dividing civil and criminal procedure, and it is inexcusable that penalty provisions of such a hybrid nature as those referred to in subdivision eight of this topic should be so frequently found in our legislation.

7. CRIMINAL PENALTIES.

In drafting a provision which includes criminal penalties any inconsistency or failure to conform with the general criminal law and procedure of the jurisdiction should be avoided. From the very nature of the case it is impractical in this report to treat exhaustively this phase of the subject; but it is possible to point out briefly how an entirely different and unintended effect may result from such disregard on the part of the draftsman. . . .

In drafting a criminal penalty it is probably advisable to state that the person violating the statutory provisions "is guilty of a misdemeanor (or felony)." This precludes the possibility of a question whether the offense is criminal, and if so, of what grade, and of in-

cidental questions as to the jurisdiction of the court, the manner of choosing a jury, etc.

In the construction of penalty provisions the question frequently arises whether a violation of a statute is punishable without proof of knowledge or intent on the part of the offender. The necessity for including the words "knowingly" or "wilfully" in defining the offense, or on the other hand expressly providing that knowledge or intent is immaterial, depends largely on such considerations as the nature and seriousness of the offense, its status at common law, the language of the statute in which it is defined, and the nature of the penalty which is imposed. The omission of such a provision defining the exact nature of the offense may necessitate a judicial interpretation, which in turn may materially affect the operation of the statute and contravene its most effective provisions. . . .

8. CIVIL PENALTIES.

In the case of a criminal penalty it is of course unnecessary to provide by whom the prosecution is to be brought; but a provision for a civil penalty should indicate upon whom the right of action is conferred—whether the state or a specified officer charged with the administration of the particular law, or a common informer or the party suffering damage on account of the violation.

It is in provisions for civil penalties that draftsmen have not infrequently committed a most flagrant breach of good form—at least it is such in most jurisdictions. Although in a few jurisdictions the courts have held to the contrary, the term "fine" ordinarily implies a criminal penalty and is for example defined by Bouvier as "a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor." The mode in which fines and penalties are to be recovered is a matter of legislative discretion and a statutory provision that a "fine" is to be recovered in a civil action would, of course, be enforced by the courts. Such wording is, to say the least, bad form, and at the worst may give rise to ambiguities as to just what procedure was intended. The use of any such terms as "fine," "guilty" or "conviction" should be strictly avoided in the drafting of any penalty provision not criminal in its nature. . . .

10. ILLUSTRATIVE PROVISIONS.

The following drafts of typical penalty provisions have been prepared in illustration of the principles here discussed:

"(a) Any person who violates any provision of this act or of the regulations made in pursuance thereof is guilty of a misdemeanor, and upon conviction shall be punished for a first offense by a fine of not less than \$20 nor more than \$100; for a second offense by a fine of not less than \$50 nor more than \$250, or by imprisonment for not more than thirty days, or by both such fine and imprisonment; and for a third or subsequent offense by a fine of not less than \$100 nor more than \$1000, or by imprisonment for not more than one year, or by

both such fine and imprisonment. A violation constitutes a second offense if committed after one conviction of the same person for a violation of the same or any other provision of this act or of the regulations made in pursuance thereof, and constitutes a third or subsequent offense if committed after two or more such convictions. (The term 'person' is used in these drafts on the assumption that it is elsewhere defined as including also corporations, associations, etc. In this connection note the use throughout the Criminal Code of the United States of the term 'whoever.')

"(b) Any person who violates any provision of this act or of the regulations made in pursuance thereof, shall, for each violation, be liable to a penalty of \$50, to be recovered in a civil action by the people of the state.

"(c) Any person who sells or gives a cigarette to any minor under the age of sixteen years, shall for each cigarette so sold or given forfeit any pay to the parent or guardian of such a minor the sum of \$10, to be recovered in a civil action by the person entitled thereto.

"(d) Any person who violates any provision of this act shall for each violation forfeit to the people of the state the sum of \$100, to be recovered in a civil action. When the violation consists of the manufacture or production of any article or substance, or the maintenance of any condition, or the continuance of any course of action, each day during any part of which such manufacture or production is carried on, or such condition or course of action is maintained or continued, constitutes a separate violation. When the violation consists of the sale or exchange or the offering or exposing for sale or exchange of any article or substance, the sale or exchange of each one of several packages shall constitute a separate violation, and each day on any part of which any such article or substance is offered or exposed for sale or exchange constitutes a separate violation. When the use or furnishing for use of any such article or substance is prohibited, each day during any part of which such article or substance is so furnished for use constitutes a separate violation, and the furnishing of the same for use constitutes a separate violation as to each person to whom it is furnished." See N.Y. Agricultural Law, Par. 52, Laws of 1901, Ch. 656.

NOTES

1. Cf. N.Y. Leg. Doc. (1935) No. 65 (G); 1935 Rep. Rec. and St. N.Y. Law Rev. Comm., 349; Recommendations and Studies made in Relation to Problems in the Field of Real Property. "The changes recommended are as follows: . . . II. The amendment of Sections 524 and 525 of the Real Property Law to do away with treble damages for waste and to limit the right of forfeiture to cases where the damage equals or exceeds the value of the estate in possession. The rule as to treble damages for waste was introduced by the Statute of Gloucester in 1278, but has not been used in England for 250 years, was repealed in effect in 1833 and in fact in 1879. The rule of the Statute of Gloucester was enacted in New York in 1787, and still survives. Those who might use it choose generally to sue instead only for compensatory damages. There is no public policy to sustain the ancient rule, and it is out of keeping with general rules of damages in actions for injuries to property." The recommended statute was adopted, N.Y. Laws 1935, c. 797.

2. See also N.Y.Leg.Doc. (1944) No. 65 (J); 1944 Rep.Rec. and St.Law Rev. Comm., 291-347, relating to recovery of treble damages for injuries to property and for waste by guardian. In this document, two bills were recommended: the first relating to treble damages for injuries to property (1944 N.Y.Sen.Int. 55, Pr. 55, Ass.Int. 46, Pr. 46) not enacted; the second relating to treble damages for waste by guardian became N.Y.Laws 1944, c. 287.

3. For an interesting case involving procedure by writ of waste, see *Kenlee Corporation v. Isolantite, Inc.*, 137 N.J.Eq. 459, 45 A.2d 500 (1946).

SECTION 5. CONTEMPT PROCEEDINGS

PENFIELD CO. OF CALIFORNIA v. SECURITIES AND EXCHANGE COMMISSION

Supreme Court of the United States, 1947.

330 U.S. 585, 67 S.Ct. 918, — L.Ed. —.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Securities and Exchange Commission, acting pursuant to its authority under § 20(a) of the Securities Act of 1933, 48 Stat. 74, 86, 15 U.S.C. § 77t, 15 U.S.C.A. § 77t(a), issued orders directing an investigation to determine whether Penfield Company had violated the Act in the sale of stock or other securities. In the course of that investigation it directed a subpoena duces tecum to Young, as an officer of Penfield, requiring him to produce certain books of the corporation covering a four year period ending in April, 1943. See § 19(b) of the Act, 15 U.S.C.A. § 77s(b). Upon Young's refusal to appear and produce the books and records, the Commission filed an application with the District Court for an order enforcing the subpoena. After a hearing, the court ordered Young, as an officer of Penfield, to produce them. Young persisted in his non-compliance. The Commission then applied to the District Court for a rule to show cause why Young should not be adjudged in contempt—a proceeding which, as we shall see, was one for civil contempt. The District Court delayed action on the motion until after disposition of a criminal case involving Young, Penfield, and others. When that case was concluded, the court, after hearing, adjudged Young to be in contempt. It refused, however, to grant any coercive relief designed to force Young to produce the documents but instead imposed on him a flat, unconditional fine of \$50.00 which he paid.³

[Footnotes 1 and 2 are omitted. Ed.]

³ The request of the Commission and the ruling of the court are made clear by the following colloquy:

"Mr. Cuthbertson: So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a look at these books and records, so I suggest to the Court, if he be so disposed, whatever punishment the Court might see fit to impose would be in connection with or so long as he refuses to produce his books and records for our inspection.

"The Court: I don't think that I am going to be disposed to do anything like that. I sat here for six weeks and listened to books and records. The Government

That was on July 2, 1945. On September 24, 1945, the Commission filed a notice of appeal in the District Court and subsequently a statement of points challenging as error the action of the District Court in imposing the \$50.00 fine, instead of a remedial penalty calculated to make Young produce the documents. The Circuit Court of Appeals reversed, holding that the District Court erred in imposing the fine and directing that Young be ordered imprisoned until he produced the documents. 9 Cir., 157 F.2d 65. The case is here on a petition for a writ of certiorari filed by Penfield Co. and Young. Neither the District Court nor the Circuit Court of Appeals rendered judgment against Penfield. Nor is any relief sought by or against it here. Accordingly the writ is dismissed as to Penfield.

First. It is argued that since no application for an allowance of an appeal was made, the Circuit Court of Appeals had no jurisdiction to entertain it. If the appeal was in a suit of a civil nature, the filing of the notice of appeal with the District Court was adequate under the Federal Rules of Civil Procedure.

It is the nature of the relief asked that is determinative of the nature of the proceeding. *Lamb v. Cramer*, 285 U.S. 217, 220, 52 S.Ct. 315, 316, 76 L.Ed. 715. This was not a proceeding in which the United States was a party and in which it was seeking to vindicate the public interest. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 445, 31 S.Ct. 492, 499, 55 L.Ed. 797, 34 L.R.A.,N.S., 874. The contempt proceedings were instituted as a part of the proceedings in which the Commission sought enforcement of a subpoena. The relief which the Commission sought was production of the documents; and the only sanction asked was a penalty designed to compel their production. Where a fine or imprisonment imposed on the contemnor is "intended to be remedial by coercing the defendant to do what he had refused to do", *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U.S. at page 442, 31 S.Ct. at page 498, 55 L.Ed. 797, 34 L.R.A.,N.S., 874, the remedy is one for civil contempt. *United States v. United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677. Then "the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." *McCrone v. United States*, 307 U.S. 61, 64, 59 S.Ct. 685, 686, 83 L.Ed. 1108. One who is fined, unless by a day certain he produces the books, has it in his power to

produced people from all over the United States in connection with the Penfield matter.

"Mr. Cuthbertson: I might say, your Honor, that we have in mind that these books and records may disclose certain acts other than those charged in the indictment. We don't propose to go over the same matter that the Court went over in connection with the criminal case.

"The Court: The Court can take judicial notice of its own books and records, and in that trial the evidence was clear and definite and positive from all of the Government's witnesses, that during one period of time this defendant had nothing whatsoever to do with the Penfield Company. Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know.

"The judgment and sentence of the Court is that the defendant pay a fine of \$50, and stand committed until paid."

[Footnotes 4-7 are omitted. Ed.]

avoid any penalty. And those who are imprisoned until they obey the order, "carry the keys of their prison in their own pockets." In *re Nevitt*, 8 Cir., 117 F. 448, 461. Fine and imprisonment are then employed not to vindicate the public interest but as coercive sanctions to compel the contemnor to do what the law made it his duty to do. See *Doyle v. London Guarantee Co.*, 204 U.S. 599, 27 S.Ct. 313, 511 L.Ed. 641; *Oriel v. Russell*, 278 U.S. 358, 49 S.Ct. 173, 73 L.Ed. 419; *Fox v. Capital Co.*, 299 U.S. 105, 57 S.Ct. 57, 81 L.Ed. 67; *McCrone v. United States*, *supra*.

The Act gives the Commission authority to require the production of books and records in the course of its investigations. And in absence of a basis for saying that its demand exceeds lawful limits (*Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 S.Ct. 494), it is entitled to the aid of the court in obtaining them. A refusal of the court to enforce its prior order for the production of the documents denies the Commission that statutory relief. The issue thus raised poses a problem in civil, not criminal, contempt. . . .

Second. The question on the merits is two-fold: (1) whether the Circuit Court of Appeals erred in granting the Commission remedial relief by directing that Young be required to produce the documents; and (2) whether that court exceeded its authority in reversing the judgment which imposed the fine and in substituting a term of imprisonment conditioned on continuance of the contempt.

As we have already noted, the Act requires the production of documents demanded pursuant to lawful orders of the Commission and lends judicial aid to obtain them. There is no basis in the record before us for saying that the demand of the Commission exceeded lawful limits. There is, however, a suggestion that the District Court was warranted in denying remedial relief since the contempt hearing came after a criminal trial of petitioners in another case, during the course of which many of Penfield's books and records were examined. The thought apparently is that the Commission had probed enough into Penfield's affairs. But the District Court did not hold that the Commission's request had become moot, that the documents produced satisfied its legitimate needs, or that the additional ones sought were irrelevant to its statutory functions.⁸ We agree with the Circuit Court of Appeals that at least in absence of such a finding, the refusal of the District Court to grant the full remedial relief which the Act places behind the orders of the Commission was an abuse of discretion. The records might well disclose other offenses against the Securities Act of 1933 which the Commission administers. The history of this case reveals a long, persistent effort to defeat the investigation. The fact that Young paid the fine and did not appeal indicates that the judgment of contempt may have been an easy victory for him. On

⁸ As will be seen from note 3, *supra*, the court, immediately prior to rendering its sentence, noted that there was one period during which Young was not connected with Penfield Co. But the court added: "Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know."

the other hand, the dilatory tactics employed suggest that if justice was to be done, coercive sanctions were necessary.

When the Circuit Court of Appeals substituted imprisonment for the fine, it put a civil remedy in the place of a criminal punishment. For the imprisonment authorized would be suffered only if the documents were not produced or would continue only so long as Young was recalcitrant. On the other hand, the fine imposed by the District Court, unlike that involved in *Fox v. Capital Co.*, supra, 299 U.S. at pages 106, 107, 57 S.Ct. at page 58, 81 L.Ed. 67, was unconditional and not relief of a coercive nature such as the Commission sought. It was solely and exclusively punitive in character. Cf. *Nye v. United States*, 313 U.S. 33, 42, 43, 61 S.Ct. 810, 812, 813, 85 L.Ed. 1172.

As already noted, Young did not appeal from the order holding him in contempt and subjecting him to a fine. Young maintains, however, that once the fine was imposed and paid, the jurisdiction of the court was exhausted; that the Circuit Court of Appeals was without authority to substitute another penalty or to add to the one already imposed and satisfied. That argument rests on the statute granting federal courts the power to punish contempts of their authority, Judicial Code § 268, 28 U.S.C. § 385, 28 U.S.C.A. § 585, and the decisions construing it. The statute gives the federal courts power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority," including violations of their lawful orders. At least in a criminal contempt proceeding both fine and imprisonment may not be imposed since the statute provides alternative penalties. In *re Bradley*, 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 500. Hence if a fine is imposed on a contemnor and he pays it, the sentence may not thereafter be amended so as to provide for imprisonment. The argument here is that after a fine for criminal contempt is paid, imprisonment may not be added to, or substituted for the fine, as a coercive sanction in a civil contempt proceeding. If that position is sound, then the statutory limitation of "fine or imprisonment" would preclude a court from imposing a fine as a punitive measure and imprisonment as a remedial measure, or *vice versa*.

The dual function of contempt has long been recognized—(1) vindication of the public interest by punishment of contemptuous conduct; (2) coercion to compel the contemnor to do what the law requires of him. *Gompers v. Bucks Stove & Range Co.*, supra, 221 U.S. at pages 441 et seq., 31 S.Ct. at page 498, 55 L.Ed. 797, 34 L.R.A.,N.S., 874; *United States v. United Mine Workers*, supra. As stated in *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 327, 24 S.Ct. 665, 666, 48 L.Ed. 997, "The purpose of contempt proceedings is to uphold the power of the court, and also to secure to suitors therein the rights by it awarded."

We assume, *arguendo*, that the statute allowing fine or imprisonment governs civil as well as criminal contempt proceedings. If the statute is so construed, we find in it no barrier to the imposition of both a fine as a punitive exaction and imprisonment as a coercive sanction,

or *vice versa*.⁹ That practice has been approved. *Kreplik v. Couch Patents Co.*, 1 Cir., 190 F. 565, 571. And see *Phillips Sheet & Tin Plate Co. v. Amalgamated Ass'n*, D.C., 208 F. 335, 340. When the court imposes a fine as a penalty, it is punishing yesterday's contemptuous conduct. When it adds the coercive sanction of imprisonment, it is announcing the consequences of tomorrow's contumacious conduct. At least in that situation the offenses are not the same. And the most that the statute forbids is the imposition of both fine and imprisonment for the same offense.

Young raises objections that go to the merits of the judgment of contempt. These were considered and determined against him by the District Court. Since he did not appeal from that adverse judgment, he is precluded from renewing the objections at this stage. *Le Tulle v. Scofield*, 308 U.S. 415, 421, 422, 60 S.Ct. 313, 316, 317, 84 L. Ed. 355; *Helvering v. Pfeiffer*, 302 U.S. 247, 250, 251, 58 S.Ct. 159, 160, 161, 82 L.Ed. 231.

There is a difference of view among us whether the portion of the order of the Circuit Court of Appeals which set aside the unconditional fine of \$50 imposed on Young is here for review. But if we assume that it is, a majority of the Court is of the opinion that the Circuit Court of Appeals was correct in setting it aside, since the fine was imposed in a civil contempt proceeding. See *Gompers v. Bucks Stove & Range Co.*, *supra*.

Affirmed.

[MR. JUSTICE RUTLEDGE concurred, with opinion. MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE JACKSON concurred, dissented on the ground that the trial court's finding that need for subpoena had ceased and his decision not to compel it were within his allowable discretion.]

⁹ Some rules governing criminal contempts are, of course, different from those governing civil contempts. *Gompers v. Bucks Stove & Range Co.*, *supra*, 221 U.S. at pages 444, 446-449, 31 S.Ct. at pages 499, 500-501, 55 L.Ed. 797, 34 L.R.A., N.S., 874. If those differences are satisfied and if, as in *In re Swan*, 150 U.S. 637, 14 S.Ct. 225, 37 L.Ed. 1207; *Matter of Christensen Engineering Co.*, 194 U.S. 458, 24 S.Ct. 729, 48 L.Ed. 1072; *In re Merchants' Stock & Grain Co.*, 223 U.S. 639, 32 S.Ct. 339, 56 S.Ct. 584; *Farmers & Mechanics Nat. Bank v. Wilkinson*, 266 U.S. 503, 45 S.Ct. 144, 69 L.Ed. 408, the criminal penalty and the remedial relief are segregated, no problem of the adequacy of the order for purposes of appellate review is presented. No question is raised here as to the propriety of combining civil and criminal contempt in the same proceeding.

SECTION 6. INVALIDATIONS AND DISABILITIES

ERNST FREUND, LEGISLATIVE REGULATION

New York: 1932 The Commonwealth Fund. 56-58.

§ 18. Prohibition by Way of Disability. There are very few cases in which a disability of a civil character is superimposed upon an antecedent common law right. Mortmain legislation which prohibits testamentary gifts under certain circumstances furnishes an instance in point; but it plays no important part in America. If the Rule against Perpetuities were a legislative product, it would be a typical illustration; the Rule, however, operates as a rule of unwritten law.

The common form of prohibition by way of disability is that found in qualified enabling legislation. There is a common law incapacity in the first instance, which the law lifts in part, subject to qualifications. The conspicuous instances in point are corporate disabilities. A pure statutory grant or benefit, subject to limitations, is of a similar character. If, on the other hand, the statute first forbids the exercise of what might be regarded as a natural capacity, except under a license or permit, and then imposes restrictions or limitations, these hardly differ from other cases of restrictive regulation.

It will be noted that in the control of transportation the United States leaves the law of corporate capacity to the states the Interstate Commerce Act operating through penal prohibitions; on the other hand, national bank legislation is enabling legislation with attendant disabilities, and the commerce power of the United States is not used to regulate banking operations of state banks.

The limitation of an enabling act may result from implication or narrow construction. The National Bank Act of 1864 was silent upon the subject of branch banks, except that it required the certificate of organization to state the particular city, etc. (using the singular) at which it was proposed to conduct operations (see § 6, No. 2 of Act of 1864); and the important branch-banking power was denied mainly upon general principles of construction (29 Op.A.G. 81, 1911; *First National Bank v. Missouri*, 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486, 1924).

The expression of a prohibition as a qualification of an enabling provision, is of practical importance, since it is not, like penal regulation, felt to be an impairment of liberty and still less of constitutional rights. It is, moreover, a matter of legislative psychology, if a disability is lifted, not to lift it altogether, or to lift it only gradually; witness the course of married women's legislation and of incorporation laws. The result is the persistence of restrictions or requirements that have ceased to represent any clear policy; qualification requirements that are commonly evaded or made perfunctory; limitations upon the duration of corporate life that are inconvenient and serve no purpose; limitations upon charter objects or upon the com-

bination of objects, the wisdom or unwisdom of which has never been thoroughly considered. And whereas penal regulations are most doubtful and precarious if they attempt to control economic forces, civil disabilities are predominantly of economic operation. They are tolerated because they conform to settled custom, denying liberties that have never been enjoyed, or because they lend themselves to accommodation or evasion.

The amount of regulative legislation contained in the statutes of a given jurisdiction is likely to be taken as an index to the relation between the respective provinces of restraint and liberty. It is, however, a reliable index only in so far as non-regulation means common law liberty, not in so far as non-regulation means common law disability. If insurance or railroad transportation cannot be carried on effectively without corporate facilities, little is gained by non-regulation, unless the common law disability is first lifted. During the earlier part of the nineteenth century the place of present-day regulative statutes was to a large extent taken by special corporate charters. Their supersession by general regulative legislation is a gain rather than a loss to liberty.

It would require an exhaustive survey of statutory civil disabilities to verify the applicability of the above suggestions to any given jurisdiction.

THIBAUT v. LALUMIERE

Supreme Judicial Court of Massachusetts, 1945.
318 Mass. 72, 60 N.E.2d 849, 158 A.L.R. 613.

RONAN, JUSTICE. This is an appeal from an order sustaining the defendant's demurrer to the plaintiff's declaration filed in an action of tort which was commenced on July 16, 1943. Although the declaration contains a mass of irrelevant and immaterial matters, no objection to its form was made in the Superior Court. We set forth all the allegations pertinent to any possible cause of action upon which the pleader might have intended to base a claim against the defendant. The declaration alleged that from the time she entered the employ of the defendant's firm in January, 1930, until 1943, when she finally ceased to keep company with the defendant, he planned to seduce her; that he induced her to keep company with him and to become engaged to marry him by his false representations that he loved her and that he was a single man; that she discovered in May, 1930, that he was married and left her employment; that she re-entered the employment several times upon his promise not to molest her but that she quit on a number of occasions when he molested her; that in 1934 she left the Commonwealth; that upon her return in 1942 the defendant represented that he had secured a divorce, that he was a single man and would marry her, and that he would make a permanent home for her; that relying on these representations she went to live at the home of the defendant's mother where he lived; that she became dissatisfied with his delaying the marriage and left the

said home; and that she learned in June, 1943, that he had married again in 1942 and she ceased to associate with him any longer. She alleges that as a result of the defendant's conduct she submitted to his embraces and caresses, was deprived of an opportunity to meet and marry some honorable young man, lost employment, suffered humiliation and grief, and was made ill.

The declaration sets forth no cause of action for seduction. Nothing more than an intent or a plan to seduce her is alleged. We do not intimate that, if seduction had been averred, she could recover damages. It has been held that, in order that a father may recover for the seduction of his minor daughter or a master for the seduction of a female servant, it must be shown that he lost the services of the woman on account of the seduction. The action cannot be maintained on any other basis. . . . But it is an ancient and settled rule of the common law that the party seduced is barred by her participation in a wrong from recovering damages. . . . While damages for seduction may not be recovered in an independent action, they may be included in the measure of damages in an action for breach of promise of marriage. . . . The plaintiff, however, cannot recover damages for seduction as an incident to an action for breach of promise of marriage if, as will presently appear, she cannot maintain such an action.

The plaintiff contends that she can recover on this declaration for an assault and battery. This contention rests upon the allegation that "as a result of defendant's behavior the plaintiff was caused to acquiesce in and submit to defendant's embraces and caresses." It is to be noted that this allegation refers to an element of damage and does not purport to set forth a substantive cause of action. In the next place, if the plaintiff knowingly consented to and participated in these manifestations of apparent affection by the defendant, her consent would bar her from complaining that conduct of this character constituted a wrong to her. . . . If, as she now contends, her consent was procured by fraud of the defendant in that he did not intend to perform his promise to marry her, . . . she could not maintain an action on account of such acts committed during a courtship where the only ground for contending that such acts constituted a wrong was his intent not to carry out his promise to marry her and so was directly attributable to the breach of contract to marry if, as will appear, a statute declares that the breach of such a contract shall not be deemed to be a legal wrong or injury. . . .

However the plaintiff's contentions are viewed, they all stem from the alleged contract to marry which she alleged was made between the defendant and herself, *Brick v. Cohn-Hall-Marx Co.*, 276 N.Y. 259, 11 N.E.2d 902, 114 A.L.R. 521. All the damages alleged by her were caused by his breach of that contract. General Laws (Ter.Ed.) c. 207, § 47A, inserted by St.1938, c. 350, § 1, provides that a "Breach of contract to marry shall not constitute an injury or wrong recognized by law, and no action, suit or proceeding shall be maintained

therefor." This statute changed the public policy of this Commonwealth. It not only abolished the right of action for breach of promise but it went farther and abolished any right of action, whatever its form, that was based upon such a breach. The breach is no longer a legal wrong. . . . Actions in tort for fraud have been held to be within the prohibition of such statutes and any other cause of action that originates in the breach of a promise of marriage. The plaintiff's cause of action arises out of a breach of promise of marriage, and she cannot circumvent the statute by bringing an action in tort for damages so long as the direct or underlying cause of her injury is the breach of promise of marriage. *A. B. v. C. D.*, D. C., 36 F.Supp. 85; *Fahy v. Lloyd*, D.C., 57 F.Supp. 156; *Young v. Young*, 236 Ala. 627, 184 So. 187; *Pennington v. Stewart*, 212 Ind. 553, 10 N.E.2d 619; *Bean v. McFarland*, 280 Mich. 19, 273 N.W. 332; *Bunten v. Bunten*, 192 A. 727, 15 N.J.Misc. 532; *Fearon v. Treanor*, 272 N.Y. 268, 5 N.E.2d 815, 109 A.L.R. 1229; *Hanfgarn v. Mark*, 274 N.Y. 22, 8 N.E.2d 47; *Sulkowski v. Szewczyk*, 255 App.Div. 103, 6 N.Y.S.2d 97.

Demurrer sustained.

Judgment for the defendant.

NOTES

1. See Note, "Twelve Years with the 'Heart Balm Acts' ", 33 Va.L.Rev. 314 (1947).

2. N.Y.Leg.Doc. (1947) No. 65 (J); (1947) Rep.Rec. & St. Law Rev.Comm., "Recommendation of the Law Revision Commission To the Legislature Relating to Restitution for Property Transferred in Contemplation of Marriage":

"Article 2-A of the Civil Practice Act, adopted in 1935, expressly abolished rights of action 'to recover sums of money as damage for the alienation of affections, criminal conversation, seduction and breach of contract to marry' and further provided that

"No act hereafter done within this state shall operate to give rise, either within or without this state, to any of the rights of action abolished by this article. No contract to marry, hereafter made or entered into in this state shall operate to give rise, either within or without this state, to any cause or right of action for the breach thereof. (Section 61-d)"

"In the interpretation of these statutes the courts have held that, under the language quoted, certain actions other than those specifically mentioned in the statute are also barred. Paramount among these are the actions to recover property transferred to a betrothed in contemplation of a marriage that never takes place. Recovery has been denied (1) where the recipient's breach of promise to marry or fraud has been alleged in the complaint (*Andie v. Kaplan*, 288 N.Y. 685 43 N.E.2d 82 (1942) and (2) in some cases where the agreement to marry is alleged to have been abandoned by mutual consent. (*Hecht v. Yarnis*, 268 App.Div. 771, 50 N.Y.S.2d 170 (1944); *Morris v. Baird*, 269 App.Div. 948, 57 N.Y.S.2d 890 (1945). Contra, *Hutchinson v. Kernitsky*, 23 N.Y.S.2d 650 (1940); *Unger v. Hirsch*, 39 N.Y.S. 2d 965 (1943); *Spitz v. Maxwell*, 186 Misc. 159, 59 N.Y.S.2d 593 (1945).) It has even been held that an action is barred in which it is sought to recover \$760 loaned by the plaintiff to the defendant, when the parties were engaged to be married, in reliance upon the defendant's fraudulent promise that he would contribute a like sum and would use the entire fund for the purchase of a taxi service to be owned jointly by the plaintiff and defendant. *Alberelli v. Manning*, 185 Misc. 280, 56 N.Y.S. 2d 493 (1945). Prior to the passage of Article 2-A, recovery was permitted in all of these situations. *Antaramian v. Ourakian*, 118 Misc. 558, 194 N.Y.S. 100 (1922);

Benedict v. Flannery, 115 Misc. 627, 189 N.Y.S. 104 (1921); *Wilson v. Riggs*, 243 App.Div. 33, 276 N.Y.S. 232 (1934).

"The aim of the Act was to do away with excessive claims for damages conceived by their very nature and, all too frequently, fraudulent in character. Denial of recovery of property transferred in contemplation of marriage is not necessary to the accomplishment of this object, and it has the undesirable result of placing it within the power of a recipient to renounce a promise and yet retain property bestowed in anticipation of performance. This thought of unjust enrichment was emphasized by the dissenting justices in *Andie v. Kaplan*, (263 App.Div. 884, 32 N.Y.S.2d 429, 2nd Dep't, 1942, affirmed 288 N.Y. 685, 43 N.E.2d 82) who wrote:

"The purpose of the new legislation was to prevent a recovery for alleged pecuniary loss, blighted affections, wounded pride, humiliation, and the like, against the one who violated the promise, but not to enable the latter to receive benefits out of his wilful act"

"In *Morris v. Baird*, 54 N.Y.S.2d 779, the plaintiff had transferred some valuable real estate to his fiancée in contemplation of their marriage. In his original complaint, he alleged that the donee had breached the contract of marriage and he sought recovery of the property transferred. It was held that this complaint stated a cause of action which was prohibited by Article 2-A. The plaintiff then served an amended complaint alleging that the agreement to marry had been rescinded by mutual consent. The amended complaint was held to be sufficient in the lower court (57 N.Y.S.2d 398), but the decision was reversed on appeal (269 App.Div. 948, 57 N.Y.S.2d 890). The injustice of this result was well stated by Justice Lockwood in the opinion in the lower court:

"If judicial construction of the statute is further extended to bar this action, then the statute, which was designed to prevent unjust enrichment of unscrupulous persons and to avoid perpetration of frauds, would become an instrument to accomplish just that purpose, and would deprive the Court of its equitable power to afford redress to one who has been deprived of his property by fraud and deceit.

"Such a shocking result could not have been the intention of the Legislature in enacting Article 2-A, Civil Practice Act, nor will the best interests of the People of the State be served thereby."

"The Commission believes that Article 2-A of the Civil Practice Act should be amended to restore the power of the Court, in a proper case, to grant restitution where property or money has been transferred, in contemplation of the performance of an agreement to marry, and the agreement is not performed.

"The Commission therefore recommends the enactment of the following new section 61-j of the Civil Practice Act:

"§ 61-j. This article shall not be deemed to prevent a court in a proper case from granting restitution for property or money transferred in contemplation of the performance of an agreement to marry which is not performed."

[This bill was vetoed by the Governor.]

SECTION 7. ABATEMENT AND SUMMARY ENFORCEMENT IN EQUITY (INCIDENTALLY OF TAXATION)

STATE ex rel. WILCOX v. GILBERT

Supreme Court of Minnesota, 1914.
126 Minn. 95, 147 N.W. 953, 5 A.L.R. 1449.

PHILIP E. BROWN, J. Three separate actions under Laws 1913, c. 562 (Gen.St.1913, §§ 8717-8726), for abatement of bawdy-houses. The complaints were sufficient in form and substance to authorize full

relief under the statute, and all defendants, except Towne, upon whom no service of summons was made, answered to the following effect: Defendant Gilbert admitted that she resided in and worked as housekeeper of the house claimed to be a nuisance, but denied the other allegations of the complaint. Defendant Drewery admitted ownership of the premises, alleged the leasing thereof to one Harrigan, and denied acquaintance or dealings with defendant Gilbert, and knowledge or notice of her occupancy of the premises or the use thereof alleged. Defendant Ryder admitted ownership, occupancy, and control of the building, and denied all other allegations. Defendant Whitford, charged with maintenance of the house, denied the charge, and defendant Towne, alleged to be the owner thereof, did not appear. The court found that defendants Whitford and Ryder were engaged as claimed, that defendant Harrigan was lessee from defendant Drewery and owned the personal property used therein, defendant Gilbert being his housekeeper, aiding and abetting in the conduct of the business, and, further, that defendant Drewery, by the exercise of reasonable diligence, could have ascertained and known of the use made of such premises. No findings were made against defendant Towne. Plaintiffs were found entitled to injunctions perpetually restraining all defendants, except Towne, from further conducting or maintaining the public nuisances alleged, but no other relief, and appealed from the judgments entered accordingly.

Defendants' point as to insufficiency of the assignments of error, is overruled, because non-prejudicial, and we proceed to the merits. All questions raised hinge upon the constitutionality, effect, and construction of the act referred to, which, being too voluminous to quote in full, may be summarized as follows:

Sec. 1. "Whosoever shall erect, establish, continue, maintain, use, own or lease" any building, etc., used for lewdness, etc., is guilty of a nuisance, and such building, etc., and also the movable personalty so used itself, constitutes a nuisance, subject to abatement as such.

Sec. 2. "An action in equity" to perpetually enjoin the nuisance, and to restrain all parties from maintaining or allowing it, may be maintained in the name of the state upon relation of the county attorney or any citizen of the county, defendants to be served as in other actions, and the court, or judge in vacation, "shall," without requiring bond, allow a temporary injunction, if satisfied by affidavits, or other evidence previously ordered to be produced, of the existence of the nuisance, and upon application for such writ an ex parte restraining order may issue, restraining all persons from interfering with the movable property used in conducting the nuisance, the same to be served by handing to and leaving with the person in charge of the property or residing in the premises a copy thereof, or by posting a copy on the premises, etc., or by both. The serving officer shall forthwith make return into court and also inventory the movable property. Three days written notice shall be given defendants of the hearing of the application for the temporary injunction, which, however, issues as a matter of course if the case be continued upon their application. De-

defendants notified shall serve answers before date set for hearing, and extension of time to answer, though allowable by the court, shall not prevent issue of the temporary writ. Injunction granted binds all defendants throughout the judicial district and its violation constitutes contempt.

Sec. 3. Action is triable as other actions in the district court. Evidence of general reputation of the place is admissible to prove existence of the nuisance, and "shall be prima facie evidence" thereof, and of knowledge thereof and acquiescence and participation therein, by all persons in possession of the property used in conducting the same or having any interest therein.

Sec. 4. Contempt in proceedings under the act, or in violating any injunction or restraining order issued thereunder, is punishable, after summary trial, "by a fine of not less than one hundred nor more than one thousand dollars or by imprisonment in the county jail not less than three nor more than six months or by both fine and imprisonment."

Sec. 5. Upon proof, in either the equity action or in a criminal proceeding in the district court, of the existence of the nuisance, an order of abatement shall be entered as part of the judgment in the case, directing removal of all the movable personalty referred to, and sale of such thereof as belongs to defendants notified or appearing, and also "the effectual closing of the building or place against its use for any purpose" for one year, unless sooner released. Owners of unsold personalty must appear and claim same within ten days after the order of abatement is made and prove innocence "to the satisfaction of the court" of knowledge of said use thereof, and also inability to have acquired such knowledge by reasonable care and diligence; every defendant being presumed to have known the general reputation of the place. If their innocence is thus established, the property shall be delivered to them, but otherwise sold. Breaking, entering, or using the place so closed constitutes contempt.

Sec. 6. Upon establishment of the existence of the nuisance in a criminal proceeding in a court not¹ having equitable jurisdiction, the county attorney shall promptly proceed "to enforce the provisions and penalties" of the act, and conviction in the criminal proceedings, unless reversed, is conclusive against defendant therein as to the existence of the nuisance. Money collected under the act is payable to the county treasurer, and the proceeds of the sale of the personalty are applicable to payment of costs, except as thereafter stated in the act.

Sec. 7. The owner of the premises may obtain its release by payment of all costs of the proceedings and giving bond with certain prescribed conditions looking to abatement, but such will not release it from any judgment, lien, penalty, or liability to which it may be subject by law.

¹ Misprinted as "now" in Laws 1913 and G.S.1913, § 8722. See enrolled act.

Sec. 8. Upon issue of a permanent injunction under the act, there shall be imposed upon the building and the ground upon which the same is located, and against the person or persons maintaining the nuisance, and the owner or agent of the premises, a "penalty of three hundred dollars," such penalty to be imposed as a part of the proceedings, and returned to the county auditor and entered "as a tax upon the property and against the person upon which or whom the lien was imposed as and when other taxes are entered, and the same shall be and remain a lien on the land upon which the lien was imposed until fully paid." Payment of said penalty does not relieve persons or property from other penalties provided by law. It is collectible as provided by the tax laws so far as applicable, and when collected is applicable to payment of any deficiency in the costs of the action and abatement on behalf of the state, after application of the proceeds of the personal property thereto, the remainder of proceeds from both sources to be distributed the same as fines for keeping houses of ill fame, except that 10 per cent. shall be paid as an attorney's fee to the attorney representing the state.

Sec. 9. Where the owner or agent of the premises is not a party and does not appear, the \$300 penalty is nevertheless to be imposed against the persons served or appearing and against the property. "But before such penalty shall be enforced against such property the owner or agent thereof shall have appeared therein or shall be served with summons therein." R.L.1905, §§ 4111, 4112, providing for substituted service, are applicable to proceedings under the act. The record owner "for the purposes of taxation" is presumed to be the true owner, and unknown persons interested may be made parties by so designating them and service by publication as provided in said section 4111. "Any person having or claiming such ownership, right, title, or interest, and any owner or agent in behalf of himself and such owner may make, serve and file his answer therein within twenty days after such service and have trial of his rights in the premises by the court; and if such cause has already proceeded to trial or to findings and judgment, the court shall by order fix the time and place of such further trial and shall modify, add to or confirm such findings and judgment as the case may require," but other parties to the action shall not be affected thereby.

1. Bawdyhouses were public nuisances at common law. 1 Wood on Nuisances (3d Ed.) § 29. They are also made such by statute. G.S. 1913, § 8759. Maintenance thereof, willful refusal or omission to perform any legal duty relating to their removal, or letting or permitting use of any building, knowingly, for such purpose, constitutes a misdemeanor. Section 8760. By section 8712 keepers of such resorts are declared guilty of felony, and those who let buildings knowingly for such use, or who permit the same, are made guilty of misdemeanor. Section 8085 includes such places as nuisances and authorizes persons injuriously affected thereby to maintain actions for injunction and abatement. These statutes had been in force for years prior to the act of 1913. Likewise at an early date equity assumed jurisdiction to

enjoin and abate public nuisances. As said by Mitchell, J., in *Township of Hutchinson v. Filk*, 44 Minn. 536, 47 N.W. 255:

"It is now well settled that a court of equity may, in a proper case, take jurisdiction of public nuisances in civil actions for their abatement, and to enjoin their maintenance. This jurisdiction is grounded upon the greater efficacy and promptitude of the remedies administered in such action, enabling the court to restrain nuisances that are threatened or in progress, as well as to abate those already in existence, and effect their final suppression by injunction, which will often also prevent a multiplicity of suits."

See, also, 35 Am.St.Rep. 674, note.

Furthermore, eliminating the questions involved in the constitutional guaranty of jury trial, the broad power of the Legislature to extend the bounds of equity jurisdiction, as well as to regulate procedure, is well established. 16 Cyc. 29. Hence it cannot be doubted that, independently of statute, jurisdiction exists in equity to abate nuisances or that the Legislature had power, subject to constitutional limitations, to enlarge the same so as to include the general subject-matter of the act here involved; nor can the general justification of the act as a matter of legislative discretion under the police power fairly be questioned, for it is a matter of common knowledge that the criminal acts cited did not result in efficient repression or suppression of the evil aimed at. It is idle, therefore, to claim that the Legislature intended to enact another penal statute.

Likewise it is manifest that any successful assault upon the act must be directed against some one or more of its details as to procedure or relief as contravening constitutional guaranties; and in this connection we must not be unmindful of the presumption that the Legislature intended to keep within constitutional bounds and enact a valid law, nor of the rule that unless a statute is unconstitutional beyond a reasonable doubt it must be sustained. Dunnell, Dig. §§ 8929, 8931.

2. Coming now to consideration of the several grounds of attack made upon the act, we will first discuss defendant's claim of right to jury trial, their contention in this connection being that the provisions relating to forfeiture and sale of personalty, closing the house for one year, and the \$300 penalty, are penal, prescribing punishments for offenses, or else, if not penal, are of such character that in either event they were entitled to trial by jury, which the Legislature could not dispense with either by clothing prosecution and punishment for an offense in the livery of equity or by giving equitable form to legal relief. To sustain this position they cite *Kennedy v. Raught*, 6 Minn. 235, *State v. West*, 42 Minn. 147, 43 N.W. 845, *Commissioners v. Morrison*, 22 Minn. 178, and cases from other jurisdictions to like effect, and also decisions of this court regarding the right to jury trial in civil actions. We will not, however, review these cases; for, conceding they establish the general propositions to which they are cited, and that the provisions attacked could not be sustained as penal enact-

ments, they are nevertheless clearly distinguishable and are not inconsistent with the conclusions which we have reached.

The constitutional provision regarding right to jury trial merely preserves such right as it existed when the Constitution was adopted. *Peters v. Duluth*, 119 Minn. 96, 101, 137 N.W. 390, 41 L.R.A., N.S., 1044. It is inapplicable to actions based upon equitable causes of action or to obtain equitable relief alone. *Dunnell*, Minn.Prac. § 582; *Koeper v. Louisville*, 109 Minn. 519, 124 N.W. 218. Since, therefore, a review of the act as a whole leads irresistibly to the conclusion that its purpose is repression of the evil, to be worked out by equitable attack upon the property of those engaged in or abetting it, and not punishment of the offenders by infliction of personal penalties, except as for contempt of court, the contention that, because the thing itself—the lewd place—declared a nuisance by the act would, in its maintenance, have constituted a criminal offense at the time of the adoption of the constitution, a jury trial is indispensable, has no foundation, and is thus answered by the authorities:

“The fallacy of the argument lies in part in disregarding the distinction between a proceeding to abate a nuisance, which looks only to the property that in the use made of it constitutes the nuisance, and a proceeding to punish an offender for the crime of maintaining a nuisance. These two proceedings are entirely unlike. The latter is conducted under the provisions of the criminal law, and deals only with the person who has violated the law. The former is governed by the rules which relate to property, and its only connection with persons is through property in which they may be interested. That which is declared by a valid statute to be a nuisance is deemed in law to be a nuisance in fact, and should be dealt with as such. The people, speaking through their representatives, have proclaimed it to be offensive and injurious to the public, and the law will not tolerate it. The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance.” *Carleton v. Rugg*, 149 Mass. 550, 553, 22 N.E. 55, 56 (5 L.R.A. 193, 14 Am.St.Rep. 446).

So, also, in *State v. Murphy*, 71 Vt. 127, at page 136, 41 A. 1037, 1038, the court said:

“The respondent contends that the statute is in conflict with the provisions of the Constitution of the state, particularly article 10 of the Declaration of Rights, which provides ‘that in all prosecutions for criminal offenses, a person hath a right to . . . a speedy public trial by an impartial jury of his country; . . . nor can any person be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers.’ This claim is made, disregarding the distinction between a proceeding to abate a nuisance, which relates simply to the property which in its use constitutes the nuisance, and a prosecution of the respondent for the crime of maintaining it.”

And in *Mugler v. Kansas*, 123 U.S. 623, 671, 8 S.Ct. 273, 302 (31 L.Ed. 205), Mr. Justice Harlan said:

“The state having authority to prohibit the manufacture and sale of intoxicating liquors for other than medical, scientific, and mechan-

ical purposes, we do not doubt her power to declare that any place, kept and maintained for the illegal manufacture and sale of such liquors, shall be deemed a common nuisance, and be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender."

See, also, *State v. Saunders*, 66 N.H. 39, 25 A. 588, 18 L.R.A. 646, where the earlier cases are exhaustively reviewed, and *State v. Marshall*, 100 Miss. 626, 56 So. 792, Ann.Cas.1914A, 434.

Defendants attack particularly the \$300 penalty imposed by section 8, on the ground stated, insisting that penalties are regarded as punishments for infractions of law, and statutes imposing them as penal. But in considering this section, and all others, we are bound to hold that if the language used is reasonably susceptible of two constructions, one rendering the enactment constitutional, and the other not, the former must be adopted, though the latter be the more natural. *Dunnell*, Dig. § 8931. While the act designates the \$300 exaction as a "penalty," the same section clearly indicates it to be imposed, treated, and collected as a tax. There is no magic in words, and the use of "penalty" is not decisive. Terminology is not necessarily decisive, and the Legislature might well have been in doubt as to the appropriate word with which to designate the exaction. After all, the legislative intent is what we seek, and the nature of the thing is more important than its name. In *Hodge v. Muscatine County*, 196 U.S. 276, 25 Sup. Ct. 237, 49 L.Ed. 477, the court had under consideration the Iowa cigarette law, whereby a tax of \$300 per annum was assessed "against every person . . . and upon the real property, and the owner thereof," whereon cigarettes, etc., were sold, or kept with intent to sell, the same to be a perpetual lien upon both personal and real property used in connection with the business. The Supreme Court of Iowa sustained the law (*Hodge v. Muscatine County*, 121 Iowa, 482, at page 488, 96 N.W. 968, at page 970, 67 L.R.A. 624, 104 Am.St.Rep. 304) observing in the course of its opinion:

"It [the \$300] is manifestly a tax upon the traffic which the Legislature saw fit to impose, not for the purpose of giving countenance to the business, but as a deterrent against engaging therein. . . . Indeed, we think it may be fairly said to be a tax upon the business. That a tax is imposed for the double purpose of regulation and revenue is no reason for declaring it invalid."

The Supreme Court of the United States approved this holding, saying, at page 279 of 196 U. S., at page 239 of 25 S.Ct. (49 L.Ed. 477):

"It is not easy to draw an exact line of demarcation between a tax and a penalty, but, in view of the fact that the statute denominates the assessment a 'tax,' and provides proceedings appropriate for the collection of a tax, but not for the enforcement of a penalty, and does not contemplate a criminal prosecution, we cannot go far afield in treating it as a tax rather than a penalty. . . . The act itself provides in terms that such a tax shall be in addition to all other taxes and penalties, and elaborate provision is made for its enforcement.

The mere fact that the charge, whatever it may be, is made a lien upon the real estate and a personal claim against the landlord, indicates that it is in the nature of a tax rather than a penalty."

We consider this case in point and follow its lead, being impelled to such course both by reason and by the authoritative pronouncement of the federal Supreme Court upon an exaction to which the assessment imposed by section 8 is closely analogous in so many of its essential features, including failure to provide proceedings appropriate for the enforcement of a penalty, particularly in that no punishment is imposed for nonpayment of the assessment.*

The act as a whole differs in no material respect from the numerous statutes regulating liquor traffic by equitable actions for injunction and abatement, universally held valid notwithstanding denial of jury trial thereunder. We hold it not penal, which disposes of defendants' main contention regarding right to trial by jury, and likewise of their points based upon the constitutional provisions relating to excessive fines and unusual punishments, the right to be confronted by witnesses, testifying against one's self, bills of attainder, and ex post facto laws. As to their claim of right to jury trial, even if the action be held civil in all its details, it is sufficient to say that in its main features the proceeding is unquestionably equitable, and that when a court of equity properly assumes jurisdiction of a cause for one purpose it acquires it for all and grants full relief. *Dunnell*, Dig. § 3138; 1 *Pom.Eq.* § 237; *State v. Marshall*, supra. . . .

5. Finally, is the act in its remedial details a proper exercise of police power? The subject-matter being within such power, the test is reasonableness, which involves a dual limitation, positive and negative, namely, adaptability to the end sought and absence of excessiveness. The measure must, on the one hand, tend to accomplish the purpose of its adoption, and, on the other, must not go beyond the reasonable demands of the occasion. In our opinion the remedies provided by the act stand the test.

"A large discretion is necessarily vested in the Legislature, to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests." *State v. Wagner*, 77 Minn. 483, 495, 80 N.W. 633, 635 (46 L.R.A. 442, 77 Am.St. Rep. 681).

Upon all points involved in the cases before us, the act is sustained as constitutional. The objections based upon the effect accorded evidence of the general reputation of the place in establishing the existence of the nuisance, etc., and the presumptions declared in section 5, more properly belong to the discussion in *State v. Lane*, 147 N.W. 951, a companion case decided herewith.

[* Cf. *People ex rel. Lemon v. Elmore*, 256 N.Y. 489, 177 N.E. 14, 76 A.L.R. 1292 (1931), holding unconstitutional, as a deprivation of jury trial, that portion of a similar New York statute which provided for imposition of a "penalty tax" upon the premises and upon the persons maintaining a nuisance. The principal provisions, authorizing maintenance of an equitable action for abatement of the nuisances, were sustained. Ed.]

Judgments reversed, in so far as they fail to award plaintiffs, as against the answering defendants, the additional relief prayed; and the trial court is directed to proceed in accordance with this opinion.

SECTION 8. ADVERSE PRESUMPTIONS

BOARD OF COMMISSIONERS OF EXCISE OF THE CITY OF AUBURN v. MERCHANT

Court of Appeals of New York, 1886.
103 N.Y. 143, 8 N.E. 484, 57 Am.Rep. 705.

EARL, J. The main question to be determined in this case is whether this action should have been commenced by the present plaintiff, or by the board of charities and police for the city of Auburn, and upon this question our views have been sufficiently expressed in the case just decided against Burtis, and we refer to the opinion pronounced in that case. Board Com'rs of Excise, etc., v. Burtis, 103 N.Y. 136, 8 N.E. 482.

Upon the trial of this action the judge charged the jury that "the law provides, in such case as this, that upon proof being made of the fact that liquor was seen to be drank on the premises, that is *prima facie* evidence that it was sold with intent that it was to be drank upon the premises." To this portion of the charge defendant's counsel excepted, and the exception is now relied upon as pointing out error fatal to the judgment.

In section 11 of the excise act (chapter 628, Laws 1857) provision is made for licenses to storekeepers and shopkeepers, authorizing them to sell spirituous liquors in quantities less than five gallons not to be drank upon the premises. Then, in section 12, it is provided as follows: "Such license shall not be granted unless the commissioners are satisfied that the applicant is of good moral character, nor until such applicant shall have executed a bond to the people of this state . . . conditioned that . . . he will not sell, or suffer to be sold, any strong or spirituous liquors or wines to be drank in his shop or house, or in any outhouse, yard, or garden appertaining thereto, and that he will not suffer any such liquor, sold by virtue of such license, to be drank in his shop or house, or in any outhouse, yard, or garden belonging thereto; and, whenever any person is seen to drink in such shop or house, outhouse, yard, or garden belonging thereto, any spirituous liquors or wines forbidden to be drank therein, it shall be *prima facie* evidence that such spirituous liquors or wines were sold by the occupant of such premises, or his agent, with the intent that the same should be drank therein. On any trial for the offense last aforesaid such occupant or agent may be allowed to testify respecting such sale." It was undoubtedly this law to which the judge referred in his charge. . . .

Thus the charge was authorized by the words of the statute. But the learned counsel for the appellant claims that this provision of

the statute is unconstitutional, on the ground that it violates the constitutional guaranties of due process of law and trial by jury. We think the claim unfounded. The general power of the legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party, and thus deny him the opportunity for a trial, would substantially deprive him of due process of law. It would not be possible to uphold a law which made an act *prima facie* evidence of crime, over which the party charged had no control, and with which he had no connection, or which made that *prima facie* evidence of crime which had no relation to a criminal act, and no tendency whatever by itself to prove a criminal act. But so long as the legislature, in prescribing rules of evidence, in either civil or criminal cases, leaves a party a fair opportunity to make his defense, and to submit all the facts to the jury to be weighed by them upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds. Affidavits in town-bounding acts and tax deeds have been declared to be *prima facie* evidence of regularity and validity, and numerous statutes of similar character are to be found in this and other states. In *Com. v. Williams*, 6 Gray 1, it was held, in a criminal prosecution for a violation of an excise law, that a statute which provided that the delivery of any spirituous and intoxicating liquors in or from any building or place other than a dwelling-house, "shall be deemed *prima facie* evidence of a sale," was constitutional and valid. In *State v. Hurley*, 54 Me. 562, it was held that an act which provided that "whenever an unlawful sale of intoxicating liquor is alleged, and a delivery proved, it shall not be necessary to prove payment, but such delivery shall be sufficient evidence of sale," was constitutional. In *Howard v. Moot*, 64 N.Y. 261, Allen, J., said: "The rules of evidence are not an exception to the doctrine that all rules and regulations affecting remedies are at all times subject to modification and control by the legislature. * * * It may be conceded for all the purposes of this appeal, that a law that should make evidence conclusive which was not so necessarily in and of itself, and thus precluded the adverse party from showing the truth, would be void, as indirectly working a confiscation of property, or a destruction of vested rights. But such is not the effect of declaring any circumstance, or any evidence, however slight, *prima facie* proof of a fact to be established, leaving the adverse party at liberty to rebut and overcome it by contradictory and better evidence."

Here the act which is made *prima facie* evidence of an illegal sale takes place upon the premises of the person charged, has some relation to and furnishes some evidence of the alleged illegal sale, and occurs in a place where liquors are authorized to be kept and sold. To make drinking the liquor in such a place and under such circumstances *prima facie* evidence of an illegal sale to the person drinking, violates no constitutional guaranty. It leaves a party ample oppor-

tunity to make his defense. It is specially provided, what is now the general law, that the party can be a witness in his own behalf, and thus it can never be difficult for him to show what the facts really are. The burden of proof is not even really changed. The statute enables the prosecutor to make a *prima facie* case by proof of the drinking. But the defendant can show the circumstances attending the drinking, his relations thereto, and any other facts tending to absolve him from liability, and then, on the whole case, the burden still rests upon the prosecution to establish the alleged sale. The defendant has the full benefit of jury trial and due process of law, and a full and fair opportunity free from any undue hinderance or embarrassment to make his justification and defense. Hence the charge resting upon the statute was not erroneous.

But the statute need not be invoked to uphold the charge. Under the circumstances of this case the drinking was good common-law evidence of a sale in violation of the statute. The defendant kept liquor for sale, and was shown to be engaged in selling it to be drank upon his premises quite indiscriminately to persons calling for it. It is against all experience that he gave it away, or that persons came there to drink liquors bought elsewhere. It was in his power to prevent the drinking, which took place from glasses presumably furnished by him. Evidence of the drinking under such circumstances was certainly *prima facie* proof that the liquor was bought to be drank there, and sufficient to justify the charge.

We are therefore of opinion that the judgment should be affirmed, with costs.

STATE v. BESWICK

Supreme Court of Rhode Island, 1881, 13 R.I. 211, 43 Am.Rep. 26.

DURFEE, C. J. The complaint is in the form provided by Pub. Laws R.I. cap. 797, of March 18, 1880, for prosecutions under Pub.Laws R. I. cap. 508, §§ 18 and 19,¹ of June 25, 1875. The complaint is for a violation of § 19. . . .

¹ As follows: "Sect. 18. If any person shall, at any time, offer to sell, sell, or suffer to be sold by any person, by sample or otherwise, any ale, wine, rum, or other strong or malt liquors, or any mixed liquors a part of which is ale, wine, rum, or other strong or malt liquors, in violation of the preceding sections of this act or any of them, he shall be sentenced on the first conviction to pay a fine of twenty dollars and all costs of prosecution and conviction, and be imprisoned in the county jail for ten days; on the second conviction he shall be sentenced to pay a fine of fifty dollars and all costs of prosecution and conviction, and be imprisoned in the county jail three calendar months; and on the third and every subsequent conviction he shall be sentenced to pay a fine of one hundred dollars and all costs of prosecution and conviction, and be imprisoned in the county jail not less than three months nor more than six calendar months."

"Sect. 19. If any person shall keep or suffer to be kept on his premises or possessions, or under his charge, for the purposes of sale, in violation of the preceding sections of this act or any of them, any ale, wine, rum, or other strong or malt liquors, or any mixed liquors a part of which is ale, wine, rum, or other strong or malt liquors, he shall, on conviction, be fined twenty dollars, or be imprisoned in the county jail thirty days."

The other exception raises the question whether § 4 of cap. 797 is constitutional. The language of § 4 is as follows, to wit:

"It shall not be necessary to prove an actual sale of the liquors enumerated in sections 18 and 19 of said chapter 508 in any building, shop, saloon, place, or tenement, in order to establish the fact that any of said liquors are there kept for sale; but the notorious character of any such premises, or the notoriously bad or intemperate character of persons frequenting the same, or the keeping of the implements or appurtenances usually appertaining to grog-shops, tippling-shops, or places where such liquors are sold, shall be *prima facie* evidence that said liquors are kept on such premises for the purposes of sale within this State." . . .

It will be observed that the statute makes proof of the facts mentioned in it not only evidence against the accused, but *prima facie* evidence of his guilt, so that upon proof of them it is not only the right but the duty of the jury to convict, unless the presumption is rebutted by other evidence, though of course such other evidence may be elicited from the witnesses for the State as well as given by witnesses for the defendant. *Commonwealth v. Pillsbury*, 12 Gray 127. The question then is, whether a statute is constitutional which makes it the duty of a jury, empanelled to try a complaint for unlawfully keeping liquors for sale, to convict the accused upon simple proof that his place of business is notorious as a place where liquors are unlawfully kept for sale, or upon simple proof that the place is frequented by persons of notoriously bad or intemperate character, or upon proof that he has there the implements and appurtenances of a grog-shop or tippling-shop, without more, unless there be other evidence to rebut or control it.

We have very carefully considered the question, and have come to the conclusion that the statute is not constitutional. It virtually strips the accused of the protection of the common law maxim, that every person is to be presumed innocent until he is proved guilty, which is recognized in the Constitution as a fundamental principle of jurisprudence. And we think it is repugnant to the constitutional provision that the accused shall not "be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land." What is meant by "the judgment of his peers" is the judgment of a jury, and certainly the accused does not have the *judgment* of a jury, if the jury is compelled by an artificial rule to convict him, whether they think him guilty or not, upon proof of a fact which is consistent with his innocence, and which is so consistent with his innocence that proof of it at common law would not even be admissible against him. Suppose that the General Assembly were to enact that if any person were generally reputed to be guilty of a murder it should be *prima facie* evidence that he was guilty, and that some citizen were convicted and sentenced to death or imprisonment on such evidence, because in the absence of rebutting evidence the jury had no option to acquit him. Could it be said that his life or liberty had been taken from him by the *judgment* of his peers? We think not. The judg-

ment of the jury would not have been taken on the question of his guilt, but only on the question whether or not he was generally reputed guilty. So under the statute here a man may be convicted of unlawfully keeping intoxicating liquors for sale, upon proof that his place of business is generally reputed to be a liquor shop, without the jury's actually passing any judgment on the question of his guilt.

The provision is that the accused shall not be deprived of his life, liberty, or property, "unless by the judgment of his peers *or* the law of the land." It may be argued that even if the accused does not have the judgment of his peers he is nevertheless convicted by "the law of the land." This phrase has a historical origin. It was borrowed from *Magna Charta*, and, as has been repeatedly decided, means the same as "due process of law." The question then is, whether if a man is convicted on the testimony indicated, and under the rule prescribed by the statute, he is convicted according to "due process of law." . . .

. . . Indeed to hold that a legislature can create artificial presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime when committed, is to hold that it has the power to take away from a judicial trial, or at least substantially reduce in it, the very element which makes it judicial. To hold so is to hold that the legislature has power to bind and circumscribe the judgments of courts and juries in matters of fact, and in an important measure to predetermine their decisions and verdicts for them. It is true the accused has the right of defence left to him, and may, if he can adduce satisfactory evidence, rebut the statutory presumptions; but the production of such evidence is not always easy, even with the right to testify in his own behalf; and the right to testify in his own behalf having been granted, can be abrogated, by the legislature. It is not one of those great and immemorial rights which lie embedded in the phrase "the law of the land." . . .

. . . The cause is remanded to the Court of Common Pleas for a new trial.

NOTE BY THE CHIEF JUSTICE.—In the Declaration of Rights adopted by the Continental Congress in 1774, it is declared that the inhabitants of the Colonies are entitled "by immutable laws of Nature, the principles of the English Constitution, and the several charters and compacts," to certain rights enumerated, the fifth of which is the following, to wit: "That the respective Colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinity according to the course of that law." This probably shows how the provision in question was understood by the great lawyers of the Revolution. See Pitkin's *United States*, Vol. I. pp. 285, 286.

NOTES

1. Morgan, "Tot v. United States: Constitutional Restrictions on Statutory Presumptions", 56 *Harvard L.Rev.* 1324 (1943) states: ". . . The burden of introducing evidence is quite different from the burden of persuading the trier of fact. As to the same proposition one party may have to bear the former, while the other has to sustain the latter. The former determines the result if no evidence, or no further evidence, is received. The latter is decisive where the mind of the trier is in equilibrium. Each party and the court must know where the former rests at every state of the trial; neither court nor party is concerned with the latter until the evidence is closed. The trier of fact, as distinguished from the judge, need never hear about the former but must always be instructed as to the latter. It would seem to follow that no court should attempt to determine the validity of a statute affecting these aspects of a trial without first ascertaining the exact effect of its application in an action. If the statute as construed permits or requires evidence of A to be used as evidence of B, then the existence of a rational connection between them is demanded by the Constitution. But how does it follow that the Constitution makes the same demand where the establishment of A fixes the burden of producing evidence or the burden of persuading as to B?" Does Section 12 of the Security Act, 1933, *supra*, p. 513, create an adverse presumption or impose burden of proof?

2. See American Law Institute Model Code of Evidence, 1942, pp. 306 et seq.; 162 A.L.R. 495; 86 A.L.R. 179; 51 A.L.R. 1139.

SECTION 9. CIVIL LIABILITIES

ERNST FREUND, LEGISLATIVE REGULATION

New York: 1932. *The Commonwealth Fund.* 58-63.

§ 19. *Statutory Liability.* It is convenient to use the term liability to indicate the legal duty of indemnification for loss as distinguished from an obligation assumed or imposed by law irrespective of loss or default. The terminology, however, is not observed in practice, for what in accordance with it would be an obligation to pay a tax is commonly spoken of as a tax liability. The law of liability is typically declaratory law, evolved upon the basis of principle, in Anglo-American jurisdictions by judicial decisions, and illustrating, in its development in different legal systems, the possibility of divergent views of justice, as, e.g., in the treatment of contributory negligence and of employers' liability, in the matter of unjust enrichment, the accountability of a possessor in good faith, the tort liability of an insane person or an infant, etc.

Where the law is codified, the code will naturally lay down rules controlling some or all of these matters, and may incidentally change previously existing law; in England and America fundamental legislative changes have been rare, the most important being probably the introduction of a cause of action for wrongfully causing death; but there has been sporadic legislation concerning principles of liability in particular circumstances or relations: thus in England the liability to restore winnings at games (16 Car. II, c. 7 and 9 Anne, c.

14), and the exemption from liability for accidental escape of fire (6 Anne, c. 3); in America special rules of liability in connection with the operation of railroads (cattle, fire), the sale of liquor (civil damage acts), the recovery of property from inadvertent trespassers who have made improvements (occupying claimants' acts), and the qualification of the law of employers' liability, which in a few states, preceded workmen's compensation legislation. So far as these statutes merely substitute one principle for another, they furnish interesting illustrations of the history of private-law legislation.

Liability legislation assumes the character of regulative legislation, if either liability serves the purpose of regulation, or if the law not merely establishes liability, but subjects it to regulative provisions.

a. *Liability as a form of regulation.* This is illustrated by the laws which make railroad companies liable for cattle killed on their right of way in absence of a sufficient fence. The basis of such legislation is the power to require railroad companies to fence their rights of way against cattle; but the obligation is not directly imposed, the company having the option to compensate for loss of cattle.

Under the same head should be placed the peculiar rule of the law of corporations, introduced into the Illinois Corporation Act of 1872, and from there copied by other states, which makes directors liable for assenting to an indebtedness in excess of the amount of the capital, to the amount of such excess (§ 23 of the Illinois Act).

Where, as in the laws of fencing against cattle, the assumption of liability is optional in lieu of the adoption of a safeguard, a consideration of relative advantages may induce the assumption of the risk of liability; but where, as in the corporation law, the liability is imposed as a consequence of avoidable action, it operates in effect as prevention of such action.

Absolute liability means a duty to indemnify for loss, but not a duty based upon default, and therefore may be regarded as being contrary to rational principle. It has in consequence been questioned on constitutional grounds, successfully so in connection with the first workmen's compensation legislation (*Ives v. South Buffalo R. Co.*, 201 N.Y. 271, 94 N.E. 431, 1911), and the rule had to be sanctioned by express constitutional amendment. However, upon analysis, the rule *Respondeat superior* is a rule of liability irrespective of fault, and a still stronger illustration is found in the rule of admiralty (contrary to the common law rule, see *Transportation Co. v. LaCompagnie Générale*, 182 U.S. 406, 21 S.Ct. 831, 45 L.Ed. 1155, 1900), that the ship is liable for the fault of the pilot whom it is by law compelled to employ (*The China*, 7 Wall. 53, 1868). If absolute liability is looked upon as a form of charging an undertaking with the inevitable risk of loss attending it, it represents a rational principle of justice; but a more perfect "rationalization of justice" may require adjustments or qualifications which the processes of unwritten law have

failed to develop, and which in any event are more conformable to regulative legislation.

b. *Liability regulation.* It is, if not inevitable, at least natural, that if legislation concerns itself with liability, it should not content itself with merely stating or altering principles, but seek for conventional adjustments that have a tendency to achieve better equity than the mere operation of a simple rule of liability is apt to do.

The following seem to be the prominent forms of liability regulation:

(1) *Limitation of liability.* It is characteristic that while there was, until the advent of workmen's compensation, no attempt to curb the extravagances of damage claims in case of personal torts, the introduction of a cause of action for wrongful death was at once and everywhere attended by the fixing of maximum amounts recoverable; even prior to Lord Campbell's Act, the early legislation of Massachusetts pursued this policy when it made negligent management of highways (resulting in death) actionable. By the constitution of 1894, New York prohibited any such limitation, but had to qualify this prohibition in order to make workmen's compensation possible. All workmen's accident compensation operates with limited benefits, which in substance represent something like apportionment of loss between employer and employee.

Congress recognized the principle of limited liability in connection with shipping by the so-called Harter Act of 1893.

Limited liability of a corporation may be looked upon as the logical result of the separate entity theory, and generally is not expressed by statute, but left to be inferred from the nature of the corporation.

(2) *Protective expedients.* Workmen's compensation laws place a duty of accident notification upon the employee, as a safeguard against possible fraud, and a similar duty is created by statute in favor of municipal corporations. Provisions may be called for to take care of cases where the injured person is not *sui juris* (O'Connell v. Sanford, 256 Ill. 62, 99 N.E. 885, 1912) or where failure to notify is not prejudicial, or appropriate equities may be worked out by judicial construction.

English legislation making railroad companies liable for damages caused by fire due to sparks escaping from locomotives empowers the company to enter upon adjoining land to clear it from inflammable material. This provision manifests a care in correlating right and liability which is not found in American statutes, but is indicative of possible elaboration of rules of liability.

(3) *Provisions to make liability effective.* Workmen's compensation laws require employers to satisfy the appropriate administrative authorities that they are financially prepared to meet compensation claims, or to insure themselves or to give bond to secure possible claims (Illinois Act, § 226). Similar safeguards are being dis-

cussed in connection with the operation of automobiles and have been put in effect in Massachusetts. See J. P. Chamberlain, "Compulsory Automobile Insurance," 12 American Bar Association Journal 49, January, 1926.

Legislation of this kind is clearly regulative; therefore, while a municipal corporation has no power to declare rules of liability it may under a power of regulation, exact a bond to secure the satisfaction of damage claims, as a condition of granting a license (*State v. Deckebach*, 117 Ohio St. 227, 157 N.E. 758, 1927).

(4) Priorities and liens. Priority is important in case of insolvency; and the recognition of priorities forms part of bankruptcy legislation and of laws for the administration of decedents' estates. Priorities recognized by courts of equity and of admiralty are based upon inherent differences in claims that can be worked out as a matter of logic; whereas legislation is free to give effect to considerations of social welfare and to pursue other collateral ends.

A lien, in addition to giving priority, permits the satisfaction of claims out of property after it has passed out of the ownership of the debtor. In appropriate cases, it may also be used to secure claims of a quasi-contractual character, on behalf of parties who have no personal claim against the owner. Lien legislation is an important part of every American statute book. Besides enlarging the range of possessory liens in analogy to those of the common law, it creates liens not dependent upon possession, but upon systems of public registry. The statutory lien based upon quasi-contractual claims is the characteristic feature of mechanics' lien legislation, which is a peculiarly American institution. It involves a complex system of notices and declarations, and great care is required in order not to do injustice to the owner. After a century of experimenting legislating, it cannot be said that all substantial equities have been worked out with complete success; and it is significant that some of the most careful laws, notably that of Illinois of 1903, permit the owner to stipulate by contract against the application of the system to his property (§ 21).

NOTE

See Sections 11 and 12 of the Securities Act 1933, which appear *supra* at p. 512-513.

RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE RELATING TO THE TRUST FUND PRO- VISIONS IN THE NEW YORK LIEN LAW

N. Y. Leg. Doc. (1942) No. 65 (H), 13-15.

1942 Rep. Rec. and St. Law Rev. Comm. 283-285.

Legislation has been enacted in New York and several other states to prevent abuses which frequently arise in the pyramiding of building operations and to afford adequate protection to those who contribute services or materials upon an improvement of real property.

Such legislation is based on the principle that funds received for an improvement should be applied to pay the cost of that improvement. It supplements the older remedy by lien upon the property improved, which is not available after all payments by the owner on his contract for the improvement have been made.

The first legislation was enacted in this state in 1929 at the time of the general revision of the Lien Law. It required that building loan mortgages contain a covenant by the owner to hold the moneys received thereunder as a trust to be applied first to the cost of improvement. Moneys so received were declared to constitute trust funds, a diversion of which was made punishable as a misdemeanor. Later the trust concept was extended to include moneys received by a contractor or subcontractor on account of an improvement, or upon an assignment of moneys due or to become due on a public improvement, as well as moneys received by an owner on a mortgage or conveyance, and proceeds of insurance on the improved property whether payable to an owner, contractor or subcontractor. Some of these statutes provide for the creation of a trust by covenant; others expressly declare the existence of a trust. Diversion of any such trust funds is now punishable as larceny.

Civil litigation involving the trust fund provisions has been relatively infrequent, and few cases of criminal prosecutions are found in the reports. The reported cases reflect uncertainty regarding the present provisions. Problems as to whether the trust may be enforced by civil action, and by whom, and by what procedure remain unsettled. In the absence of any definite decision by the Court of Appeals, confusion exists in the legal profession and the building trades on the issue of whether only lien claimants are entitled to enforce a trust. . . .

The Commission is of the opinion that these uncertainties should be resolved by legislation. Persons having claims for services or materials in connection with an improvement of real property should be entitled to share in the trust funds and to enforce the trust by civil action, whether or not they have filed notice of lien against the property. Lienors in the case of a private improvement already have available one remedy by lien against the property and, in the case of a public improvement, against the balance of moneys still due. There is no valid reason why a fund impressed with a trust for payment of the cost of improvement should not be available to all those who have contributed to the improvement. A requirement of filing notice of lien would tend to burden property with liens for every small claim as the work progresses, and would deprive a class of persons intended to be benefited by the statute of a remedy more effective and speedy than that of a personal judgment upon their claim.

Further, the failure of an owner, contractor or subcontractor to include in an assignment, mortgage or conveyance the trust covenant required by law should not prejudice the rights of persons who were intended to be protected. . . .

Under present law, the right to receive moneys which, if received, would constitute trust funds, is not a trust res. This is a gap in the law. The Commission proposes that the trust res, for the purposes of a civil action only, should be expanded to enable a beneficiary to reach such choses in action as well as moneys actually in the hands of the trustee. Existing criminal liability is in no way affected.

The Commission also proposes the closing of another gap by extending the present provision of the Lien Law applicable only to assignments of moneys due or to become due on a public improvement contract to include assignments of moneys due or to become due on a private improvement contract. There is no basis for the distinction. The protection of persons making the advances which constitute the trust fund is made similar in the two classes of improvements.

Finally, the ineffectiveness of the trust fund provisions in the present law is probably due in large measure to the lack of an established procedure for their civil enforcement. Although the courts have indicated that the proper remedy is by class action, no reported case has been found where that remedy was used successfully. A procedural article is proposed to be added to the Lien Law, which provides for the enforcement of the trust by representative action. It also includes provisions for bonding of the trustee, a preference for wage claims, a short period of limitations, and court supervision of any settlement of the action. . . .

NOTES

1. The recommended proposal was enacted as N.Y.Laws 1942, c. 808.
2. California Code of Civil Procedure (Deering 1941) § 1183:

§ 1183. [Mechanics, etc., to have lien for value of labor, etc.: Contractor, etc., deemed agent: Nature and limitations upon lien: Filing contract or modification, effect: Bond of contractor; Limitation of owner's liability, exaction of security.] Mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists, builders, miners, teamsters and draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services, or furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the construction, alteration, addition to or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure, or other work of improvement, or performing labor upon or bestowing skill or other necessary services, or furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the grading, filling in, or other improvement of any lot or tract of land or the making of any improvement in connection therewith, including within the meaning of the said word "improvement" any seeding, sodding or planting of such lot or tract of land for landscaping purposes or the demolition of buildings thereon or the removal of buildings therefrom, made or done on such real property, shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished and for the value of the use of such appliances, teams or power, whether at the instance of the owner, or of any other person acting by his authority or under him, as contractor or otherwise; and every contractor, subcontractor, archi-

tect, bullder or other person having charge of the construction, alteration, addition to or repair either in whole or in part of any building or other improvement as aforesaid shall be held to be the agent of the owner for the purposes of this chapter.

Direct liens; not limited by contract price: Filing of contract, etc. The liens in this chapter provided for shall be direct liens, and shall not in the case of any claimants, other than the contractor be limited, as to amount, by any contract price agreed upon between the contractor and the owner except as hereinafter provided; . . .

In case said original contract shall, before the work is commenced, be so filed, together with a bond of the contractor with good and sufficient sureties in an amount not less than fifty (50) per cent of the contract price named in said contract, which bond shall in addition to any conditions for the performance of the contract, be also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in, or furnishing appliances, teams or power contributing to, such work, and shall also by its terms be made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in or furnish appliances, teams or power contributing to, the work described in said contract as to give such persons a right of action to recover upon said bond in any suit brought to foreclose the liens provided for in this chapter or in a separate suit brought on said bond, then the court must, where it would be equitable so to do, restrict the recovery under such liens to an aggregate amount equal to the amount found to be due from the owner to the contractor, and render judgment against the contractor and his sureties on said bond for any deficiency or difference there may remain between said amount so found to be due to the contractor and the whole amount found to be due to claimants for such labor or materials or both.

Limitation of owner's liability, exaction of security. It is the intent and purpose of this section to limit the owner's liability, in all cases, to the measure of the contract price where he shall have filed or caused to be filed in good faith with his original contract a valid bond with good and sufficient sureties in the amount and upon the conditions as herein provided. It shall be lawful for the owner to protect himself against any failure of the contractor to perform his contract and make full payment for all work done and materials furnished thereunder by exacting such bond or other security as he may deem necessary.

3. See Note, "New Civil Liabilities Under Securities and Exchange Act Rules", 14 U. of Chicago L.Rev. 471 (1947).

VIOLATION OF STATUTES AS NEGLIGENCE PER SE

[See Chapter 8, Section 8, *infra*, p. 1279.]

SECTION 10. REQUIREMENT OF OATH

CHESTER LLOYD JONES, STATUTE LAW MAKING
IN THE UNITED STATES

Boston: 1923 The F. W. Faxon Co. 260-265.*

The Efficiency of the Oath

Any act too often repeated becomes familiar; if originally sacred or awful, it becomes routine and commonplace. This has been the uniform experience in the use of the oath. Oaths became more frequent in later Rome, but less efficient as their number increased. During the middle ages their common use spread throughout Europe. Priests and ecclesiastics especially encouraged them, for by administering oaths they made large fees. Nowhere were oaths more common and less influential than in England. Oaths of office, of allegiance, military oaths and customhouse oaths—the latter for the importation of small quantities of merchandise, such as a few pounds of tea—grew more and more frequent. In the universities the students were obliged, on entering, to take oaths to obey all the statutes and to uphold the privileges and customs of the college, concerning which they knew nothing when they took the obligation. The result was a lack of solemnity in making declaration. In addition many of the oaths became mere formalities which all recognized but none observed. The oaths in the colleges, for example, bound the affiants to use no language but Latin in conversation in the college—English was spoken every day by instructors and students,—and a certain number of hours each day were to be spent in disquisition—a rule to which no one paid the least attention.

One of the influences which has contributed to lessen the efficiency of oaths is the rule allowing interested witnesses to testify in their own behalf. The new rule is undeniably one which promotes justice, but it is generally admitted that it has increased the amount of perjury and has helped make the oath of little consequence.

In the United States no less than in England the solemn formula of the oath has been cheapened and its force destroyed by over-use. It is a striking example of the maxim that familiarity breeds contempt. The power of religion to make the promise binding has almost or wholly disappeared, since ecclesiastics no longer have part in administering the oath and the circumstances of our modern life have made less vivid the pains and penalties of the divine wrath. Attention to the real meaning of the words is no longer given either by him who administers the oath or by him who places himself under the obligation.

Over each state are scattered a large number of notaries authorized "to take oaths" at a nominal charge. Oaths are administered in

* [Footnotes are omitted. Ed.]

many states by all officials, no matter what the nature of their duties, and they are demanded of citizens in cases which, by their number alone, must reduce the promise taken to a formality. In a court room the judge is sworn to discharge his official duties; the sheriff, clerk of court, district attorney, witnesses, court stenographers, lawyers on entry into their profession, notaries, justices of the peace, grand jurors and petty jurors are all under oath. The legislators and commonly all the holders of the smaller offices connected with the legislature have taken oaths. The members of the third division of the government, the officers charged with the execution of the law, are similarly bound. State, county, city officers are sworn, so also are bee inspectors, umpires, grain inspectors, gas inspectors, oil inspectors, veterinary examiners, brand inspectors, road overseers, cadets, assessors, dairy commissioners, directors of penitentiaries, high school trustees, weighmasters of railroads and a host of officers who exercise semi-public functions such as bank directors and trustees. In Kansas, for example, there are one hundred twenty-eight classes of officers who are put under oath.

The manner of the administration of oaths, especially when they are required of other than officials, has helped to destroy their significance. When two or three of a man's near neighbors are competent to swear the affiant and are required by law to do so in a large number of cases, the oath becomes a mere statutory form which is gone through with the same hurry that accompanies the filling out of a bill of lading. The affiant either repeats after the officer phrases the meaning of which he makes no effort to understand, or the officer mumbles through a formula in a way that makes the words unintelligible, the affiant merely responding at the end, "I do." This is all that is left of the former solemn act known as "the taking of an oath."

Oaths Classified by Purpose

Oaths in present practice are taken for three general purposes. By them the one binding himself may:

1. Give a general promise to be faithful to his duty as prescribed by law.
2. Define the duty as he understands it, in specific terms, or repeat a definition of the duty included by law in the oath.
3. Declare that he has qualified himself for the duties of the office or the exercise of the rights which he wishes to enjoy.

The first two classes are the so-called "promissory oaths," the last is the "test oath."

For the first sort there is little to be said. It has lost its former virtues and has become a meaningless form. It is valueless as a legislative expedient because the penalties it invokes no longer are looked upon with dread and the manner of its administration destroys what solemnity it formerly had. Public officers are not held to their duties, lawyers are not held to their trusts, and bank directors are not

made responsible by their oaths of office, and oaths of allegiance have never proved a bulwark against rebellion. For the violation of the general promissory oath the law as a rule provides no penalty except the distant sanctions of impeachment in the case of those in official positions. Where specific penalties are provided, they could follow quite as well if the person promised without being sworn. The host of oaths of merely promissory character that parade through our constitutions and statute books are phantom soldiers not feared by affiants and inefficient to protect the public.

The promissory oath by which a person states a definition as to his duty in specific terms—or as to some particular subject—has greater merit. It serves to forewarn the affiant. He cannot fail in his duty through actual ignorance of what his promise includes. No disgrace attaches to an official who, through oversight, neglects a detail of his duty under his promise, and if certain things are held essential, the enumeration of the particulars should be inserted. If violation of a promissory oath is to be punished by the penalties of perjury, though a guilty mind be absent, it will be found that enforcement of the law is easier if an express forewarning is provided. In the case of minor officials, especially, it is doubtful whether the penalties of a perjury prosecution will be as efficient in securing observance of the law as a system of direct fines for breach of duty. The latter can be established in a way which will allow their imposition in cases which from their triviality would not be taken into court. They can be made available by summary process, by action by superior administrative officers, and they can be more easily graduated to fit the seriousness of the offense. If the constitution require *all* officials to take an oath, it is still possible to make the punishment independent of the oath by referring only to the breach of duty.

The third class of oaths—test oaths—are still a valuable statutory expedient. By them a person declares himself free from certain disqualifications for the exercise of the duty to be undertaken or the right to be enjoyed. They may or may not subject the affiant to penalty for violation and in practice their force is about the same in either case. The deterrent influence is not so much the fear of the penalty in the average case as the reluctance to declare in express terms that which is untrue. The test oath is taken to establish a certain state of facts, not merely to declare the intent of the affiant. Those who have known the law before accepting the office may hesitate to swear to a deliberate untruth, and those who have honestly sought the office in ignorance of their own disqualifications will have these called to their attention before entering the office, thus avoiding embarrassment for themselves and expensive litigation for those whom they have sought to serve.

In contrast to the other forms the test oath remains a useful means of enforcing disqualifications created by statute. Even in such cases, however, the duties *may* be read without realizing their meaning; at best the oath stands as a warning to the affiant. It is not an efficient protection to the public.

These forms of oath are not mutually exclusive. For example, the Wisconsin Public Utilities Act of 1905 requires of the members of the railroad commission an oath which has the characteristics of both a promissory and a test oath. It reads:

"Before entering upon the duties of his office each of the said commissioners shall take and subscribe the constitutional oaths of office, and shall, in addition thereto, swear (or affirm) that he is not pecuniarily interested in any railroad in this state or elsewhere, and that he holds no other office of profit nor any position under any political committee or party, which oath or affirmation shall be filed in the office of the secretary of state."

NOTES

1. See extended discussion in Earl, "Too Many Oaths and Their Consequences", 22 Rep.N.Y.St.B.A. 60 (1899).

2. See N.Y.Leg.Doc. (1935) No. 60 (F); (1935) Rep.Rec. & St.Law Rev.Comm. 227-343, "Recommendations and Studies on Perjury"; N.Y.Leg.Doc. (1939) No. 65 (G); Rep.Rec. & St.Law Rev.Comm. 301-326, "Act, Recommendation and Study relating to Materiality in Perjury as a Question of Law or a Question of Fact". And see *People v. Samuels*, 284 N.Y. 410, 31 N.E.2d 753 (1940).

3. See a note by the editor of Michael, "The Elements of Legal Controversy; Introduction to the Study of Adjective Law" (to be published in 1948 by this publisher), entitled "Truthfulness in Pleading".

SECTION 11. REQUIREMENT OF BOND

CHESTER LLOYD JONES, STATUTE LAW MAKING IN THE UNITED STATES

Boston: 1923. The F. W. Faxon Co. 267-280.*

BONDS

One of the familiar means to insure the honest carrying out of the duties of an officer under the law is to require him to deposit a bond. By this means a second person assumes to guarantee that the party in whose behalf the bond is issued shall faithfully observe what the law requires of him. Bonds of this sort are commonly required of officers of the federal, state and municipal governments.

A second class of bonds are those required of administrators, guardians, executors and other persons who stand in a peculiar relation to the public, requiring special guarantees that they will not abuse the powers intrusted to them. Of a similar semi-public nature are the guarantees required of certain officers of business organizations such as banks and railroad companies, and corporations in general. Finally, there are bonds required of persons who stand in no peculiar

* [Footnotes are omitted. Ed.]

relation to the public except for the duty created by the statute requiring the bond.

Statutes in Which Bonds May be Used

Statutes requiring bonds from public officers, persons exercising special trusts, and from officers of certain sorts of private or semi-public corporations, are familiar. Those of the latter class are as a rule of recent origin. There is no reason why this method of protection cannot be extended, where it is an advantage, to persons in purely private employments, especially when they are to undertake some uniform course of conduct or duty. Recent state legislation shows an increasing use of this expedient. Examples of the way in which the enforcement of law may be facilitated by bonds where the expedient is not ordinarily used are the following: In Massachusetts an act provides that when dogs are known to have worried sheep, fowls or other domestic animals the owner of the offending dog can be required to give bond for \$200 that the offense will not occur again within a year. It is provided that if he does not do so the dog shall be killed. A law of 1905 requires that pawnbrokers in addition to their licenses shall give bonds with two sureties in the penal sum of \$300, conditioned for faithful performance of the duties and obligations pertaining to their business.

In Indiana a statute provides that parties to a dispute who agree to settle their differences by arbitration may give bonds with the condition to abide by and faithfully perform the award or umpirage. In Tennessee a master of an apprentice is required to give a bond, renewable at the pleasure of the county court, in such sum as the court may direct, conditioned upon the carrying out of the contract the master has made with the court.

The object of all bonds of the kinds mentioned is to protect the public against loss, or to secure the more efficient carrying out of legal duties. The conditions under which the guarantee is given, the penalties, the number and qualifications of the sureties, are prescribed in the law, and the form they take determines the value of the guarantee. Many of the circumstances which surround the giving of bonds have been radically changed in the last generation, and as a consequence new safeguards have now to be observed to insure that they will carry out their purpose.

Character of Bonds

Formerly the sureties on a bond were the relatives or personal or business friends of the person who gave the bond. Their act was one prompted by loyalty, one which pledged their property as a guarantee for the conduct of another person. Through it the public took for itself the benefit of an agreement prompted by the personal confidence of the sureties in the man whose bond they signed, and put itself in a position through which it would profit, though the sureties not only did not, but could not, profit and might suffer serious loss. It was only fair under such conditions, even though the object

of the bond was to protect the public, to hold that the liability of the sureties should be only that definitely assumed—it was an obligation *strictissimi juris*.

The development of modern bonding companies has largely destroyed the reason for this rule. When a corporation makes it its business to assume the risk of an officer's defalcation or carelessness, in return for a money payment, there is no longer any reason why the law should not be construed liberally in favor of the public, for the bonding company can not plead that it undertook the obligation from friendship and without hope of pecuniary return. Statutes are now appearing which recognize the changed conditions and reverse the former standard of interpretation. In many states too, the statutes regulate in detail the conditions upon which bonding companies, especially when chartered in other states, are allowed to do business.

With the development of companies which act as sureties for hire the states have shown a willingness to bear the cost of the bonds themselves. In this way, since the officer no longer bears the charge and is freed from the duty to seek someone who will out of friendship become his bondsman, the chance of irregularities in form of the undertakings or of failure to give bonds, or of the insufficiency of the bonds when given, is reduced to a minimum.

Provisions of Bonds in Favor of Those Protected by the Bonds

The most important feature which should appear in a bond, from the viewpoint of those protected, is that it should always be in full force to cover the acts done. The courts are divided as to whether in the absence of a specific statutory or constitutional statement an office or position in which the holder must give a bond can be taken over *before* the bond is filed and accepted. The giving of the bond may be considered a condition precedent or as an incidental requirement of the position; to be fulfilled within a reasonable time.

Proper protection demands that the law should make impossible any period in which the bond does not bind him who undertakes the duty. Where the bond is required by statute to be given "for the period for which the person is elected or chosen," the courts may hold that *though* given after entry into office it operates from entry into office. It is better to establish that standard by an express declaration. In New York the law is strengthened in the case of officials by making it a misdemeanor for a person to act in an official capacity without filing his bond. Still, even this would not cover cases where misconduct occurred when no bond had been given and no bond was subsequently given. In most offices the practice is still to allow a short period for the filing of the bond. Some statutes make it a condition precedent to the entry into office, which is indeed the only absolutely safe standard.

A similar difficulty is apt to arise through careless wording as to the period at which the obligation of the sureties ends. Courts dis-

agree as to the time when a bond ceases to bind if it is given "for the period for which the officer is elected." Can the sureties be held responsible for acts occurring after the expiration of the term, but before the successor is qualified, or for acts which officers are allowed to complete if begun within their term even though their successors be in office—as is still the custom in some states for some officers, especially sheriffs? It is therefore wise to include language which will remove any doubt as to the sureties' responsibility for these acts. It would be impractical to require the retiring officer to furnish a new bond for the duties remaining for him to carry out.

It may happen that the misconduct may not be discovered during the holding of the position. If the bond comes to an end at a stated time or with the term of office, the release, unless carefully worded, may be a complete discharge from liability. The new bondsmen, if any, cannot properly be held responsible for the misconduct done before the date of their obligation and the old bondsmen should be. The statute should therefore contain an explicit declaration that the bond shall cover all misconduct during its term even though discovered thereafter. These responsibilities should last until destroyed by the statute of limitations.

In order to guard the interests of those protected as far as possible against loss through the depreciation from natural or other causes of the property of the sureties, the statute may well provide that they must be worth, free of all incumbrance, an amount greater than, or a multiple of, that for which the surety signs. A similar object is back of laws requiring sureties to become severally responsible for the full amount of the bond. To prevent defeat of liability by the inclusion in the bond of a sum less than that required by law, the law may declare that if a different sum from that required by law be named the undertaking shall be for the amount so required, or if the law does not name a sum it may be made the rule that an amount named in the bond shall not limit the responsibility of the sureties.

Statutes on bonds should make an express declaration if the form prescribed is mandatory and exclusive. If they prescribe the terms and conditions of bonds and declare all bonds in other forms void, they are so; otherwise only the conditions which are contrary to the statute are void and the bond is valid as a common-law bond.

Some authority should be given the duty to review the bond to determine whether the sureties should be accepted under the rules. The statute should make it clear that the acceptance is not a mere ministerial act, but calls for the exercise of the reviewer's judgment in the interest of those to be protected. Where the form of bond has been prescribed, penalties may be provided against an officer who accepts bonds of other forms, resulting in loss.

Especially where the undertakings extend over a number of years it is important that the law should provide a periodical inspection to determine soundness and sufficiency, or that an administrative officer

should have power of inspection at discretion, or both. Sureties may become insolvent or may remove from the state when the law requires them to be residents of the state. All danger of loss on this account cannot be removed, but provisions for review will reduce it to a minimum.

Authority may be granted to a superior officer or to a court to increase the amount of the bonds required or to demand new bonds whenever the interest of those to be protected renders it advisable. Another method of insuring that they shall be sufficient is to authorize any of a number of officers, or any person, to demand a hearing on the need of additional guaranties.

The order in which the various sureties are to be held responsible should clearly appear. The statute should require that it be stated in the bond itself whether it is an original undertaking, or is to replace one formerly given, or is one which is added to the original one, assuming the same legal position as the original, or is to be resorted to only when the remedy on the previous bond is exhausted. In the wording of strengthening bonds special care should be taken to avoid language which may raise the presumption that the obligation on previous bonds is released.

In order to make it easier to ascertain the responsibility of the surety and that the security offered may be within the jurisdiction of the local courts, a few states require that the sureties on the bonds of state and county officers must reside within the state or county, or that they must own property there in an amount sufficient under the law.

The statute should leave no doubt whether the sureties are to be held responsible for acts done under laws passed subsequent to the date of giving the bond. There is no doubt that the sureties *are* bound by all laws previous to the date of the bond even though enacted later than the statute by which the form of the agreement is determined. Many cases go farther, holding that when the duties placed upon the principal by the new law are similar to those formerly exercised, the sureties are bound. An express statement in the law on this point will avoid possibility of misunderstanding and the legislature may require that the bonds be conditioned for the faithful performance of *all duties that may be imposed by subsequent statutes*.

To make the rights of the parties certain a bond should contain an explicit statement as to whether the sureties are insurers, or merely assume to guarantee that the official will be honest and exercise the care to be expected of a prudent man. In general, sureties are not responsible when the carrying out of duty is prevented by overruling necessity.

But if an officer execute a penal bond by which he binds himself to perform the duties of his office *without exception*, the better holding is that he becomes an insurer. By this act he adds an express contract to the general duty created by law to be faithful to his

trust. In requiring the officer to enter such an agreement the law does not compel him to contract to do an impossibility, though it does make him responsible for losses resulting from no fault of his own, and in some cases caused by forces beyond all human control. The officer does not contract to do the impossible but contracts so to conduct his office that to carry out its duties will not be impossible—which so far as he is concerned is often the same thing. Equivocal language on this point may result in litigation which could be easily avoided if the wording were clear.

Provisions of Bonds in Favor of Sureties

It is an accepted rule that, though a surety signs on condition that some other person or persons also sign the bond, still he will be bound unless the fact that he signed conditionally appears on the face of the bond. The statute may therefore well require that a statement be included showing whether the signing were conditional or not. This will remove the possibility of a surety held on conditions into which he did not intend to enter.

Though there is now little chance of misunderstanding, the law may well state the exact character of the penalty. Originally the liability of the sureties on a breach of the condition was absolute and for the entire amount of the stipulated penalty although the damage or loss occasioned might be insignificant. At present this rule has become relaxed so that though the judgment is for the penalty, it is discharged on the payment of the debt and damages as assessed by the jury, plus the cost of the suit. The bond only measures the maximum liability of the surety. In practice, therefore, the penalty of the bond will not now operate as a forfeiture, unless the statute clearly so demands.

Where sureties are individuals who become bondsmen without money payment for assuming the risk, there is every reason for allowing them to retire from their promise where that can be done without damage to the public. The same is true to a lesser extent when the surety is a commercial company. In fact practically the only unusual means of protecting himself which the surety has in exchange for assuming his unusual liability is the power to refuse longer to guarantee the proper conduct of the principal. When the privilege of withdrawal is not guaranteed the surety will often find himself in a position where, though he cannot approve the acts of the principal, he is practically powerless to prevent them. It is only fair to allow him to refuse to continue his guarantee of the acts of the principal, when that can be done without loss to those protected. It would not be just to force him to remain in a position concerning the danger of which he had already warned the state.

To remedy this condition, statutes are found which allow sureties to give notice of unwillingness to continue to act, whereupon the principal is called on to furnish a new bond. If this is not proffered within a stated time the office is declared vacant. In this way the responsibility of the sureties is brought to an end and the public is contin-

uously protected whether the man offer a new bond or not. Doubt has been expressed as to the power to declare offices vacant in this way when the term is prescribed by the constitution. In practice many of the statutes on the subject apply in general terms to all offices and the constitutional question appears not to have been raised. Where the office is created by statute, or where the constitution leaves the legislature free to prescribe the end or beginning of the term or to outline other conditions on which the position may be held, there is no doubt that this remedy may be applied.

An unusual protection is granted to sureties by the statute of Idaho which provides that the party of whom the bond is required may agree with the surety to deposit any assets that may come into his possession in a certain bank approved by the court or one of the judges. The party of whom the bond is required may agree not to draw on this account except with the written consent of the surety, or on an order from the court or one of its judges, made on such notice to the surety as the court or judge may direct.

What Constitutes Delivery

The statute on bonds should contain a clear statement of what shall constitute delivery. Does the bond become binding as soon as it has left the possession of those giving it, or is it delivered only when received by the proper authority? Different rules have been established by statute, and though the courts almost uniformly hold for the first standard stated even in the absence of statute it is best to prescribe that rule in the general statute regulating the form of bonds.

NOTE

1. Concerning influence of the "equal protection" clause on bonding requirements in statutes, see *Brass v. North Dakota*, 153 U.S. 391, 14 S.Ct. 857, 38 L.Ed. 757 (1894).

SECTION 12. EFFECTUATION THROUGH ADMINISTRATIVE AGENCIES

EXPLANATORY NOTE

The purpose here is to outline in brief compass some of the considerations to be borne in mind when evaluating the utility of administrative agencies as a means of making a proposed law effective. The study of legislative method should be correlated with that of the system of legal control exercised through the law administering agencies other than the courts which is made in a course in administrative law. Only in that way can a complete basis for competent evaluation be acquired.

O. DOUGLAS WEEKS, ADMINISTRATION THROUGH LAWMAKING

In Research in The American State Legislative Process, 1947.
(American Political Science Association) 24-26.

Administration through Lawmaking

. . . While the typical function (of state legislatures) may be that of enacting statutes, it is well known that, both as a part of their statute-making power and quite independently of it, these bodies engage in what Freund described as "legislative administration."¹¹

. . . Administrative oversight by the legislature assumes many forms. In the first place, general statutes and appropriation measures frequently go much farther than merely to enact broad governmental policies, lay down rules of law, create administrative agencies, or vote lump-sum appropriations for general purposes. American legislatures habitually, although not consistently, legislate in detail with respect to executive and administrative agencies both in distributing and in allocating duties and funds, and thus they invade the executive and administrative spheres of discretion and make decisions a numerous assembly is ill qualified to make. Moreover, in the enactment of private, special, and local legislation, which in spite of constitutional restrictions continues to be voluminous, the legislature in the guise of statute-making frequently descends into the realm of petty regulation.¹² In fact, American state and local administration continues to be subjected to countless statutes which enact regulations of the most detailed nature and which provide no directing superior even for minor officials other than the words of the statute itself.¹³ Each state presents a different situation with respect to this type of legislation, but in no case has research gone far enough to complete the picture in any one state. More information is needed as to the effects of this so-called legislative activity upon the work of the legislature and the administrative agencies and units of government subjected to it, to say nothing of the political activities to which it gives rise. In the words of John Stuart Mill, ". . . numerous representative bodies ought not to administer . . . or to dictate in detail to those who have charge of administration." The propensity of American legislatures to do these things under pretense of exercising their legislative function proper is without doubt their greatest failing. Broad policy-framing and determining the general nature of the administrative structure are legitimate functions of the legislature, but it is not equipped to issue what are in effect administrative orders. "The more fully the modern parliament can be freed

¹¹ Ernst Freund, "American Administrative Law", *Political Science Quarterly*, vol. 9 (1894) p. 403.

¹² See: Hallie Farmer, *Local and Private Legislation in Alabama* (1944).

¹³ Consult: Robert Luce, *Legislative Problems* (1935), chs. xviii-xxi.

from the necessity of scrutinizing narrowly the specific details of legislation, the more adequate is likely to be the performance of the functions for which it is, in fact suited."¹⁴ . . .

JAMES HART, THE EXERCISE OF RULE-MAKING POWER

A Monograph for the President's Committee on Administrative Management: Studies on Administrative Management in the Government of the United States No. V (1937), 12-14, 6-7.

The Rule-Making Power a Practical Necessity

In the simpler days of the agricultural era it was assumed that Congress would produce practically all the uniform rules required for the operation of Government. The statutes were expected to be concrete, specific, and detailed. This would reduce administration to a clerical function.

But never in the history of the Federal Government has practice completely conformed to this traditional conception. As early as 1794 Congress authorized President Washington, during its recess, to lay an embargo "whenever, in his opinion, the public safety shall so require." The act continued: "And the President is hereby fully authorized to give all such orders to the officers of the United States, as may be necessary to carry the same into full effect."¹ This was the broadest of the early delegations; but the fact remains that delegations of one sort or another have been scattered through subsequent history. They are no recent novelty in the Federal Government.²

Delegation of rule-making powers reached maximums in four periods of emergency. The first was 1789-1815, the period when the United States was trying to defend its neutral trade against British orders in council and Napoleonic decrees. The second was 1861-75, the period of the Civil War and Reconstruction. The third was 1917-18, the period of participation in the World War. The fourth was 1933-35, the period of the New Deal attack upon the depression.

The necessity for exceptionally broad emergency delegations, however, should not obscure the general trend over many years in the direction of an increase in the number of rules and regulations issued by various Federal agencies in pursuance of delegated authority not connected with any emergency. The use of executive rules and regulations has, in fact, long since become a normal method of government. It is sanctioned by a long history, dating from a time practically contemporaneous with the adoption of the Constitution. Within broad limits it has been sanctioned by the Supreme Court of the

¹⁴ Harold J. Laski, *Democracy in Crisis* (1933), p. 81.

¹ Stat. L. 372.

² Cf. Hart, *The Ordinance Making Powers of the President*, ch. IV; *Comer*, *op. cit.*, ch. III.

United States in a series of decisions dating from the *Brig Aurora* case³ in 1813. The leading case is *Field v. Clark*,⁴ decided in 1892. Recent Supreme Court decisions have defined the scope of delegated authority but have not challenged its validity as a method. There can at this date be no serious question of its practical necessity or of its constitutionality. "Nearly everyone concedes," said the 1934 Report of the Special Committee on Administrative Law of the American Bar Association, "that the necessities of modern Government business require a certain amount of such delegation."⁵

There are obvious reasons not only for the necessity for the rule-making power, but also for the necessity for its growth in recent decades. These reasons parallel closely those for the growth of the regulatory and service functions of the Federal Government. Regulation required legislation. The demands for new laws increased the burden upon Congress. The conditions to be controlled were not simple and familiar, as they had been in the agricultural era, but extremely complex and technical. With the coming of the industrial age conditions change more rapidly than ever before, and, as unprecedented problems emerged, the public demanded new controls, but there was no experience to teach the best methods of control.

The net result has been a change in the regulatory role of Congress. It has been compelled to devolve much of the detail of regulation upon commissions created for the purpose or else upon the regular departments. It is, of course, the task of Congress to define basic policies and to fix the limits of administrative action. But Congress often finds it inexpedient to do more. It then delegates a limited discretion to the agencies charged with the administration of its laws. Such delegations often authorize the issuance of uniform rules and regulations that are later to be applied equally to all persons who come within the same reasonably defined class. Rule-making is thus shown by long experience to be a necessary and normal technique of twentieth century American government. This conclusion is increasingly verified by experience and practice in the several States.⁶

The Ideal Relation between Statutes and Regulations

The tradition in favor of detailed statutes is the perversion of a principle that is fundamental to the system of government in the United States. Nobody questions the principle that the basic policies of government must be embodied in statutes of Congress. But it does not follow from this—indeed, it is both unhistorical and unsound to hold—that Congress must state in minute detail either its basic policies or the administrative methods by which they are to be carried out.

³ 7 Cr. 382 (1813).

⁴ 143 U.S. 649 (1892). Cf. *Hampton v. United States*, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624 (1928).

⁵ See also Report of Committee on Ministers' Powers, pp. 5, 51, 58.

⁶ Cf. *State v. Whitman*, 196 Wis. 472, 220 N.W. 929 (1928).

The practice of delegating rule-making authority to administrative agencies represents the adaptation of eighteenth century governmental machinery to twentieth century governmental problems. This adaptation has taken place within the broad framework of the Constitution. But it has been piecemeal and empirical. The rule-making power is often "grudgingly conceded",⁷ as a sort of necessary evil. Like the British Parliament, Congress is still apt to delegate authority to fill up the details only in those cases in which it "is either highly inexpedient or practically impossible" ⁸ for it to provide the details itself.

Thus, in the United States delegation is not based on a philosophy of legislation as it is in France. In France the statutes are written on the assumption that it is the function of the popular assembly to block out only the general principles of policy, and that it is the function, as well as within the constitutional power, of the Executive to concretize these principles by uniform but more specific regulations before they are applied to individual cases. The power of the President to execute the laws carries with it the power, without special statutory authorization, to supplement all statutes by completing rules and regulations. In the United States, this is not, and need not be, the interpretation of the corresponding constitutional power of the President. The Executive may render more concrete the general provisions of the statutes only when, and to the extent that, he is authorized to do so by express, and in exceptional circumstances tacit,⁹ delegation from Congress. But Congress may, within limits defined by the courts, attach express delegations to its statutes as it enacts them.

Suppose Congress adopted a philosophy of legislation whereby it deliberately refrained from freezing details into the statutes, confined itself to the declaration of a policy, and delegated to the agency charged with administration of that policy the power, within defined limits, to issue the rules and regulations necessary to the execution of that policy. What would be the consequences? . . .

ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES

Report of Committee on Administrative Procedure, Appointed by the Attorney General, 1941, 11-21.

Reasons for Resort to the Administrative Process

What are the reasons why Congress thus resorted, continuously and with increasing frequency, to the administrative process as an instrument for the execution of the policies which it has enacted into law? No single or simple explanation can be given. The reasons are

⁷ See Report of the Committee on Ministers' Powers, Annex VI.

⁸ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed., London: Macmillan and Co., 1915), p. 50, n. 1.

⁹ *United States v. Midwest Oil Co.*, 236 U.S. 450, 35 S.Ct. 309, 59 L.Ed. 673 (1915).

both varied and numerous, reflecting the variety and number of the agencies themselves. Discussion frequently requires classification in terms of the differing functions which the agencies perform.

1. *Advantages of administration as compared with executive action.*—One of the principal alternatives to the administrative process is the more extensive use of ordinary executive officers. This alternative appears in a distinctive field of governmental action, comprising those numerous functions which commonly are regarded, for historical or other reasons, as belonging peculiarly to the executive department. An instance is the issuance of passports, the task of the Passport Division in the Department of State. Another is the actual expenditure, as distinguished from the appropriation, of public funds. Congress itself cannot or should not issue passports or make payments of money. Nor have these been thought of as appropriate tasks for the courts. This being so, two alternatives, broadly speaking, are available. Congress can establish an administrative tribunal for the task. Or it can make use of executive officers, charged with acting substantially as officers of business enterprises act.

The difference between these alternatives is not easy of exact statement, yet it appears readily enough from a comparison of extremes. It can be illustrated by the contrast between the Works Progress Administration and the Veterans' Administration. Both agencies disburse benefits. The former, however, proceeds in fluid executive fashion under a statute so framed that it confers upon individuals no "rights" to relief in stated circumstances. It issues no regulations giving notice of how it will act or limiting its own discretion. The latter, administering law embodied in statute and regulations, adjudicates "rights" by a relatively formal hearing procedure. The former the Committee has not regarded as an "administrative" agency falling within its purview; the latter it has. In this and analogous situations weighty reasons may often lead Congress to frame statutes upon the executive, more broadly discretionary, pattern. But the alternative of administrative adjudication, where practicable, insures greater uniformity and impersonality of action. In this area of Government the administrative process, far from being an encroachment upon the rule of law, is an extension of it.

A substantial number of existing administrative agencies represent an effort to discharge in a fashion analogous to the judicial a function which might have been discharged executively or even legislatively. Many of these, as we have noted in the preceding paragraph, and concerned with disbursing what, in legal theory, have been regarded as benefits. The Patent Office, so far as concerns the issuance of patents, is an early illustration. So also came to be the General Land Office. The United States Employees' Compensation Commission—so far as concerns payment of benefits to Federal employees—is an administrative agency doing what Congress formerly did by private acts. The Veterans' Administration illustrates increasing application of the adjudicatory method in the evolution of pension policy. Most recently, in the field of general social security, Congress in creating the Social

Security Board and the Railroad Retirement Board directed action by adjudication as a matter of course; indeed, establishment of these agencies would scarcely have been possible, politically, on any other terms.

Extension of the rule of law through resort to the administrative process is by no means confined to the discharge of benefits. In the assessment of taxes, for example, the development of an administrative procedure through the Bureau of Internal Revenue and the Board of Tax Appeals has operated in considerable measure to replace an executive procedure. The Public Contracts Division in the Department of Labor, in prescribing the wages which must be paid by employers contracting with the Government and enforcing the wage stipulations in these contracts, follows an administrative method of hearing and rule-making sharply at variance with the executive methods by which other than labor terms of public contracts are determined. One of the most striking examples is the most recent—the Selective Service Administration with its relatively elaborate administrative process.

2. *Constitutional limitations upon the powers of courts.*—Many of the functions just discussed might, as far as the Constitution is concerned, have been assigned directly to the courts. Congress, for example, might conceivably have empowered the Federal district courts to hear claims for social security benefits under the Social Security Act and, when a claim was approved, to enter a money judgment against the United States. For reasons of expediency or appropriateness Congress did not use this method. In other situations, however, no such choice under the Constitution is open to Congress. Federal courts created under Article III can be authorized only to decide “cases and controversies,” to use the constitutional phrase; and from an early day the Supreme Court has regarded this restriction as an important one, to be scrupulously observed. “Cases and controversies,” broadly speaking, are matters in which a court can determine with finality the rights of adverse parties by applying the law to the facts as found. Thus the whole field of rule-making (with the exception of rules of judicial procedure) is outside the constitutional competence of the courts, for rules do not determine the rights of specific litigants but, like statutes, are addressed to people generally. Again, the Supreme Court has held that the Federal courts cannot be empowered to fix rates or prices, although they can review rate orders made by administrative agencies. Nor can they be authorized to issue broadcasting licenses, or to perform many other functions involving similarly wide discretion with respect to future conduct or arrangements. This insistence of the courts upon confining themselves to judicial, as distinguished from executive or legislative, functions has made inevitable the conferring of a wide range of powers, if the powers were to be conferred at all, upon some one of the executive departments or upon an independent agency.

3. *The trend toward preventive legislation.*—If administrative agencies did not exist in the Federal Government, Congress would be limited to a technique of legislation primarily designed to correct evils

after they have arisen rather than to prevent them from arising. The criminal law, of course, operates in this after-the-event fashion. Congress declares a given act to be a crime. The mere declaration may act as a deterrent. But if it fails to do so the courts can only punish the wrong-doer; they cannot wipe out or make good the wrong. Traditional non-criminal, private law operates for the most part in the same after-the-event fashion. A statute or the common law gives one individual a right to go into court and sue another. This procedure is likely to be expensive. It is uncertain. At best, in the ordinary action for money damages, it leads only to compensation for the injury, which is seldom as satisfactory as not having been injured at all. To be sure, courts of equity administer a substantial measure of preventive justice by giving injunctions against threatened injuries. But it is necessary to prove the threat, and other limitations confine the scope of this mode of relief. The desire to work out a more effective and more flexible method of preventing unwanted things from happening accounts for the formation of many (although by no means all) Federal administrative agencies.

The rate-making powers of the Interstate Commerce Commission afford an apt illustration. The common law, from time immemorial recognized a right of action against a common carrier on account of an unreasonable rate. The shipper or the passenger could pay the charge and then sue to recover the unreasonable excess. Preference for a mechanism whereby reasonable rates could be established in advance was a principal factor leading to the Commission's establishment. A more recent example is the Securities and Exchange Commission. Within rather severe limits, the common law recognized a right in a purchaser of securities to recover damages from the seller resulting from false statements made in effecting the sale. The importance of truth in securities led to a demand that honest statements, as well as fuller and more informative statements, be assured so far as possible in advance. If this end were to be accomplished, it could only be done by creating an administrative agency. A similar purpose, effected in a great variety of ways, underlies the formation of many other agencies. Thus, licensing is one of the most significant of all preventive devices. It would be possible to permit anyone to act as the pilot of a ship or a plane, and then to punish those whose incompetence led to accidents or to prohibit them from acting as pilots again. People have preferred, however, to attempt by a licensing method to assure competence in advance; and administrative agencies have had to be created to carry out the licensing system. Licensing of radio broadcasters has, among other purposes, a comparable object of securing advance assurance of conformity to certain standards of broadcasting, as well as the object of security [sic] a ready means of dealing with departures from the standards. Licensing of any activity may be one of the most burdensome forms of regulations, since all who engage in the activity must be licensed in order that the persons who would probably act improperly may be controlled. But it is also one of the most effective, and it is particularly likely to be resorted to where the effort to effectuate policies is made with conviction.

4. *Limitations upon effective legislative action.*—Many of the functions of existing Federal administrative agencies obviously could not, in any view, be performed by Congress. Others, however, could. Thus, State legislatures once fixed rates by statutes, although Congress seems never to have done so. Congress once disposed of all money claims against the United States by a private bill procedure; much, although not all, of this work has now been passed on to other agencies. Apart from instances of this character, the full range of rule-making activity of Federal administrative agencies represents work of a type which Congress could do if it had the time and deemed it wise to do it. Independently of the comparative advantages of administrative action, various inherent limitations upon its own functioning militate in these cases against action by Congress itself. The total time available is the most obvious. Time spent on details must be at the sacrifice of time spent on matters of broad public policy. Lack of specialized information is another; lack of a staff or a procedure adapted to acquiring it is a third. The complexity of the problems which have to be determined, even after basic policy has been settled, is the governing consideration. Even if Congress had the time and facilities to work out details, there would be constant danger of harmful rigidity if the result were crystallized in the form of a statute. Thus comes a steady pressure—which may, of course, be yielded to overreadily—to assign such tasks to the controlled discretion of some other agency.

5. *Limitations upon exclusively judicial enforcement.*—If Congress chooses to rely upon the courts instead of assuming the tasks itself, discretion as already pointed out, must not be so broad as to require the exercise of non-judicial functions. Although this difficulty be avoided, however, other limitations operate. The 94 Federal district and territorial courts are structurally incapable of the same uniformity in the application of law as a single centralized agency. The problem of uniformity, and other problems as well, arise also with respect to the initiative of enforcement which, of course, the judges themselves cannot assume. Action must be brought either in the name of the Government or by private individuals. If brought by the Government, the 94 district and territorial attorneys will vary in their enforcement policy as will the courts in their decisions. If brought by private individuals, there is cast upon these individuals a burden which it is one of the prime purposes of administrative agencies to avoid. Certain agencies, it is essential to recognize, represent an effort, whether wise or unwise, to place upon the Government—rather than upon millions of people of often limited resources—a large share of the responsibility for making effective policies which the people through their Government have declared.

6. *The advantages of continuity of attention and clearly allocated responsibility.*—In contrast to the limitations of other agencies, just discussed, are certain advantages which administrative agencies, properly organized, may have. The need of bringing to bear upon difficult social and economic questions the attention of those who have

time and facilities to become and remain continuously informed about them was recognized very early. In 1787, for example, the General Assembly of the State of Vermont recited that—

"Whereas it has been found by experience, that great advantage has been taken, by ferrymen demanding unreasonable prices for their services. And whereas this assembly cannot so well distinguish between the several rivers, and the several parts of the said river, pond or lake, on account of distance, swiftness of water, number of travellers, etc. Therefore to prevent such impositions for the future:

"Be it enacted by the general assembly of the State of Vermont, That the magistrates, selectmen, and constables of the several towns where ferries are needed, shall meet before the first day of August annually, at a time and place by them agreed upon, and appoint proper persons and places for ferries; and further regulate the price thereof, according to the profits of such ferries, and price of labour; to be varied from time to time as occasion shall require. . . ."²⁶

One hundred years later problems arising from the rapid extension of railroads were pressing and national. Neither the courts nor Congress could exercise adequate control over rates and practices. The task, accordingly, was assigned to an administrative agency, the Interstate Commerce Commission.²⁷ When in the course of time supervision over carrier operations was extended beyond rate control, the impossibility of direct legislative regulation and the need for an administrative system of control were merely emphasized.

The experience out of which came the Interstate Commerce Commission has been duplicated in other fields. Regulations of marine transportation and aviation presented problems not unlike those involved in regulation of the railroads and led to the Bureau of Marine Inspection and Navigation, the United States Maritime Commission, and the Civil Aeronautics Authority. Control over water power and natural gas resources, after a period of unsatisfactory experiments, was given to the Federal Power Commission. Protection of commerce in agricultural products led to supervision of the instrumentalities of that commerce by the Department of Agriculture administering the Packers and Stockyards Act, the Commodity Exchange Act, and oth-

²⁶ Vermont Laws Revised, 1787 [Haswell], pp. 77-78. The statute provided further that any person or persons "demanding any greater sum for ferriage than shall be stated by the authority of aforesaid . . . shall . . . forfeit the sum of fifteen shillings. . . ."

²⁷ "The relationships involved were numerous and complicated, for the general adjustment of which general legislative bodies, dealing with all types of matters and functioning under pressure of political considerations, possessed no special competence and even such legislative adjustments, necessarily of limited scope, as might be deemed sound and just when made, were bound to operate with a harmful rigidity, unresponsive to the constantly changing conditions which surround transportation activity." I. L. Sharfman, *The Interstate Commerce Commission: An Appraisal* (1937), 46 Yale L.J. 915, 949. Note also the statement of Chief Justice Taft that "the utter inability of Congress to give the time and attention indispensable to the exercise of these [legislative] powers in detail" forced it to confer upon the Interstate Commerce Commission the power to exercise them. 257 U.S. xxv, xxvi.

er regulatory statutes. Banks and banking presented complex problems calling for special knowledge and continuing and detailed supervision, not possible for either Congress or the courts, and now performed by the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the Comptroller of the Currency. For radio communication only a limited airspace is available. The science has been from the first a rapidly developing one, demanding technical knowledge and expertness. Here complete legislative regulation was scarcely practicable. So Congress provided the principles of regulation and gave responsibility for administration to the Federal Radio Commission and its successor, the Federal Communications Commission. The financial collapse of 1929 and the years following focused attention upon the investment field. Delicate problems requiring at once an intimate knowledge of financial machinery and elasticity of treatment led Congress to delegate regulatory powers to the Securities and Exchange Commission. So, too, the administrative machinery of this Commission was availed of to perform the complex task of supervising and regulating the structure, finances, and management practices of public utilities.

Each of the agencies just mentioned specializes in the regulation of a single industry or phase of industry—railroad transportation, or shipping, or investment, or banking. But Congress has also employed the administrative process to perform specialized and continuing regulation not of particular industries but of activities cutting across many industries. For example, Congress, believing it necessary to supervise and check competitive practices which tended toward monopoly and restraint of trade, in 1914 created the Federal Trade Commission to prevent unfair methods of competition. In 1935 the National Labor Relations Board was established to prevent unfair labor practices. Both objectives were declared by Congress to embody a national policy. In the case of these two agencies, the factor of technical expertness plays a less important part than in the others; but the advantages of continuous attention and a clearly allocated responsibility are substantially the same. If the initiative for enforcement were to be left to the injured persons immediately concerned, they might often be too weak or timid or discouraged to bring the necessary proceedings, in which case, so Congress thought, the public interest would suffer, since the public interest called for the elimination of the particular practices.

The administration of the Walsh-Healey Act affords a similar example. This statute is enforced primarily by the Department of Labor, through its Division of Public Contracts. The statute provides in part that certain contractors with the Government must pay their employees not less than prescribed wages. If lower wages are in fact paid, a proceeding may be brought before the Division of Public Contracts by agents of the Department to recover for the employees the resulting deficiencies. The problems presented for determination in cases of this type do not require an expert tribunal for their proper solution. On the contrary, the issues involved resemble those which

often appear in the courts. But the individual cases involve very small sums, and though the aggregate alleged to be due to all the workers may be substantial, each man's claim will normally be so small and his confidence in the security of his job so tenuous, that litigation will be out of the question for him. Therefore if the Act is to be enforced at all, official means of investigation and specialized procedure for the collection of numerous small claims must be provided.

The enforcement of the disciplinary provisions of the marine laws presents a problem not of acting for weak claimants in the public interest, but of acting against offenders in the wisest and most effective way possible. Meting out punishment for such offenses as intoxication, disorderly conduct, and the like is, of course, a function capable of execution by any magistrate, and technical complexities are absent. Yet discipline on vessels presents a special problem closely related to a whole scheme of regulation, inspection, and safety of the seas and waters. The relatively insignificant issue of whether a seaman was intoxicated is part of a much larger pattern over which there must be special regulation and to which special attention must be paid, and thus one finds the administrative process utilized to determine issues which elsewhere have been reserved for the judiciary.

It is thus apparent that varied types of subject matters, from rate control of railroad carriers to collection of employees' wages and disciplining of seamen, have been entrusted by Congress to administrative agencies at least in part for similar reasons: in order to assure continuous attention to and clearly allocated responsibility for the effectuation of legislative policies.

7. *The need for organization to dispose of volume of business and to provide the necessary records.*—The volume of cases arising under certain laws is very great. The Veterans' Administration, the Railroad Retirement Board, the Social Security Board, and the United States Employees' Compensation Commission, for example, each adjudicates annually thousands of comparatively small claims. The Veterans' Administration alone makes determinations in about 100,000 cases each year; the Social Security Board, it is estimated, will in the year 1940 have disposed of eight or nine times that number. One need not labor the point that the present judicial structure would scarcely be equipped to handle this multitude of cases.²⁸

These same agencies illustrate another and related reason for employing the administrative process. This is the need of specialized staffs and machinery to keep and make available the records upon which judgment must be based. Before an agency such as the Social Security Board can disburse annually millions of dollars to hundreds of thousands of eligible claimants, a vast clerical machinery must be created. Complex records must be kept, classified, and made avail-

²⁸ The judicial statistics contained in the Annual Report of the Attorney General for the fiscal year ended June 30, 1939, show that in that year the combined total criminal and civil (other than bankruptcy) cases determined in all Federal district courts came to 73,448.

able. In the Railroad Retirement Board or the Veterans' Administration it may be necessary to call upon medical experts and occupational specialists. In the registration of securities the Securities and Exchange Commission must be organized to collect and collate huge masses of data available for immediate reference by clerks, accountants, analysts, oil and gas experts, engineers and the like. In part, also, the creation of these agencies with their staffs and accumulation of data is due to recognition by Congress that time is essential in the conduct of many business affairs. In the flotation of securities or the publication of a schedule of rates, it is important that procedures and staffs be available to investigate speedily the propriety of the proposed transaction, at least to the extent of suspending it for further study in formal procedure if serious question of public injury is raised.

Some Characteristics of Administrative Agencies

Certain characteristics of administrative agencies are of such fundamental importance in relation to the problems of their organization and procedure as to require specially emphatic statement.

1. *Size.*—Most administrative agencies are, of necessity, large organizations. For example, the Interstate Commerce Commission has a personnel of more than 2,500; the Securities and Exchange Commission, more than 1,200; the Social Security Board has some 9,000 employees in its Bureau of Old-Age and Survivors Insurance alone; the National Labor Relations Board and the Federal Power Commission each has a staff of more than 800; the Federal Communications Commission, more than 600; the Railroad Retirement Board, more than 2,500; and the Veterans' Administration, more than 36,000, of whom nearly 2,000 are engaged in adjudicating claims of various sorts.

The size of these staffs reflects both the nation-wide jurisdiction of the agencies and the character of the work they are called upon to perform. Each is charged by Congress with the work of continuing supervision of some field of activity throughout all the forty-eight States.

The Interstate Commerce Commission receives, analyzes, and files thousands of rate schedules, inspects thousands of locomotives and safety appliances, receives thousands of applications to be allowed to do, or to be excused from doing various things, receives complaints, conducts investigations. The work of the Social Security Board is even greater. It keeps literally millions of records, and will soon dispose of eight or nine hundred thousand claims a year. The Grain Standards Administration supervises over a million gradings of grain a year. These are perhaps striking illustrations, but they are not unrepresentative of the administrative field.²⁹ Whether an agency is establishing the records or making the decisions upon which claims will be paid, or regulating an industry, or enforcing standards of conduct which cut across industrial divisions, it is made up of a large number

²⁹ [Footnote omitted.]

of people performing a variety of tasks which have to be coordinated, supervised, and directed toward fulfilling the functions prescribed by Congress. The personnel may include clerks to receive, analyze, and file reports and other material; accountants to devise and supervise the keeping of accounts by those whom the agency regulates; engineers skilled in radio, or in land, sea, or air transportation; chemists; biologists; economists to interpret and appraise the effect of a given wage rate or other factor upon any business or industry; lawyers and investigators to secure observance of the law. . . .

2. *Specialization.*—Administrative agencies specialize in particular tasks and they include specialists on their staffs. The staffs may become such either by experience in the specialized work of the agency or by prior technical or professional training. In many cases a principal reason for establishing an agency has been the need to bring to bear upon particular problems technical or professional skills. A public health agency, for example, must be staffed with people who understand diseases, the Federal Communications Commission with technicians who comprehend the engineering and economic aspects of telegraph, telephone, and radio. In other instances recurring experience with the work of the agency, or with a particular phase of its work may develop specialists—such as are found, for instance, in the Veterans' Administration—who have an insight and judgment which a beginner would lack. In either event a central problem of organization is how best to utilize these skills of training and experience. This does not mean that the heads of the agencies should necessarily be specialists. The problem is rather how to bring into play the technical resources of the agency staff so as to reduce the ultimate points of contention, if such there be, to such compass and form that they can be presented upon an understandable record for decision by the heads of the agency and for review by the courts.

Specialization has further consequences in procedure. Because the members of an agency or of its staff—like persons of similar experience in private affairs—approach problems of administration with a considerable background of knowledge and experience and with the equipment for investigation, they can accomplish much of the work of the agency without the necessity of informing themselves by the testimonial process. It is in part for this reason that so many questions, as we point out in chapter III, can be disposed of by informal methods with the consent of the private interests involved. Only when differences do not yield to adjustment or when other considerations, mentioned in chapter IV, make formal proceedings desirable need there be resort to the procedures of formal testimony, more familiar in judicial and legislative processes. Even if there is formal procedure, the characteristics of specialization may, as is discussed in chapter V, have an impact upon procedures for formal adjudication.

The same effects are felt in the procedures antecedent to rule-making. Here again the function of the formal hearing, in many instances, differs from its function in legislative and judicial methods. In the lat-

ter it is the instrument for gathering information. In many administrative rule-making situations, as we discuss in chapter VII, the information may be and is obtained by direct investigation and the hearing is most useful as a method of subjecting it to the criticism of private interests affected and of obtaining the views of these interests upon the desirability of various methods of achieving all or some of the objects sought.

3. *Responsibility for results.*—An administrative agency is usually charged by Congress with accomplishing or attempting to accomplish some end specified in the statute. It may be to see that benefits of some sort are received by persons with whom the agency deals, or that transportation systems or communications systems, or various other business activities are conducted either so as to comply with certain negative requirements or so as to achieve positive results. Taken together, the various Federal administrative agencies have the responsibility for making good to the people of the country a major part of the gains of a hundred and fifty years of democratic government. This means that the agencies cannot take a wholly passive attitude toward the issues which come before them. Out of this fact flow perhaps the most difficult of the problems relating to the administrative process. Administrative agencies constitute a large measure of the motive power of Government; a problem of motive power is a problem also of brakes; but the necessity of both must be faced frankly when either is in question.

4. *Variety of administrative duties.*—No single fact is more striking in a review of existing Federal administrative agencies than the variety of the duties which are entrusted to them to perform. This is true of many single agencies taken alone; it is true, above all, of the agencies taken as a group. This central and inescapable fact makes generalization in description difficult. It makes even more difficult generalization in prescription. For variety in functions means variety in the circumstances and conditions under which the activities of the various agencies impinge upon private individuals. A procedure which would be for the protection of the individual in one situation may be clearly to his injury in another. A set of standards evolved to meet one problem may fail wholly to meet another. One need look no further than a single agency—the Interstate Commerce Commission—to be impressed by the basic necessity of differing procedures for different types of activities, and by the varying procedural patterns which the Commission has evolved to meet this necessity.

ROSCOE POUND, FOR THE "MINORITY REPORT" *

27 A.B.A.Jour. 664 (1941).

. . . . What are these characteristics of administrative adjudication? The more significant ones for our purpose may be summed up in seven tendencies.

Failure to Hear Both Sides

First and most serious among these tendencies is one going counter to what has always been the first principle of judicial justice, namely, to hear both sides fully and with scrupulous fairness. In administrative adjudication there is everywhere an obstinate tendency to decide without a hearing, or with our hearing one of the parties, or after conference with one of the parties in the absence of the other whose interests are adversely affected. There are many such cases in the English reports. In a significant Australian case an administrative Court of Marine Inquiry cancelled a pilot's certificate on the basis of a reconstruction of maneuvers of vessels in a collision in the absence of the pilot and without his knowledge. Examples in the reports of our federal courts are numerous. One may find such cases in almost every volume of the law reports of our several states. Examples are not wanting in the Monographs submitted to the committee. For example, we are told that an investigation by the Railroad Retirement Board "is not necessarily a complete one in that all sides may not be notified." Indeed, it is the unanimous report of the committee that too frequently notice is inadequate. The administrative agencies, it is reported, frequently fail to apprise respondents fully of what they have to meet so as to permit adequate preparation of their defenses. As the report adds, notice ought to "fairly indicate what the respondent is to meet." How obstinate this tendency is may be seen from a case where, although the statute required a hearing, the commission made orders without notice or hearing and sought to obtain a ruling from the court that they were not necessary. Aversion to hearings on the part of administrative agencies is abundantly shown in the Monographs, the report of the committee, and the testimony taken by the Senate sub-committee. After reading the Monographs one cannot but feel that administrative agencies tend to consider that hearings and arguments before them are, as Terence Mulvaney put it, "a shuparfluous and impartinent nicissity." The statutes often prescribe them and the courts require them, but they are not to have any controlling influence upon determination of facts.

Private Consultations and Undivulged Reports

A second tendency is to make determinations upon the basis of consultations had in private or of reports not divulged, giving the party

* [Footnotes omitted. Ed.]

affected no opportunity to refute or explain. The law reports are full of illustrations of this. The Monographs are replete with examples. In the Federal Alcohol Administration "no attempt is made to withhold from the administrator any extra-record information bearing on cases awaiting decision." In the administration of the Grain Standards Act the official in charge of General Field Headquarters "considers the record and report and, if he wishes, *consults supervisors or others familiar with the subject matter and obtains their views.*" Such consultations are often had by correspondence. The Railroad Retirement Board, in about one-third of the cases, after the hearing seeks new evidence "Usually by correspondence or field investigation." In foreign fraud order cases the respondent knows nothing about the proceedings till he inquires why no mail comes to him. Then he finds an order has been issued against him. But he is only allowed to see the findings of fact, which are in general terms. He is not allowed to see the files or learn the specific evidence against him. Sometimes administrative orders are based "almost exclusively on reports of investigation and the statements of the agency's own examiners." It should be noted particularly that in some of these cases there is no power to administer oaths and so no safeguard against perjury. The Federal Trade Commission makes its decision on a record of the evidence taken, with no report of the trial examiner, and after decision and order refers the case back to the trial examiner to make findings of fact in accord with the decision. But the trial examiner has not heard the oral argument nor participated in the decision. So the decision is made without findings of fact and the facts are found afterward by one who did not hear argument. Naturally the findings are commonly in the words of the complaint. In the administration of the Grain Standards Act there is no oral argument before the examiner or before the official in charge of General Field Headquarters. On review, there is no provision for briefs. They get into the hands of whoever has the papers at the moment and are attached to the files. Of one mode of proceeding in forfeiture cases we are told in the Monograph that after the elaborate preliminaries the hearings are nothing but "the statutory addition of an otherwise unnecessary nail in the coffin." This attitude is typical of those whose primary interest is in administration. In the Post Office Department in fraud order cases the respondent's oral argument "is made either to the hearing officer, who does not finally make the findings, or the solicitor, who has not heard the evidence and has not yet become familiar with the record. Thus, in effect, if the respondent in a fraud order case chooses to argue before the hearing officer, he is not addressing his argument to the crucial person who decides; if he chooses to argue before the solicitor, he cannot argue against or upon any defined finding or opposing position, since none has been presented to the solicitor." After reading the Monographs one cannot escape a conviction that many administrative agencies regard a hearing as a mere form to create an appearance of complying with the requirement of due process of law.

Determinations Without Basis in Substantial Evidence

Third, there is a tendency to make determinations of fact seriously affecting individual rights without a basis in substantial evidence or in any evidence of rational probative force, much less sustained by the reasonable weight of the evidence as a whole. Indeed, one of the most serious features of administrative justice is a tendency to find the facts not on the basis of hearing and evidence but on the basis of preconceptions of the facts to fit the assumed exigencies of a policy. One might in this connection refer to some of the determinations of the National Labor Relations Board in the past. Many examples which are no longer controversial may be found in findings of prohibition administrators under the National Prohibition Act. An illustration may be found also in the Monograph setting forth the procedure of the Federal Communications Commission. We are told that "the distinction between the determination of issues of fact and questions of policy has not been made by the commission either in theory or in practice." In other words the policy finds the facts to which the policy is to be applied.

Policies Outside of the Statute

A fourth tendency is to set up and give effect to policies beyond or even at variance with the statutes or the general law governing the action of the administrative agency. It is very easy to say that the public interest demands or justifies activity beyond or in contravention of the statute and to cover this up by a general pronouncement upon the case. Usually this is done out of zeal to promote supposed social ends to which the legislative body might or might not agree. Some late examples from the current reports may be cited. As a witness said before the subcommittee of the Senate, there is a general tendency of an administrative agency, when it administers a statute, "to feel that the bill enacted by Congress is merely the starting point from which to push forward into new fields. They try to extend the jurisdiction and enforce their own ideas in all possible ways." One board was found to have repeatedly exceeded its authority by "arbitrarily substituting its autocratic judgment for the Congressional mandate."

Policy Determining Facts

Connected with this last tendency and with the one to decide without any basis in substantial evidence, is a fifth tendency, namely, to determine facts not on the basis of hearing and evidence but on the basis of preconceptions or assumptions of facts to fit the assumed exigencies of a policy. It is said by a writer on administrative law that the adjudication must support the policies of the administrative agency. But note how this proposition works. The Federal Communications Commission changed its procedure because "the examiner's report frequently failed to represent the views of the Commission as reflected by its legal and technical staff"—that is, the report of the examiner who heard the evidence did not adjust itself to the

preformed decision. There is a tendency to identify in advance one side of a controversy with the public interest and to find the facts accordingly. This tendency is the more likely when the administrative agency combines undifferentiated investigating, prosecuting, and adjudicating functions. Under such a combination of functions it is not easy to realize that the policy is to be applied in determining the legal effect of the facts under the statute, not to determining the facts.

It is interesting to note in this connection that while in one breath we are told that analytical distinctions as to administrative functions are useless, in another we are told that a distinction must be made between administrative agencies whose business it is to detect and prosecute violations of the law and those which fix rates or decide policies for a particular industry. The former act quasi judicially. The latter act administratively. This is true enough. In former the standards of fair hearing and the ethics of decision of controversies apply. In the latter the question is one of due process in the sense that the resulting orders must not be arbitrary and unreasonable. But in those cases what is reasonable must depend on ascertainment of facts, and there are certain fundamental requirements of fair play and support of the ascertainment of facts by evidence of at least rational probative force which cannot be suffered to be overlooked.

Undifferentiated Finding of Facts and Law

Another closely connected tendency, growing out of the setting up of administrative agencies to investigate, prosecute, and adjudicate, is one to make no separation of facts and law, or of facts, law, and policy to be applied to facts. In all legal systems the history of appellate procedure shows the importance of separating ascertainment of the facts, as a process, from ascertainment of the applicable law and application of the ascertained law to the facts. Progress in reviewing procedure has largely taken the form of perfecting this separation. In the common-law system this progress has been slow and difficult because of the general verdict of the jury in which for a long time the three were wrapped up in one pronouncement. That general verdict grew out of the exigencies of primitive procedure in which there was a mechanical mode of trial of a single issue. Recently there has been widespread assertion of a doctrine that finding of facts and finding and application of law cannot be separated. For the most part, this assertion is a phase of the recrudescence of absolutism, conspicuous in all parts of the world in the last decades. It is urged chiefly abroad by those who hold that law will gradually disappear and believe in a regime of administrative orders. In this country it is urged chiefly by advocates of administrative absolutism of whom the Attorney General certainly is not one. But the idea stands out in more than one of the Monographs and serves to hold back the majority of the committee from recommending any effective legislation. Undifferentiated finding of facts and finding and application of the law thereto is the method of the personal justice and mechanical modes of trial which characterize the beginnings of a legal order.

The Same Problem in Judicial Procedure

We are told in the Monographs that the Federal Communications Commission "convinced that there was no merit in segregation of functions in its work and a good deal to be gained by scrapping the distinction between prosecuting and judging a case" adopted its system of pronouncement upon a case as a whole with no discriminations of fact, policy, and law. In the Report of the Committee we are told that as a general policy there ought to be at least a separation of functions within each agency. But the majority are inclined to emphasize the difficulties and not perceive that here is the better reason for insisting upon adequate judicial review. We have had the same problem in judicial procedure. The colonial courts in the seventeenth century rendered judgments upon general verdicts of juries to whom the case was turned over as a whole. But as lawyers of training and ability came to practise in them and sit as judges there was continually increasing separation of law and fact. Demurrers to the evidence, cases stated, reservation of points of law at the trial and special verdicts came to be used. In England, the practice grew up of putting special questions of fact to the jury and upon the answers given directing what the general verdict should be. On the basis of recent philosophical ideas some professors are now telling us that what we have learned to do in long experience in English and American courts is theoretically impossible. Perhaps the best commentary on this teaching is William James's saying that the worst enemies of a subject are the professors thereof.

Adjudication by Prosecutors

All of the foregoing tendencies are given increased scope for operation in action by the effect of combining or not differentiating the receiving of complaints, investigation of them, bringing and conducting a prosecution upon them, advocacy before the agency itself in the course of the prosecution, and adjudication. Thus the adjudication becomes one by or with the advice and assistance of those who investigated, prosecuted, and were advocates for the prosecution. Members of legislative bodies have often borne witness that their constituents expect them to forward complaints to administrative agencies which are authorized to receive the complaints and are then to investigate, prosecute, and judge. Such things are in manifest derogation of the maxim that no one is to be judge in his own case. The effect of it has been noted by courts. The extent to which this fundamental maxim is habitually violated appears fully in the Monographs, and is, indeed, recognized in the report. In the administration of the Walsh-Healey Act, the trial attorney represents both the division and the complainants, and the trial examiners consult with him before making their reports. In the Federal Communications Commission, usually the attorney who "has worked on the case from its very inception" presides at the hearing. He discusses the case with other members of the staff

throughout the hearing and after the hearing in the preparation of the decision. In some administrative proceedings this combination of roles has led to procedures little short of scandalous. It was shown that a trial examiner of one board, during a hearing, held an all day conference with the trial attorney, the regional attorney of the board, and the regional director. That is as if a trial judge were to hold such a conference with the prosecuting attorney, the director of prosecutions, and the attorney general—of course in the absence of the respondent. There is much significance in the answer of an official of one of the important agencies as to whether the prosecuting officials of the agency could be kept from collaborating with the deciding officials. He said: "We try. But there is no way that we have been able to find to keep the prosecutors and the deciding officers from meeting at lunch and elsewhere and discussing their cases." Many administrative agencies do not even try. Some actively provide for such collaboration in their established procedure. In a court house, where judge and prosecutor are not part of a common organization with a common head interested in promoting the prosecution, they would not be tolerated in talking over at lunch cases then on trial. In their case there is no common interest in carrying out the views of an organization of which each is part. Yet the ethics of the profession preclude any contact. Administrative law has developed no code of ethics to deal with an infinitely more dangerous situation in that prosecutor, advocate, and judge are part of one thoroughly organized bureau with intimate daily contracts and a strong common interest in the prosecutions carried on by that bureau.

Organization *Esprit de Corps*

I have spoken of this situation as a very serious one and I submit it is much more serious than the majority of the committee and certain writers on administrative law are willing to acknowledge. In the testimony of the Attorney General (when Solicitor General) before the Senate sub-committee he seems to intimate that Congress intended one of the agencies to be unfair. The report of the committee is inclined to make light of the effect of organization and *esprit de corps* and supervision by a common head on which the responsibility for the result ultimately rests. But common sense and actual experience and the testimony of cases which have come into court and of investigations speak to the contrary. In an administrative agency there must inevitably be close contacts between the heads and the subordinates and of the subordinates of every degree with each other. But this necessity does not mean that we are to give up attempt to secure impartial, objective determinations of fact nor that the importance of securing such determinations is negligible.

Inequality between Government and Citizen

Lord Herschell said truly that "important as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it." The British Committee

points out the danger of permitting the Minister (i.e. head of an administrative agency) "to perform the incongruous task of dealing with the judicial part of the quasi judicial decision as an impartial judge when *ex hypothesi* he and his department want the decision to be one way, rather than the other." Moreover, the one-sidedness of administrative justice, a closely connected phenomenon, is brought out in many places in the Monographs and report. The situation as to issuance of subpoenas is notably unfair. Some agencies are without power to issue them. In some the requirements imposed on private parties are found to be "accidental, haphazard, and burdensome." Private parties are required to disclose their evidence in requesting subpoenas and this information is submitted to counsel for the government, while a respondent has no access to the evidence of the prosecution. The Post Office Department, we are told, objects to statutory treatment of the power of subpoena because it will lead to claims of denial of right to subpoenas and will result in more being issued. What this comes to is that the power to issue subpoenas should be kept as secret as possible so that, while the agency may exercise the power in the interest of the prosecution, private parties may not readily do so. There is no idea of fairness as between citizen and government. It is the idea of the administrative tribunals of the Stuarts. The interests of private parties are negligible in comparison with the zeal of the administrative agency to get results. One of the chief ideas of the minority is to create and maintain equality of opportunity between the government and the individual in matters of procedure.

Delegation to Subordinates

A seventh characteristic of administrative justice is a tendency to delegate decision to subordinates where the law requires decision to be made by the head, and to make decision by the responsible authority a perfunctory matter. This is something that was forbidden in judicial justice long ago. The Roman law had to forbid the delegates of the emperor, appointed to hear appeals, from delegating their task. In the canon law the Pope had to forbid redelegation by those whom he chose to hear appeals to Rome. There is no such thing known to our law as delegation to a subordinate of a judge's duty of decision. The extent to which determinations are those of subordinates and not of the responsible administrative heads in whose name orders are made has been brought out in many recent discussions. The head of one of the most important of federal administrative agencies said about a year ago: "The Board members themselves cannot expect to read the records. In making its decisions the board, therefore, avails itself of assistants. . . . The review attorneys analyze the evidence, inform the board of the contentions of all the parties and the testimony relating thereto, and, after decision by the board, make initial drafts of the board's findings and order." As a witness before the Senate sub-committee said, "There are many youngsters who are given pretty broad arbitrary powers in dealing with pretty important matters." It is significant that administrative agencies object to judicial inquiry into

how determinations are arrived at. They seem to feel that if the external appearance of due process and decision by the authority appointed by law to decide can be created, nothing further should be looked for. The head of a very important board said to a bar association a year or so ago that if there was a complaint defining the issues, an intermediate report redefining the issues after hearing, and opportunity for oral argument before the agency itself, "the requirements of fair hearing do not permit an inquiry into the internal operations of the administrative agency, at least in the absence of specific allegations of fraud." In other words, such things as secret reports, conferences with one side in the absence of the other, dictation of the examiner's report by the prosecuting official, decision on abstracts of the record not accessible to the parties, and review by conference with the subordinates reviewed, are not to be inquired into.

Ignoring Requirements of Fairness

It is fundamental that one who decides controversies and exercises what are substantially judicial functions should know the record thoroughly. If he is to decide on the basis of an abstract, it should be, as in the courts, one agreed on by the parties or settled after hearing both as to what it should contain—an abstract settled before argument and available to the parties at the argument so that those who argue and those who decide have the same material before them. He should not decide on an abstract made after argument by a subordinate, very likely in conference with the prosecuting advocate. The general attitude of too many administrative agencies, however, is illustrated by the objection of the National Labor Relations Board to a provision recommended by the minority intended to emphasize the responsibility of the individual officer. Many cannot afford the expense of formal hearings and judicial review. Their only reliance is the fairness of a multitude of subordinate officials. There is obvious need, therefore, to emphasize that they have a responsibility beyond that of carrying out in every way the general aims of the organization. They should be made to feel that they are under responsibility as lawyers are under the canons of ethics and judges under the canons of judicial ethics. That an authoritative statement of this responsibility should be objected to as "dangerous," can only mean that the agency so objecting seeks to ignore requirements of fairness toward those whom it is pursuing.

Characteristics Are Deep-Seated

That these tendencies of administrative determination are not a matter of occasional sporadic cases but represent inherent and deep-seated characteristics of lay administration of justice is shown by the number of cases found in the reports of all jurisdictions and the persistence with which the same procedures appear for years after the courts have called attention to them. Four such cases are to be found in the one volume, 259 App. Div. (N.Y.) covering from March to August, 1940. Such things explain the activity of lawyers, who have continual ex-

perience of what these tendencies in action mean to their clients, in seeking effective safeguards as to records, hearings, and findings, an understood and fair procedure, and a modern mode of appeal from administrative orders.

Checks upon Courts

It is of special importance to take account of the checks upon courts which do not obtain or in our practice are ineffective as to administrative agencies. Four of these checks are significant. In the first place in a court the judges from their very training are impelled to conform their action to certain known standards and to conform to settled ideals of judicial conduct. Professional habit and training lead them to hear both sides of every point scrupulously, rules of law which have entered into their everyday habits of action lead them to insist that everything upon which they are to base an order or judgment must be before them in such a way that no party to be affected can be cut off from full opportunity to explain or refute it or challenge its application to his case. Judges in court are impelled in every case to seek authoritative grounds of decision before acting and to base their action upon reasoning from such grounds. Again, the decision of a court is subject to criticism by a trained profession to whose opinion the judges, as members of the profession are keenly sensitive. Thirdly, every decision and the case on which it was based appear in full in public records. In those records any one may find exactly what the claims of the respective parties were, what disputed questions of fact and law were before the tribunal, and how the questions of fact were determined—If by a jury very likely by questions put by the court and specifically answered, if by a judge, in the form of special findings of fact. Likewise any one can find from those records what conclusions the court came to as to the applicable law, either in the form of instructions to the jury or of findings by the court. Moreover, the judgment of the court must respond to the pleadings, findings of fact and conclusions of law, and any lack of consistency in these respects will be apparent on the face of the record. Fourthly, every judgment of a single judge is subject to review by a bench of judges, independent of the one whose action is to be scrutinized and constrained by no hierarchical organization or *esprit de corps* to uphold whatever he does. Nor is this all. In the case of appellate courts all important decisions and the grounds on which they proceed and the reasons on which they proceed are published in the law reports. The opinions must be based upon the records in the cases decided, and those records are public records accessible to everyone. Thus the materials for criticism of and accurate judgment with respect to judicial decisions are always available and readily accessible. There are no such checks upon administrative action.

Want of Checks on Administrative Justice

Let us make a comparison. Those who sit in administrative determinations seldom have had experience of the deciding function. The

expertness demanded of them is of quite another sort. They are likely to have the layman's idea that decision is an easy task involving no acquired expertness through training and experience and to be conscientiously unconscious of what the lawyer soon learns, namely, that there are two sides to every case. Without training in grounding their action upon certain known standards, they are prone to act in deciding, as very likely they properly may in directing, as if every case was unique. Again, the number of those who are competent to criticise administrative determinations, as distinguished from the general course of administrative action, if we leave lawyers out of account, is at least very limited. They are not necessarily members of a common profession with the administrative officials and the latter are not unlikely to consider their criticism and that of lawyers negligible. Thirdly, administrative determinations are not safeguarded by the detailed and explicit records which keep down any tendency of a court to act otherwise than impartially and objectively in arriving at its determinations and enable lawyer and layman alike to know accurately what has been done and how and why. Fourthly, as will be shown presently, review of administrative determinations by an administrative official is a very different thing from review of the action of a judge by an independent bench of judges.

Difference of Spirit of Administrative Justice

I do not claim for a moment that the technique of judicial proceedings is to be applied to administrative determinations. But it is just because it is not, and because the checks upon judicial action are necessarily wanting, that we are required to do what we may to provide reasonable checks and assurance against the tendencies which administrative justice displays. Indeed, the Monographs disclose this need. For example, one of them points out the want of specific grounds of complaint in proceedings in the Department of Labor under the Walsh-Healey Act. There is only a general complaint. This is found objectionable in the Monograph, and it is noted that the Department urged unsatisfactory grounds for not making complaints giving real notice. It should be noted also how a court of equity submits or requires submission of a draft decree in any important case to counsel for the defeated party for suggestions and objections. The spirit of such procedure is wholly different from that of administrative adjudication.

Need of Simple Appeal

If such things could be easily and effectively reached by judicial review, as provided at present, it would not so much matter. The term "judicial review" has been criticized as connoting a putting of the judiciary above the executive. But the name is a name not a description. Appeal is only a modern, speedy, non-technical, less expensive mode of adjudicating controversies arising upon administrative orders, substituted for the older writs at law or suits in equity. If the latter were permissible and unobjectionable the former are also. Statutes,

however, often make no provision for review. In that event, as appeal is a purely statutory proceeding, the only recourse is a suit in equity for an injunction, an expensive proceeding, calling for taking evidence *de novo* and involving risk of substituting the discretion of a court of equity for that of the administrative agency. Moreover, in statutory appeals it is held that the ordinary incidents of review by appellate courts do not apply to proceedings of administrative agencies. In some cases it seems that mere injury to a private interest does not permit of the statutory appeal and leaves only the awkward remedy of a suit in equity. Certainly the criterion of appealability ought to be whether the party seeking review has a substantial interest which is affected. This is what courts and statutes have come to in judicial proceedings, and it should be so as to any sort of proceeding. That statutes provide otherwise is but another example of the extent to which the interests of private persons have been coming to be ignored. Other difficulties in judicial review as it now exists are pointed out in the report of the committee. We may take it as admitted that the present condition is unsatisfactory. It should be added, however, that one of the purposes of appointing the committee, suggested by the President, was to "avoid litigations." This should be achieved by a simple appeal replacing suits in equity; not by making appeal difficult or by cutting it off and leaving parties aggrieved to suits in equity or attacking orders as void when prosecuted for violation of them.

Effects of Official Zeal

In pointing out the characteristics of administrative justice as it has developed somewhat rapidly in the United States in the last fifty years, one is not in the least attacking the members, past or present of our administrative agencies, nor impugning their intentions or motives. What is behind those characteristics is largely zeal in carrying out laws which are felt by those chosen to administer them to be of paramount importance, justifying the means by the end. It is natural that an administrative agency should see its particular, relatively narrow task out of proportion. To take an example which is no longer controversial, this was notably manifest under the regime of national prohibition. Those in charge of administering the National Prohibition Act felt strongly, and no doubt conscientiously, that the objects of that Act were of such overruling importance as to justify extra-legal measures and overriding of individual rights and constitutional guarantees. Indeed, it has been argued by an able exponent of the administrative standpoint that we must look at administrative adjudication "against a background of what we now expect government to do." If we keep our eye too exclusively on that background we may overlook the importance of how we expect government to do it. The effect of well intentioned zeal upon administrative justice has often been remarked. Thus the British Commission said: "Bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest." As a witness before the Senate sub-committee put it, "administrators have a tendency to become so wrapped up in

their objectives that they are often unnecessarily disregarding of private rights." The Attorney General, when Solicitor General, testifying before the Senate sub-committee put this as an excuse for not effectively segregating the judging from the prosecuting function, saying that administrative boards were set up to carry out policies and make that the paramount consideration. The attitude is praiseworthy and has its good side as making for efficiency. But because it makes for efficiency at the expense of individual and guaranteed rights is the best of reasons for imposing checks and providing adequate judicial review.

Administrative Rule-Making

Thus far I have spoken of administrative adjudication. Hardly less important is administrative rule-making. Here, again, the significant point is the extent to which exercise of the powers of administrative agencies is left at large as compared with exercise of the powers of legislatures and courts. Administrative rules and regulations having the force of laws have become an increasingly important part of the everyday law in nation and state. Often these rules affect interests of far more economic significance to individuals than statutes or rules of court. Yet even the least significant statute must be formally introduced as a bill, printed, referred to a committee and reported on, often after hearing, read three times before each house, discussed in committee of the whole, passed by each house, and approved by the executive. Rules of court are drafted by committees of judges, practicing lawyers, and law teachers, or by judicial councils, referred for criticism to bar association committees or committees of the bar in different circuits, discussed before bar associations and in the legal periodicals, and only adopted after every one having an interest has been fully heard. Administrative rule-making is in striking contrast. The first knowledge that those affected have of a rule is usually after it has gone into effect. The first opportunity they have to challenge it is usually after it is sought to be enforced against them and they may attack it in the courts. As was said by a witness before the Senate sub-committee: "The members of the Bureau of Customs are not business men. They will issue regulations without consulting business men, and the result is business is upset." Another witness points out that administrative rules and regulations may require over night a change in long standing business practice without any one affected having an opportunity to be heard in advance. Still another witness says: "I have seen regulations changed by the Department where there was no opportunity whatever to be notified in advance to discuss the matter and where great difficulty and expense were involved, and where later tremendous effort to get a hearing and review came to nothing because there was no procedure." How those affected feel about this condition is well put by the chairman of a committee of the National Association of Manufacturers: "When administrative rules or regulations are necessary to clarify or enforce the law, any person to be affected should have a real opportunity to be heard and participate in making rules which will govern his future conduct." One

would think this an eminently reasonable proposition. But it is strenuously objected to by important administrative agencies. . . .

NOTES

1. With reference to Dean Pound's article, Pirsig, "Cases on Judicial Administration" (West Pub. Co., 1946), in Note on p. 155, says:

"This article evoked vigorous criticism in Davis, Dean Pound and Administrative Law (1942) 42 Col.L.Rev. 89, on the ground that the practices and habits of administrative agencies are not as pictured. The article was defended, in turn, in Bailey, Dean Pound and Administrative Law (1942) 42 Col.L.Rev. 781, to which reply was made in Davis, Dean Pound's Errors About Administrative Agencies (1942) 42 Col.L.Rev. 804. For another attack upon Dean Pound's views see Frank, If Men Were Angels (1942) chap. V."

2. When the Administrative Procedure Act bill was being considered in the Committee of the Whole of the House of Representatives, Mr. Jennings from Tennessee remarked in part:

"The Federal Government now touches almost every activity that arises in the lives of millions of people who make up the population of this country. The chief indoor sport of the Federal bureaucrat is to evolve out of his own inner consciousness, like a spider spins his web, countless confusing rules and regulations which may deprive a man of his property, his liberty, and bedevil the very life out of him.

"Recently Westbrook Pegler dissected an interesting speech by a young lady who is an official in one of the bureaus here in Washington. I was interested in his article because I heard her make a speech not so long ago at a meeting of the Federal Bar Association in which she said that this bill was pending before the two Houses of Congress, and that the Federal bureaucrats and lawyers who served these bureaus and bureaucrats should be on their toes and should do their best to prevent the passage of this bill or any similar bill because she said that it would put the Federal Bureaucrats and the lawyers whom they had on their pay rolls in a strait-jacket.

"Well, I was interested in that frank confession and I became interested in fitting a restraining legal strait-jacket on these people who have been harrassing the citizens of this country. As I have said, one of their principal indoor sports is to promulgate these rules and regulations.

"Now, this bill does three things generally, you might say. It puts a legal restraint upon the power of these bureaus to promulgate rules and regulations and gives the citizen who may be affected by them the right to a hearing, to make suggestions, and to enter protest against the proposed rule, and then it gives the citizen the right to a hearing before these bureaus. It requires that the rules and regulations shall be made public, and as a last resort when the citizen has exhausted his remedy before some Federal bureau here in Washington, he has a right to go into court and undertake to protect himself.

"I just want to read some of the things that this enterprising young woman had to say. Mr. Pegler said of her speech before a meeting of the Texas Bar Association:

"Though cynical, Miss Rawalt was thoroughly honest and practical. The citizen occupied no place in her remarks. Her message was an exhortation to her fellow lawyers to get aware of the existence of government by bureaucracy and to grab off their share of the loot from a Nation bedeviled by confusing and harassing rules, regulations and interpretations, many of them improved by New Deal bureaus operating as courts.

"... the extent to which the citizen has been elbowed out of court and into New Deal bureaus for his justice, constantly in need of lawyers to keep him out of jail, is thoroughly convincing. Miss Rawalt certainly would not exaggerate.

" "Speaking of opportunity," the lady said, "are the lawyers of this country, men and women, going to take full advantage of their opportunities in administrative law? It is the most rapidly expanding area of law practice today. There are some 217 special courts, bureaus and commissions which today decide upon and administer various Federal laws directly affecting citizens and business firms in this country. This does not take into account similar State quasi-judicial bodies.

" "Administrative law, through the Federal Communications Commission, regulates the programs you hear on your radio and determines the use of the telephone and telegraph in our country today. Administrative law, through the Federal Trade Commission, determines various trade practices within the industries of this Nation. Administrative law through the OPA and other departments, regulates what food you may buy and what you may pay for it. Concurrent with the phenomenal growth in this field of law, there has been a sudden decrease in the number of lawyers."

"Then this young woman told the Texas lawyers that they should 'stake their claim in this promising professional gold mine now and avoid the costly process of ejectment of others who have laid claims thereto.' She urged them to familiarize themselves with the bureau where this administrative law is administered. She also called their attention to the fact that a certain provision which was expressed in 500 words in the original income-tax law now runs to 2,300 words.

"Then she stressed the statement of Mr. Justice Frankfurter, who recently said in one of his opinions:

" 'The notion that, because the words of a statute are plain, its meaning also is plain, is merely pernicious oversimplification.'

"In other words, words do not mean what they say and things are not as they appear to the naked eye and to ordinary human intelligence.

"Mr. Chairman, for the reason I have stated and for many other reasons that might be stated, I hope this bill is enacted by this House as passed by the Senate. It will give a long-suffering public much-needed relief." (Senate Document No. 248, 79th Congress, 2nd Session pp. 392-393.)

3. As published in 5 Federal Bar Assn.Jour. 86 (1943), sub nom "How Our Federal Tax Laws Grow", Miss Rawalt's address contains no reference to the Administrative Procedure Act bill.

4. The Administrative Procedure Act as passed in 1946 (Ch. 324, Pub.Law 404) represents a compromise of the views advanced in the majority and minority reports of the Attorney General's Committee on Administrative Procedure. The Act has been the subject of several critical articles by proponents of free development of administrative procedures. In Blachly and Oatman, "The Federal Administrative Procedure Act", 34 Geo.L.J. 407 (1946), it is said: "... In reality, what the law does is to overturn the established system of federal administration and administrative law, and to cripple administrative action. To read it is to learn that such is not only its effect but its purpose. How does the new statute accomplish this purpose?

"I. By so changing the administrative system of the federal government, through comprehensive definitions and statements, that administrators will be uncertain of their powers and duties under law.

"II. By requiring unnecessary, burdensome and expensive procedures in respect to many types of administrative action.

"III. By requiring a separation of functions where no such separation is necessary or advisable.

"IV. By requiring that the proponents of a rule or order, that is normally the administration, shall have the burden of proof.

"V. By requiring a judicialized procedure for the granting of licenses of every nature.

"VI. By greatly weakening the sanctioning power of administrative authorities.

"VII. By making unnecessary requirements as to public information.

"VIII. By subjecting to judicial review hundreds of acts not presently and not logically reviewable.

"IX. By greatly extending the scope of judicial review."

See also Kaufman, "The Federal Administrative Procedure Act", 26 Boston U.L. Rev. 479 (1946); Nathanson, "Some Comments on the Administrative Procedure Act", 41 Ill.L.Rev. 368 (1947); Cohen, "Legislative Injustice and Supremacy of 'Law'", 26 Neb.L.Rev. 323 (1947). Cf. Walkup, "The Administrative Procedure Act", 34 Geo.L.J. 457 (1946); Dickinson, "Scope and Grounds of Broadened Judicial Review", 33 A.B.A.Jour. 434 (1947).

5. The Federal Register Act (49 Stat. 500 (1935), 44 U.S.C.A. §§ 301-314), resulted in the establishment of the Federal Register which provides a comprehensive and authoritative publication of administrative rules. The Administrative Procedure Act requires that notice of proposed rules (with certain exceptions) shall also be published therein. See §§ 3 and 4. Cf. *infra*, p. 1117, Note 3. view", 33 A.B.A.Jour. 434 (1947), Note, "The Federal Administrative Procedure Act: Codification or Reform?", 56 Yale L.J. 670 (1947). See authoritative comprehensive discussion in "Federal Administrative Procedure Act and Administrative Agencies", (1947).

JAMES HART, SOME ASPECTS OF DELEGATED RULE- MAKING

25 Va.L.Rev. 810 (1939).

. . . The requisites of a valid delegation may be stated as five in number. Congress must:

1. itself have power in the premises to regulate.
2. definitely limit the delegation.
3. require, in the case of contingent legislation, a finding.
4. delegate the power to public officers or authorities, not to private persons or groups.
5. itself provide any penal sanction for violation of resulting rules.

. . . Limitation of the delegation has two interrelated aspects: definition of the subject, and provision of a policy. A reasonably clear definition of the subject is requisite. That subject, however, may be extensively as wide as the commerce power, provided it is intensively defined as some specific aspect thereof.

Limitation also comes through provision of a policy, standard or criterion. There is no valid distinction between the three. The ideal statute steers a middle course between the Scylla of attempting to anticipate every possible situation and the Charybdis of embodying no policy at all except that contained in an empty formula. The important thing is that the objectives the administrator is to seek be reasonably plain. This also is requisite; but whether it has been done must be decided in terms of common sense, and not in terms of formalism. An expression of policy that is couched merely in the pious terms of a glittering generality like "the public interest" adds nothing to what in any event would be implied. On the other hand, general terms often furnish adequate guidance. . . .

[Note. Concerning use of general terms, see Chapter 6, Section 2c, *infra*. Ed.]

WALTER WHEELER COOK, CERTAINTY IN THE
CONSTRUCTION OF THE LAW

21 A.B.A. Jour. 19 (1935).

The Securities Act of 1933 as amended by the Securities Exchange Act of 1934 contains a provision the significance of which from the point of view of general legal development seems not to be fully appreciated either by members of the legal profession or by the citizens whose lives it will affect. The reference is to Section 209(b) of the Securities Exchange Act of 1934, which amended the provisions of Section 19 of the Securities Act of 1933. To the original section, which authorized the Securities and Exchange Commission to adopt and alter rules and regulations and definitions of terms, the amendment of 1934 added the following provisions: "No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

The significance of these provisions will appear when we recall the dilemma which normally confronts the citizen when faced with new and often complex legislation which imposes upon him new legal duties: he must at his peril interpret the frequently ambiguous language of the new law, perhaps to be told later by some reviewing body, usually a court, that he has misinterpreted the law and thereby incurred a burdensome liability. Confronted by such a dilemma the members of the business community may often hesitate to enter upon legitimate business enterprises, fearing that even in spite of the best of intentions they may run afoul of the new law. The provisions of the new amendment are intended to meet this situation by conferring upon a small body of experts, who will continually study the operations of the law in question, the power to furnish the citizen with the information he needs if he is to keep within the law. A careful reading of the precise wording of the amendment will reveal that it differs from many apparently similar provisions in that there is no attempt on the part of the legislative body to authorize an administrative body to impose upon citizens legal burdens or liabilities which without the administrative action in question would not exist. Such procedure may be valid and necessary in some cases—see the discussion below—but is not attempted by the amendment of 1934. What is provided for is the creation by administrative action of exemptions from legal liabilities, exemptions which might not otherwise exist under the other provisions of the Act: the honest citizen who in good faith acts in reliance upon the interpretations of the Act embodied from time to time in the rules and regulations of the Commission is by the terms of the amendment exempted from legal liability, even though later the Commission may alter its ruling or some reviewing body may disagree with the Commission's interpretation of the statute.

The difference between the two things—imposition of liability by means of administrative action and exemption from liability because of reliance on such action—while recognized in our legal system and adopted in some instances in legislation, has not hitherto been given the emphasis and recognition which it appears to deserve. It is the purpose of the present paper to direct attention to the importance of the difference and to discuss briefly the validity under our constitutional system of the provisions of the 1934 amendment in question.

Before considering the validity of the amendment of 1934 from a constitutional viewpoint, certain aspects of its practical operation should be noted. The citizen who follows administrative determinations of the Commission is protected: what happens if he refuses to do so? The answer is that he thereby assumes the risk that his interpretation of the Act will later not be upheld by the courts when the question is raised in the appropriate way. If the court before whom the question may come agrees with the Commission, then and then only will the citizen who has refused to accept the Commission's interpretation be liable. On the other hand, if the court agrees with him rather than with the Commission, he will be under no legal liability, this in spite of the Commission's administrative determination. . . .

Precedents for this type of administrative proceeding are not entirely lacking. Its possibility was foreshadowed long ago by the opinion of the United States Supreme Court in the case of *La Bourgoyne*, 210 U.S. 95, 134, 28 S.Ct. 664 (1908). In that case, the Board of Supervising Inspectors had, pursuant to legislative authority, by regulation laid down certain requirements for the equipment of vessels. Action by parties injured was instituted against a vessel on the ground, among others, that the equipment provided did not conform to the statute. Having found that the equipment did conform to the regulations issued by the Board, the Court said, page 134:

"Again, the contention that the regulations of the Board are inconsistent with the statute, we think when the statute is considered as a whole, is without merit. *Even, however, if it were otherwise, as compliance on the part of the petitioner with the regulations adopted by the board was compelled by law, it cannot be that upon it was cast the duty of disobeying the regulation at its peril, thus, on the one hand, subjecting it in case of non-compliance to the infliction of penalties, and on the other hand, if it fully complied with the regulations, imposing a liability upon the assumed theory that there had been a violation of law.*"

Practices developed in the Treasury Department are obviously based upon the idea under consideration. These practices provide a warning period for the enforcement of administrative determinations resulting in changes in rates of Customs duty. (See example, 66 Treasury Decisions, No. 47261, September 27, 1934; 66 Treasury Decisions, No. 47290, October 18, 1934). This procedure, in effect, concedes that a previous ruling was erroneous, involving an error in the application of legal principles to a stated set of facts; but in place of the recognized

principle, which the courts would apply, that such a ruling has been law from the beginning of time, not only fails to assume that the change is of retroactive effect, but in addition provides an interim period before the decision will become effective, to permit those affected to adjust their situations accordingly. The distinction between the imposition of burdens and absolution from liability is apparent here, in that this principle does not appear to be applied to cases where a change in regulation provides less rather than more burdensome results. (See for example, 66 Treasury Decisions, No. 47251, September 20, 1934).

Sanction for these practices of the Treasury Department appears *inter alia* in Section 516 of the Tariff Act of 1930. That section provides that a domestic manufacturer may object to a classification, for duty purposes, of merchandise in which he is interested as a producer; and that if the Secretary of the Treasury considers his protest justified, he may change the classification to become effective thirty days after promulgation. Other examples are certain provisions of the Revenue Acts of 1924 and 1926. For instance, Section 1108(b) of the Revenue Act of 1926 provides that in cases where a sale or lease is made in reliance upon a ruling, regulation, or Treasury Decision existing at the time, holding that the sale or lease was not taxable, no tax under the Act shall be imposed. Again, subdivision (b) of the same section recognizes the principle that changes in administrative determinations or regulations need not be applied with retroactive effect.

The practical convenience and desirability of the type of regulation in question seem clear. There remains the question whether there are objections on constitutional grounds. Possible objections may be based upon the doctrine of the separation of powers, the argument being that there is an unconstitutional delegation of either legislative or judicial power to an administrative body. Is there such an unconstitutional delegation? It seems abundantly clear that there is not. Here first of all we need to recall the case of *La Bourgoyne*, 210 U.S., 95, 134, 28 S.Ct. 664 (1908) discussed above, in which it was held that one who had in good faith complied with the regulations issued by an administrative board in supposed compliance with the statute in question had incurred no liability, the Court saying that this would be true even if the regulations were inconsistent with the statute. In that case the statute contained no explicit provision exempting the defendant from liability in case of compliance with the Board's regulations. Clearly if the exemption would exist in the absence of specific legislative enactment to that effect, the specific provisions of the amendment of 1934 under consideration must be valid. Aside from the authority of that case the matter may be put shortly as follows: In the statute under consideration the legislative branch of the government is defining the conditions which, when they exist, are to result in the imposition of legal liabilities upon persons engaged in certain enterprises. In its discretion the legislative body has decided that it would be unfair to impose liabilities upon persons whose conduct is in com-

pliance with the regulations of the Commission, and so has provided that conduct of that kind shall not give rise to legal liability. It seems clear that to deny to Congress the power to do this would be to infringe upon its discretion to determine when and when not legal liability shall exist. It thus becomes entirely unnecessary to rely upon the principle exemplified in *Buttfield v. Stranahan*, 192 U.S. 470, 24 S.Ct. 349 (1904), and similar cases, where it is sought to bind the citizens by administrative determinations which result in the imposition of liabilities, and, it would seem to follow, the limitations of that doctrine are not necessarily applicable to provisions of the kind here in question. The conclusion seems clear that the constitutional validity of the type of administrative determination under discussion can not be questioned on the ground of an unconstitutional delegation of legislative or judicial power. All that Congress has done is to define what conduct shall and what shall not result in legal liability.

NOTES

1. The question involved in *Buttfield v. Stranahan*, *supra*, is treated in Chapter 6, Section 2, *infra*. Ed.

2. In Hart, "Some Aspects of Delegated Rule-Making", 25 Va.L.Rev. 810, 811-812 (1939), the author says:

"The writer has recently heard some criticism of this technique of granting immunity in exchange for conformity to regulations. Will pressure for the issuance of regulations cause them to be hurriedly prepared? Will pressure against amendment tend to freeze them in their original form? Or will frequent amendment tend to make the intended certainty illusory? At the most, such questions do not militate against experimentation. A more serious matter is the possibility of collusion, or that a lawyer friendly with agency personnel will secure the issuance of a regulation that concerns a hypothetical A and B in terms that fit his client as A. The same thing may happen, however, in the case of Treasury regulations, where immunity is not involved. This objection goes rather to the propriety and scope of interpretative regulations."

3. In Lee, "Legislative and Interpretive Regulations", 29 Geo.L.J. 1-4 (1940), the author states:

"Regulations are not all birds of a feather. The genus contains several species and numerous activities. The several species differ in origin, function, and performance. These differences in the case of the two dominant species, legislative regulations and interpretive regulations, give rise to legal problems of practical importance to administrative law. Unfortunately the problems are none too well recognized. Relatively few lawyers realize, when they see legislative regulations and interpretive regulations perched side by side, that they are not the same kind of bird.

"The legal product resulting from the exercise by an administrative officer or agency of power to prescribe substantive regulations in connection with federal regulatory legislation, including revenue legislation, is variously denominated in the acts of Congress and in administrative practice thereunder. The product is commonly known as a 'regulation'. But it may also be called a 'rule', or sometimes an 'order' or 'determination' although of general application. Under the federal food and drug legislation the product is frequently designated as a 'definition' or 'standard', particularly when it deals with the identity or quality of a food or the fill of its container.

“ . . . These substantive regulations fall into the two main categories, legislative regulations and interpretive regulations. One difference between the two lies in their force and effect. A brief, and correspondingly inadequate, statement is that legislative regulations prescribe what the law shall be and have the force and effect of law, while interpretive regulations merely construe the terms of a statute and do not have the force and effect of law unless ‘ratified’ subsequently by Congress.

“Whether or not a substantive regulation is interpretive or legislative is to be determined from the statute. If the statute provides that nonconformance to the regulation is to result in the imposition of legal sanctions specified by Congress, then the regulation is legislative. Among such sanctions are denial of right to import or export, or forfeiture of goods, criminal penalties, penalty taxes, and suspension or revocation of permits. A few of the income tax regulations are legislative and in such instances the amount of tax payable will depend on these regulations.

“In another class of situations the statute lays down a primary rule but allows or requires the administrative officer or agency to relax it by regulations. Such regulations have the force and effect of law and are legislative for failure to come within the permitted tolerance, variation, or exemption may result in the imposition of statutory sanctions.

“On the other hand if power to prescribe a substantive regulation is delegated by statute, but no sanctions are imposed by statute for failure to conform to the regulation, then it is interpretive. It is also interpretive if it is prescribed pursuant to the inherent powers of the Executive to construe the statute and not pursuant to a specific delegation of authority by Congress. Despite the numerous grants of authority for legislative regulations made by recent acts of Congress interpretive regulations still are probably the more common type of regulations promulgated by federal administrative officers or agencies. Some if not the majority of the regulations issued under most regulatory acts are interpretive. Such regulations express the views of the administrative officer or agency as to the meaning or application of general requirements of a regulatory act, the construction that will be followed in administering the act. Interpretive regulations (except where they have been ‘ratified’ by Congress) have validity in judicial proceedings only to the extent that they correctly construe the statute and then, strictly speaking, it is the statute and not the regulation to which the individual must conform.

“Incidentally there has arisen, particularly in connection with the defining or standardizing of agricultural commodities, a third category. This embodies permissive definitions or standards. To call them ‘permissive regulations’ would be a misnomer. They make no pretense of regulating, neither do they interpret the provisions of a regulatory act. They set forth standards that are made available for voluntary use and observance but there is no legal compulsion to use or to observe them.”

FEDERAL COMMUNICATIONS COMMISSION v. POTTSVILLE BROADCASTING CO.

Supreme Court of the United States, 1940.
309 U.S. 134, 60 S.Ct. 437, 84 L.Ed. 656.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The court below issued a writ of mandamus against the Federal Communications Commission, and, because important issues of administrative law are involved, we brought the case here. 308 U.S. 535, 60 S.Ct. 107, 84 L.Ed. 451. We are called upon to ascertain and

enforce the spheres of authority which Congress has given to the Commission and the courts, respectively, through its scheme for the regulation of radio broadcasting in the Communications Act of 1934, c. 652, 48 Stat. 1064, as amended by the Act of May 20, 1937, c. 229, 50 Stat. 189, 47 U.S.C. § 151 et seq., 47 U.S.C.A. § 151 et seq.

Adequate appreciation of the facts presently to be summarized requires that they be set in their legislative framework. In its essentials the Communications Act of 1934 derives from the Federal Radio Act of 1927, c. 169, 44 Stat. 1162, as amended, 46 Stat. 844. By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry.¹ The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927.

Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. Licenses were not to be granted for longer than three years. Communications Act of 1934, Title iii, § 307(d). No license was to be "construed to create any right, beyond the terms, conditions, and periods of the license." Ibid. § 301. In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, "public convenience, interest, or necessity" was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest. Ibid., Title I, § 4(j), 47 U.S.C.A. § 154(j). Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that

¹ For the legislative history of the Act of 1927, see H.Rep.No.464, S.Rep.No.772, 69th Cong., 1st Sess.; 67 Cong.Rec. 5473-5504, 5555-86; 5645-47; 12335-59; 12480, 12497-12508, 12614-18; 68 Cong.Rec. 255-80, 2750-51, 2859-82, 3025-39, 3117-34, 3257-62, 3329-36, 3569-71, 4109-55. A summary of the operation of previous regulatory laws may be found in Herring and Gross, *Telecommunications*, pp. 239-245.

the administrative process possess sufficient flexibility to adjust itself to these factors. Thus, it is highly significant that although investment in broadcasting stations may be large, a license may not be issued for more than three years; and in deciding whether to renew the license, just as in deciding whether to issue it in the first place, the Commission must judge by the standard of "public convenience, interest, or necessity." The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.²

Against this background the facts of the present case fall into proper perspective. In May, 1936, The Pottsville Broadcasting Company, respondent here, sought from the Commission a permit under § 319 *Ibid.*, Title iii, for the construction of a broadcasting station at Pottsville, Pennsylvania. The Commission denied this application on two grounds: (1) that the respondent was financially disqualified; and (2) that the applicant did not sufficiently represent local interests in the community which the proposed station was to serve. From this denial of its application respondent appealed to the court below. That tribunal withheld judgment on the second ground of the Commission's decision, for it did not deem this to have controlled the Commission's judgment. But, finding the Commission's conclusion regarding the respondent's lack of financial qualification to have been based on an erroneous understanding of Pennsylvania law, the Court of Appeals reversed the decision and ordered the "cause . . . remanded to the . . . Communications Commission for reconsideration in accordance with the views expressed." *Pottsville Broadcasting Co. v. Federal Communications Commission*, 69 App.D.C. 7, 98 F.2d 288.

Following this remand, respondent petitioned the Commission to grant its original application. Instead of doing so, the Commission set for argument respondent's application along with two rival applications for the same facilities. The latter applications had been filed subsequently to that of respondent and hearings had been held on them by the Commission in a consolidated proceeding, but they were still undisposed of when the respondent's case returned to the Commission. With three applications for the same facilities thus before it,

² Since the beginning of regulation under the Act of 1927 comparative considerations have governed the application of standards of "public convenience, interest, or necessity" laid down by the law. ". . . the commission desires to point out that the test—'public interest, convenience, or necessity'—becomes a matter of a comparative and not an absolute standard when applied to broadcasting stations. Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster, or the advertiser." *Second Annual Report, Federal Radio Commission*, 1928, pp. 169, 170.

and the facts regarding each having theretofore been explored by appropriate procedure, the Commission directed that all three be set down for argument before it to determine which, "on a comparative basis" "in the judgment of the Commission will best serve public interest." At this stage of the proceedings, respondents sought and obtained from the Court of Appeals the writ of mandamus now under review. That writ commanded the Commission to set aside its order designating respondent's application "for hearing on a comparative basis" with the other two, and "to hear and reconsider the application" of The Pottsville Broadcasting Company "on the basis of the record as originally made and in accordance with the opinions" of the Court of Appeals in the original review (69 App.D.C. 7, 98 F.2d 288), and in the mandamus proceedings. *Pottsville Broadcasting Co. v. Federal Communications Commission*, 70 App.D.C. 157, 105 F.2d 36.

The Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest. See *In re Sanford Fork & Tool Co.*, Petitioner, 160 U.S. 247, 255, 256, 16 S.Ct. 291, 293, 40 L.Ed. 414. That proposition is indisputable, but it does not tell us what issues were laid at rest. Compare *Sprague v. Ticonic Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L. Ed. 1184. Nor is a court's interpretation of the scope of its own mandate necessarily conclusive. To be sure the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes. But it is not even true that a lower court's interpretation of its mandate is controlling here. Compare *United States v. Morgan*, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211. Therefore, we would not be foreclosed by the interpretation which the Court of Appeals gave to its mandate, even if it had been directed to a lower court.

A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal courts inter se—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution, U.S.C.A. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those.³ To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. That this movement was natural and its extension inevitable, was a quarter century ago the opinion of eminent spokesmen of the law.⁴ Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services.⁵ These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mould Congress has cast more recent administrative agencies, "should not be too narrowly constrained by technical rules as to the admissibility of proof," *Interstate Commerce Commission v. Baird*, 194 U.S. 25, 44, 24 S.Ct. 563, 568, 569, 48 L.Ed. 860, should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.⁶ Compare *New England Divisions*

³ See Maitland, *The Constitutional History of England*, pp. 415-18; Landis, *The Administrative Process*, *passim*.

⁴ See, for instance, the address of Elihu Root as President of the American Bar Association: "There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. . . . There will be no withdrawal from these experiments. . . . We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation." 41 A.B.A.Rep. 355, 368-69.

⁵ See *United States v. Lowden*, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208, decided December 4, 1939; Herring, *Public Administration and the Public Interest*, *passim*.

⁶ The Communications Commission's Rules of Practice, Rule 106.4, provided that "the Commission will, so far as practicable, endeavor to fix the same date . . . for hearing on all applications which . . . present conflicting claims . . . excepting, however, applications filed after any such application has been designated for hearing." Respondent contends, and the court below seemed to believe that

Case, 261 U.S. 184, 43 S.Ct. 270, 67 L.Ed. 605. To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.

Under the Radio Act of 1927 as originally passed, the Court of Appeals was authorized in reviewing action of the Radio Commission to "alter or revise the decision appealed from and enter such judgment as to it may seem just." § 16 of the Radio Act of 1927, 44 Stat. 1169. Thereby the Court of Appeals was constituted "a superior and revising agency in the same field" as that in which the Radio Commission acted. *Federal Radio Comm. v. General Electric Co.*, 281 U.S. 464, 467, 50 S.Ct. 389, 390, 74 L.Ed. 969. Since the power thus given was administrative rather than judicial, the appellate jurisdiction of this Court could not be invoked. *Federal Radio Comm. v. General Electric Co.*, *supra*. To lay the basis for review here, Congress amended § 16 so as to terminate the administrative oversight of the Court of Appeals. c. 788, 46 Stat. 844. In "sharp contrast with the previous grant of authority" the court was restricted to a purely judicial review. "Whether the commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action, are appropriate questions for judicial decision." *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266, 276, 53 S.Ct. 627, 632, 77 L.Ed. 1166, 89 A.L.R. 406.

On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. *Federal Power Comm'n v. Pacific Co.*, 307 U.S. 156, 59 S.Ct. 766, 83 L.Ed. 1180. But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. *Cf. Ford Motor Co. v. Labor Board*, 305 U.S. 364, 59 S.Ct. 301, 83 L.Ed. 221.

this rule bound the Commission to give respondent a non-comparative consideration because its application had been set down for hearing before the later and rival applications were filed. The Commission interprets this rule simply as governing the order in which applications shall be heard, and not touching upon the order in which they shall be acted upon or the manner in which they shall be considered. That interpretation is binding upon the courts. *American Tel. & Tel. Co. v. United States*, 299 U.S. 232, 57 S.Ct. 170, 81 L.Ed. 142.

The Commission's responsibility at all times is to measure applications by the standard of "public convenience, interest, or necessity." The Commission originally found respondent's application inconsistent with the public interest because of an erroneous view regarding the law of Pennsylvania. The Court of Appeals laid bare that error, and, in compelling obedience to its correction, exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application in the light of "public convenience, interest, or necessity." The fact that in its first disposition the Commission had committed a legal error did not create rights of priority in the respondent, as against the later applicants, which it would not have otherwise possessed. Only Congress could confer such a priority. It has not done so. The Court of Appeals cannot write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors in the first of an allowable series of administrative actions. Such an implication from the curtailed review allowed by the Communications Act is at war with the basic policy underlying the statute. It would mean that for practical purposes the contingencies of judicial review and of litigation, rather than the public interest, would be decisive factors in determining which of several pending applications was to be granted.

It is, however, urged upon us that if all matters of administrative discretion remain open for determination on remand after reversal, a succession of single determinations upon single legal issues is possible with resulting delay and hardship to the applicant. It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U.S. 267, 270, 24 S.Ct. 638, 639, 48 L.Ed. 971. Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies. Anglo-American courts as we now know them are themselves in no small measure the product of a historic process.

The judgment is reversed, with directions to dissolve the writ of mandamus and to dismiss respondent's petition.

Reversed.

SECTION 13. LICENSING AND INSPECTION

GEORGE A. WARP, LICENSING AS A DEVICE FOR
FEDERAL REGULATION

16 Tulane L.Rev. 111-113, 118-119 (1941).*

It has been said that a license, in its broad sense, is "a permit or privilege granted by competent authority to do that which by law would otherwise be unlawful." Licensing, in turn, might be defined as "the administrative lifting of a legislative prohibition." The legislature prohibits in order to make its regulations effective. It denies the right to do a particular thing but permits individual exceptions to be made by an administrative act. The exception constitutes the license and represents an official permit to engage in certain activities otherwise forbidden. In other words, licensing means that citizens stand before their government, one saying, "I wish to operate a securities exchange," another saying, "I desire to set up a radio station," and still another saying, "I want to be an aeroplane pilot." To each of these people and to others the government replies: "What you propose to do is of such public importance that it must be regulated in the interests of the common good. If you cannot or will not meet the standards which we prescribe, you may not go ahead with your plans."

The licensing device has been employed effectively in the field of federal administration only during recent years. Perhaps this is due somewhat to the fact that the licensing power has been associated customarily with some phase of the police power. The police power, of course, has been considered as one of the reserved powers of the states. Until the concept of a federal police power developed, few people thought of using licensing as a federal device. At any rate, the effective use of licensing as an instrument for law enforcement in this country is very largely a development of the twentieth century. Prior to 1900 examples of federal licensing were almost nonexistent. One instance, however, occurred in 1789, when the first Congress made provision for the licensing of ships and seamen. Indeed, practically all of the nineteenth century licenses involved the subject of navigation. Finally, in 1902, more than a century after the first licensing act was passed, licenses were required for the preparation of viruses and toxins when these were to be moved in interstate commerce. Ten years later licenses were required for the importation of nursery stock. The first of the great federal licensing acts, however, was the Warehouses Act of 1916. It was followed in rapid succession by other important acts: the Federal Water Power Act of 1920, the Packers and Stockyards Act of 1921, the Grain Futures Act of 1922, the Radio Licensing Act of 1927, the National Industrial Recovery Act of 1933, the Agricultural Adjustment Act of

* [Footnotes are omitted. Ed.]

1933, and the Securities Act of 1933. Thus the newness of licensing as a means of federal control is readily apparent. . . .

The terminology of the various license laws varies considerably. The typical law, however, sets forth (1) the conditions under which a license becomes necessary; (2) the requirements which must be met by applicants; (3) the fees charged; (4) the duties imposed upon the licensees; (5) the agency authorized to issue such licenses; (6) the powers enjoyed by this agency; (7) the procedure in revoking licenses; (8) the grounds which constitute cause for revocation; and (9) the penalties for violations. Of course, most federal license laws state these matters in very general terms, leaving broad rule-making powers in the hands of the licensing agent or agency.

CHESTER LLOYD JONES, STATUTE LAW MAKING IN THE UNITED STATES

Boston: 1923. The F. W. Faxon Co. 281-283.*

. . . There are several classes of cases to which this means of law enforcement is peculiarly adaptable.

Business Licenses

Most important are the licenses on businesses which from their nature involve possibilities of unnecessary danger to the public. The chief instance of regulation in this case involves the perennial problem of the regulation of the sale of liquor. Some of the chief means of control which have been used where the policy of licensing has been followed are:

(a) Granting licenses for one year only, so that the licensing authorities will have the question of compliance or non-compliance with the law frequently brought before them for review.

(b) Limiting the maximum number of licenses by the population of the city, ward or other civil division, as one to 1,000 population.

(c) Prohibiting granting of licenses within certain distances of public parks, churches or schoolhouses.

(d) Requiring any person holding a license to sell liquor to be drunk on the premises to hold also a license as innholder or victualer. A provision of this sort used in Massachusetts and in Pennsylvania gave general satisfaction. It was argued that it helped eliminate disorderly bars. In New York, under the famous Raines law, the licenses issued produced an exactly opposite effect. The hotels operating under such licenses often became disorderly houses.

(e) Making courts the licensing authority. This was done on the theory that the long term of the judges would make them independent of the political influence of the liquor interests. It was doubtless true that this would be a better plan than the alternative of putting

* [Footnotes are omitted. Ed.]

license-granting into the hands of the mayor or aldermen of cities; but it did not destroy the political influence of liquor and it put an unwelcome burden on the courts. Especially in large cities licenses are very valuable and when large numbers are to be issued it is not to be expected that the courts in their actions as to them will be as free from suspicion of accepting bribes as in their ordinary judicial duties. It is more important to protect the judge in his reputation for honesty than to insure fair licensing.

(f) Creating special commissions for licensing. These provisions have been of varying value. In some cities, especially when their members retire at different times and are appointed for long terms, they have been a decided success. Elsewhere they have, because of these very characteristics, forced the liquor interests to take an active part in politics all the time to insure that the commissioners shall not be "unfriendly." In the average case every licensing board becomes a powerful factor in local politics.

The Ohio constitution of 1851 forbade licenses and forced the state to the plan by which, under the law now in force, a flat charge of one thousand dollars per annum is demanded from anyone wishing to take up the business of the sale of liquor. Since it removes the discretionary element it has been claimed that this plan removes the liquor influence from politics to a greater extent than under the usual license scheme.

(g) Giving to the licensing authority the power to revoke the license at any time when judged necessary to protect the public interests.

(h) Providing that licenses shall be forfeited for infraction of law.

(i) Providing that no new license should be issued to a person for a term of years after forfeiture of a previous license.

(j) Making special regulations for the bonds of licensees. Abuses arise when wholesale dealers get control of retailers by signing bonds for them. Legislation has been passed to prevent this by forbidding any person to sign more than one bond (Iowa) or requiring that bondsmen shall not be engaged in the manufacture of spirituous or malt liquors (Pennsylvania). Office-holders might well be forbidden to be on bonds.

(k) Requiring consent of the owner of the building where liquor is to be sold before license will issue or the consent of all owners within a certain number of feet of the saloon.

(l) Placing restrictions on the way in which the business can be carried on, as by forbidding that musical instruments may be played on the premises, or providing that saloons shall not be run in connection with dance halls, bowling alleys, concert halls, theatres, boxing or wrestling exhibitions.

(m) Forbidding objectionable pictures, or the use of dice, cards, screens or partitions.

(n) Forbidding the employment of women as bartenders, waitresses or singers.

(o) Prohibiting druggists to sell liquors except on a physician's prescription.

(p) Creating a special state constabulary for the enforcement of the rules to be observed by the licensees.

The regulation of various callings alleged to be in a peculiar relation to the public began in England at least as early as 1547. Almost from the first the device has been used in ways which show that the protection of the public was only the secondary object. Besides the regulation of the liquor traffic, where the public interest was clear, licenses were frequently demanded for many sorts of livelihoods, alleged to involve danger. Steeplejacks, chimney sweeps, and the like were early required to have licenses. Present-day legislation, under the same excuse, tends to increase the number of cases regulated. The requirement of licenses to practice as a physician or dentist or pharmacist, or to run engines, is evidently justifiable on the ground of the protection of the public, no matter how great may be the incidental advantage reaped by those licensed through the exclusion of unqualified competitors. Licensing of hackmen and ferrymen and the regulation of their charges is also justified because of public policy. But much of the licensing authorized by our present legislation is evidently motivated not by protection of the public nor even by the desire for public revenue, but by the supposed benefits coming to those licensed by the creation of their veiled monopoly. The licensing of barbers, horseshoers, and similar tradesmen involving examinations for entry is now becoming frequent. Regulations of this character not infrequently have been used as a means by which the number of apprenticeships and the number of those in the "profession" can be regulated to the advantage of those already licensed.

NATIONAL BROADCASTING CO. v. UNITED STATES

Supreme Court of the United States, 1943.
319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344.

Appeals from the District Court of the United States for the Southern District of New York.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In view of our dependence upon regulated private enterprise in discharging the far-reaching rôle which radio plays in our society, a somewhat detailed exposition of the history of the present controversy and the issues which it raises is appropriate.

These suits were brought on October 30, 1941, to enjoin the enforcement of the Chain Broadcasting Regulations promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941. . . .

On March 18, 1938, the Commission undertook a comprehensive investigation to determine whether special regulations applicable to radio stations engaged in chain broadcasting¹ were required in the "public interest, convenience, or necessity". The Commission's order directed that inquiry be made, *inter alia*, in the following specific matters: the number of stations licensed to or affiliated with networks; and the amount of station time used or controlled by networks; the contractual rights and obligations of stations under their agreements with networks; the scope of network agreements containing exclusive affiliation provisions and restricting the network from affiliating with other stations in the same area; the rights and obligations of stations with respect to network advertisers; the nature of the program service rendered by stations licensed to networks; the policies of networks with respect to character of programs, diversification, and accommodation to the particular requirements of the areas served by the affiliated stations; the extent to which affiliated stations exercise control over programs, advertising contracts, and related matters; the nature and extent of network program duplication by stations serving the same area; the extent to which particular networks have exclusive coverage in some areas; the competitive practices of stations engaged in chain broadcasting; the effect of chain broadcasting upon stations not licensed to or affiliated with networks; practices or agreements in restraint of trade, or in furtherance of monopoly, in connection with chain broadcasting; and the scope of concentration of control over stations, locally, regionally or nationally, through contracts, common ownership, or other means. . . .

On May 2, 1941, the Commission issued its Report on Chain Broadcasting, setting forth its findings and conclusions upon the matters explored in the investigation, together with an order adopting the Regulations here assailed. . . .

. . . . The Regulations, which the Commission characterized in its Report as "the expression of the general policy we will follow in exercising our licensing power", are addressed in terms to station licensees and applicants for station licenses. They provide, in general, that no licenses shall be granted to stations or applicants having specified relationships with networks. Each Regulation is directed at a particular practice found by the Commission to be detrimental to the "public interest" The Radio Act of 1927 created the Federal Radio Commission, composed of five members, and endowed the Commission with wide licensing and regulatory powers. We do not pause here to enumerate the scope of the Radio Act of 1927 and of the authority entrusted to the Radio Commission, for the basic provisions of that Act are incorporated in the Communica-

¹Chain broadcasting is defined in § 3(p) of the Communications Act of 1934, 47 U.S.C.A. § 153(p), as the "simultaneous broadcasting of an identical program by two or more connected stations". In actual practice, programs are transmitted by wire, usually leased telephone lines, from their point of origination to each station in the network for simultaneous broadcast over the air.

tions Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151 et seq., 47 U.S.C.A. § 151 et seq., the legislation immediately before us. As we noted in *Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137, 60 S.Ct. 437, 438, 84 L.Ed. 656, "In its essentials the Communications Act of 1934 [so far as its provisions relating to radio are concerned] derives from the Federal Radio Act of 1927 By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927."

Section 1 of the Communications Act states its "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges". Section 301 particularizes this general purpose with respect to radio: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." To that end a Commission composed of seven members was created, with broad licensing and regulatory powers.

Section 303 provides:

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

"(a) Classify radio stations;

"(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

"(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act ;

"(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

"(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act"

The criterion governing the exercise of the Commission's licensing power is the "public interest, convenience, or necessity". §§ 307(a) (d), 309(a), 310, 312. In addition, § 307(b) directs the Commission that "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity", a criterion which "is as concrete as the complicated factors for judgment in such a field of delegated authority permit". *Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, 60 S.Ct. 437, 439, 84 L.Ed. 656. "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *N. Y. Cent. Securities Corp. v. United States*, 287 U.S. 12, 24, 53 S.Ct. 45 [48], 77 L.Ed. 138. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services" *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285, 53 S.Ct. 627, 636, 77 L.Ed. 1166, 89 A.L.R. 406.

The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio". § 303(g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Federal Communications Comm. v. Sanders Bros. Radio Station*, 309 U.S. 470, 475, 642, 60 S.Ct. 693, 697, 84 L.Ed. 869, 1037. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station?

Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity". See *Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 n. 2, 60 S.Ct. 437, 439, 84 L.Ed. 656.

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303(g) provides that the Commission shall "generally encourage the larger and more effective use of radio in the public interest"; subsection (i) gives the Commission specific "authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and subsection (r) empowers it to adopt "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act".

These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest". We cannot find in the Act any such restriction of the Commission's authority. . . .

We conclude, therefore, that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting. There remains for consideration the claim that the Commission's exercise of such authority was unlawful.

The Regulations are assailed as "arbitrary and capricious". If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in *Board of Trade v. United States*, 314 U.S. 534, 548, 62 S.Ct. 366, 372, 86 L.Ed. 432, is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.

It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations. Its long investigation disclosed the existences of practices which it regarded as contrary to the "public interest". The Commission knew that the wisdom of any action it took would have to be tested by experience: "We are under no illusion that the regulations we are

adopting will solve all questions of public interest with respect to the network system of program distribution. . . . The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial." (Report, p. 88.) The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations. . . .

We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity". Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

A procedural point calls for just a word. The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial

de novo of the matters heard by the Commission and dealt with in its Report would have been improper. See *Tagg Bros. v. United States*, 280 U.S. 420, 50 S.Ct. 220, 74 L.Ed. 524; *Acker v. United States*, 298 U.S. 426, 56 S.Ct. 824, 80 L.Ed. 1257.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

[MR. JUSTICE MURPHY, with whom MR. JUSTICE ROBERTS concurred, dissented on the ground that the Act does not in terms give the Commission power to regulate the contractual relations between the stations and the networks, and cannot properly be construed to do so. Ed.]

NOTE

See McManus, "Federal Legislation Regulating Radio", 20 So.Calif.L.Rev. 146 (1947).

STATE v. CANNON

Supreme Court of Wisconsin, 1932. 206 Wis. 374, 240 N.W. 441.

[This case appears *supra*, p. 357]

BECK v. WALLANDER

Supreme Court of New York, 1947. 71 N.Y.S.2d 237.

EDER, JUSTICE. Motion granted. The petitioner is a professional dancer and at present under engagement to perform in a cabaret in the Borough of Manhattan. Rules and regulations have been promulgated by the Police Commissioner of this city governing cabarets. Under the definition of "employee", as defined by regulation 1(b), the petitioner comes within its ambit. Under regulation 6, a cabaret employee is required to have an "identification card" in order to have employment in such an establishment and the holder thereof is required to conform to certain standards of behavior as prescribed by the Police Department regulations. So far as here deemed pertinent, regulation 6 provides: "6. Identification card. No person who comes in contact or is likely to come in contact with the patrons of a cabaret shall be employed on the premises of a cabaret for more than three (3) days from the date of original employment and shall not be reemployed unless such person has obtained a cabaret employee's identification card or temporary permit issued by the Police Commissioner in such form and manner as he may prescribe"

The holder of an identification card or temporary permit is required to comply with the police regulations prescribed for the proper regulation of cabarets, among them not to engage or participate in any illegal or unlawful capacity nor in any conduct offensive to public decency and is not to indulge in indecent language or conduct offensive to decency or propriety in any scene, sketch or act.

Regulation 20, which is entitled "Attire", provides: "No person shall be permitted to appear in any scene, sketch or act with breasts or lower part of torso uncovered or so thinly covered or draped as to appear uncovered."

The petitioner made application for an identification card and informal hearings were held and the application was denied by the respondent. The transcript of these hearings does not disclose the reason for the denial but the opposing affidavit of the Deputy Police Commissioner in charge of supervision and licensing of cabarets reveals that the conclusion was reached that petitioner's performance offends regulation 20, in that reports made by two police officers assigned to watch her performance disclose that during her performance parts of her body were exposed, i. e., her bosom, her breasts and lower part of her torso. This the petitioner denies, but I shall assume, for the purposes of this application and the disposition thereof, and to avoid any issue of fact and thus dispose of the matter as a pure question of law, that the statements in the opposing affidavits in the mentioned respect are true.

It is to be noted that there is no claim by respondent that petitioner's performance was unlawful or in violation of any statute; and the fact is that the police officers who witnessed the performance on two evenings made no arrest; reasonable assumption is that they would have done so if any basis or justification for an arrest existed.

Proceeding upon this premise, I am of opinion that the refusal of the respondent to issue to petitioner an identification card is an arbitrary and unjustified act and one without authority in law.

It is to be observed that the rules and regulations respecting the behavior and conduct of a cabaret employee or permittee only come into effect after the employee or permittee has been granted an identification card: "The holder of an identification card or temporary permit shall" comply with the regulations. There is, seemingly, no rule or regulation prescribing the qualifications of an applicant for an identification card as to the applicant's previous behavior or conduct, reputation, character or record. It would seem that the Police Commissioner is impliedly empowered to prescribe rules and regulations in that regard, but so far as the record discloses none have been promulgated.

Assuming petitioners' performance to have been in contravention of regulation 20, it does not by any means follow that if granted an identification card she will continue her performance in that manner: she may not and there is no arbitrary right to presume that she will: she may and the fair inference is that she will alter or modify the same to conform to the requirements of the regulation. Whether or not she will, or has done so, obviously cannot be determined until she has been granted an identification card and has thereafter acted.

Suppose she does conform after the issuance of the identification card? What then? Surely, in such an event there would be no justifiable basis for interference with her performance. On the other

hand, if she did not conform to the requirements of the regulation, the respondent could then take such action as he deemed proper within the proper and lawful scope of his powers. But until the anticipated offending event actually occurs (and it may never eventuate) the possible happening thereof rests in the realm of pure conjecture.

If the respondents' denial is to prevail a cabaret employee may never have an opportunity to earn a livelihood for such an employee would never be afforded the chance to conform to the requirements of the regulation and such a viewpoint, as the basis for denying an identification card or temporary permit, is an arbitrary one and is, as I view it, unsustainable in law.

It is the common right of every person to engage in the pursuit of a lawful occupation or calling and it is a settled canon of statutory construction with respect to acts in derogation of common-law rights that an act which infringes upon common right is to be strictly construed. 1 McKinney's New York Statutes, Section 311 and cases there cited. It is also a general rule of statutory construction that all statutes are presumed to operate prospectively and are not to receive a retroactive construction unless their language either expressly or by necessary implication requires that they be so construed. 1 McKinney's Statutes, *supra*, Section 51 and cases there cited.

By its very language regulation 20 is plainly prospective in operation, not retrospective,—and if attempted to be made retrospective,—in the absence of any rule or regulation as to the qualifications which an applicant for an identification card must possess,—it is, to that extent, invalid and void.

After due consideration and reflection I have reached the conclusion that petitioner is entitled to a peremptory order directing the respondent to issue to her a cabaret employee's identification card, as prayed for. Settle order on one day's notice.

CONSOLIDATED MINES v. SECURITIES AND EXCHANGE COMMISSION

Circuit Court of Appeals of the United States, 1938. 97 F.2d 704.

HEALY, CIRCUIT JUDGE. The Securities and Exchange Commission, under authority of § 22(b) of the Securities Act of 1933, 15 U.S.C.A. § 77v(b), applied to the district court to enforce compliance with a subpoena duces tecum directed against appellants in the course of an investigation ordered by the Commission. From an order directing obedience to the subpoena, this appeal was taken.

The appellant Consolidated Mines of California is a California corporation, operating in Calaveras County. Appellants Wikoff and Tyler are respectively its president and secretary. On November 5, 1937 the Commission, pursuant to § 20(a) of the Securities Act of 1933, 15 U.S.C.A. § 77t(a), ordered an investigation of the facts concerning alleged violations by appellants of §§ 5 and 17(a) of the act, 15 U.S.C.A. §§ 77e, 77q(a). These latter are shown on the margin.

Pursuant to § 19(b), 15 U.S.C.A. § 77s(b), officers were appointed for the purpose of the investigation and empowered to require the attendance of witnesses and the production of documentary evidence deemed relevant to the inquiry. A copy of the order is annexed to the application filed with the court.

It sufficiently appears from its application and the showing made in support of it that the Commission was in possession of information affording reasonable grounds for the belief that the appellant corporation and its officers, although no registration statement was in effect as to its securities, had for a long period been engaged in the sale of the corporation's stock; further, that during the same period these securities were being marketed on the basis of untrue statements concerning the extent and value of ore bodies and the profits to be derived by the corporation from its operations.

Prior to ordering the investigation, the Commission had received complaints and information tending to establish that those in charge of the affairs of the appellant corporation had undertaken to sell its stock in interstate commerce and through the use of the mails. In these efforts it was represented that the company possessed ore bodies running from \$18.00 to \$38.53 per ton; that the company could have shown a good profit on ore of an average value of \$10.00 per ton, due to low costs of milling; that "our engineers report that we now have enough ore blocked out to justify the erection of the mill with assurance that we have sufficient ore for continuous operation"; that "our assays show that the value of the ore we have developed is much higher than we had anticipated. An average of several hundred assays runs in the neighborhood of \$35.00"; that the company's mill had been producing steadily and that its capacity was being increased. The Commission had information that these representations were false and misleading, and that in fact the company had operated at a substantial loss from its organization to as late as September 30, 1937, the latest date as to which figures were made available to the Commission's investigators.

Acting upon this information, the Commission issued its order to determine whether infractions of §§ 5 and 17 of the act had in fact taken place or were threatened. The officers of the Commission designated to conduct the investigation issued subpoenas directed to the corporation and to appellants Wikoff and Tyler, the latter being ordered to appear at the investigation to be held on November 22, 1937, and there produce the following:

"1. All the engineers' reports, together with covering letters, exhibits, supporting data and supplements in the possession of the company, concerning the McKisson, Grand Prize and/or Mineral Lode Properties in Calaveras County, California.

"2. All mining records and assay records in the possession of Consolidated Mines of California, pertaining to the McKisson, Grand Prize and/or Mineral Lode Properties in Calaveras County, California, for the period from January 1, 1934, to October 1, 1937, including all

sampler's books, assay certificates, assay records, sample maps, the assay and routine records of the McKisson mill, with the head assays, tail assays, concentrate assays, records of tonnage handled, plus the daily records of mill operation, smelter settlement sheets and mint returns, all reports from officers or employees at the properties, all ore reserve estimates including tonnage and grade calculations and maps relative thereto, all records of receipts and disbursements pertaining to any of said properties, including payroll records, material and equipment purchases, maintenance accounts and segregation records showing segregation of receipts and disbursements against development, mining, milling, selling or other costs; the general journal and general ledger of the company concerning said properties, all said records being for the period from January 1, 1934, to October 31, 1937."

The appellants failed to appear, advising the Commission's representative that they would refuse to respond to the subpoena until so ordered by the court. The order subsequently made by the trial court required the production of the documentary evidence called for in the subpoena.

It is urged that the application for the production order was defective in that it did not allege that any complaint or statement of facts respecting the claimed violation of the statute had been filed with the Commission. It is said that § 20(a) requires such complaint or statement as prerequisite to an investigation. This court, in *Woolley v. United States*, 9 Cir., 97 F.2d 258, has held otherwise. § 20(a) provides that "whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title [subchapter], or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts." If the Commission is in possession of facts affording reasonable grounds for the belief that a violation of the act has occurred or is threatened, it may order an investigation. The form of the information or its source is not material.

The appellants do not deny that sales were made and solicited, or that the mails and the means and instruments of communication in interstate commerce were used for this purpose. They say, however, that the sales were made by appellant Tyler of his personally owned stock, independently of the company. The Commission had substantial evidence to the contrary. Letters soliciting sales or encouraging purchases were written on the stationery of the corporation, and in some instances the signers designated themselves as corporate officers. The proceeds of the securities sold were in part loaned or contributed to the corporation and were used to keep the properties in operation, thereby enabling more stock sales to be effected. Certainly, the facts in the possession of the Commission justified an investigation to determine whether the sales were in truth the individual trans-

actions of Tyler, or were made on behalf or at the behest of the corporation.

It appears to be the view of appellants that virtually conclusive evidence of a violation of the act must be in the possession of the Commission before an investigation can be ordered. If this were so there would be no point in conducting an investigation. The very purpose of the inquiry authorized by § 20(a), 15 U.S.C.A. § 77t(a), is to investigate the accuracy of information in the possession of the Commission tending to show a violation, and to aid the Commission in determining whether the facts justify injunction proceedings or the placing of the matter before the Attorney General for the institution of criminal prosecutions. See § 20(b), 15 U.S.C.A. § 77t(b); *In re Securities and Exchange Commission*, 2 Cir., 84 F.2d 316.

It is urged that the investigation is a "fishing expedition" of the sort condemned in *Federal Trade Commission v. American Tobacco Company*, 264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 696, 32 A.L.R. 786; also, that the order for the production of the documents called for is so harsh, sweeping and summary in its terms as to violate the rights of appellants under the Fourth Amendment to the constitution, U.S.C.A. Const.Amend. 4, citing *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746.

We are unable to agree that the order invades the constitutional immunities of the appellants. The materiality of the documentary evidence called for is apparent. The reports of the company's engineers as to the extent of its ore reserves, the values disclosed by assays made, the records of the company relating to the economy and efficiency of its milling operations and to its mining costs, and the records of returns from concentrates and from sales to the mint, are all pertinent to the subject matter of the investigation. All bear on the truth or falsity of the representations shown to have been made on behalf of the corporation in effecting sales of its securities. The case made out by the Commission abundantly discloses the propriety of the order for the production of these records. From them it may be determined whether the stock-selling campaign was in fact based on representations which were materially false or misleading, and whether the corporation and its officers had acted in bad faith. *Newfield v. Ryan*, 5 Cir., 91 F.2d 700; *McMann v. Securities and Exchange Commission*, 2 Cir., 87 F.2d 377, 109 A.L.R. 1445. Compare *Smith v. Interstate Commerce Commission*, 245 U.S. 33, 38 S.Ct. 30, 62 L.Ed. 135; *Wheeler v. United States*, 226 U.S. 478, 483, 33 S.Ct. 158, 57 L.Ed. 309; *Brown v. United States*, 276 U.S. 134, 48 S.Ct. 288, 72 L.Ed. 500.

Investigations of the sort here under consideration are analogous to those of a grand jury. In *re Securities and Exchange Commission*, supra; *Woolley v. United States*, supra. The scope of the inquiries of a grand jury, it has been said, is "not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found

properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Blair v. United States*, 250 U.S. 273, 39 S.Ct. 468, 471, 63 L.Ed. 979; see, also, *Norcross v. United States*, 9 Cir., 209 F. 13.

Affirmed.

NOTE

See Davis, "The Administrative Power of Investigation", 56 *Yale L.J.* 1111 (1947).

WALLACE v. MAYOR OF RENO

Supreme Court of Nevada, 1903.

27 Nev. 71, 73 P. 528, 63 L.R.A. 337, 103 Am.St.Rep. 747.

TALBOT, J. Among other things, the petitioner alleges that on the 15th day of May, 1903, he paid for and received a license from the city of Reno to conduct the business of retail liquor dealer for the period of three months; that on or about the 3d day of last June he received a request from the respondents to attend a meeting on the same evening, and to give them all the information he possessed relative to an alleged charge that he was conducting his business in such a manner as to be a nuisance, or detrimental to public peace or morals; that he complied with this request, and stated he would do all he could to protect his patrons; that later, and on or about the 3d day of June, he was served with a citation issued by the respondents, ordering him to appear before the council on the 4th day of June, and show cause why his license should not be revoked; that the citation did not state the grounds upon which it was proposed to revoke the license; that no due and legal proceedings or investigation were had, and no evidence relevant, competent, or material was introduced tending to prove the truth of the charge; that the council then adjourned until June 6th, at 6 p. m., when, on motion, the license of petitioner was revoked, withdrawn, and discontinued; that during the investigation respondent Luke stated that he had received information relative to the charge at a time other than their regular open meeting, but when sworn as a witness on behalf of petitioner he refused to divulge the names of his informants. It is further asserted in the petition that respondents acted in excess of their jurisdiction because their proceedings were arbitrary, and petitioner did not have an opportunity to make a fair, full, legal, and complete defense to the charge; and, further, that they had no legal power or authority to conduct such investigation, or to issue citation to petitioner, or to revoke his license, unless upon a complaint or petition being first filed with them.

Respondents demur to the petition on the ground that it fails to state sufficient facts in different respects.

We deem it necessary to consider only one of the objections raised, as that goes to the merits and is conclusive. It may be assumed from the allegations of the petition, and it was conceded on the argument,

READ & MACDONALD U.C.B.LEG.

that the city council voted unanimously in favor of revoking the license.

Section 20, subd. 8, of the act incorporating the city of Reno (St. 1903, p. 189), specifies that the city council shall have power "to fix and regulate a license upon, and regulate all characters of business conducted within the corporate limits, and to license, regulate, prohibit or prescribe the location of saloons or barrooms." Sections 1 and 3 of an act approved March 10, last (St. 1903, p. 81), authorizes all city councils and licensing boards "to revoke, withdraw and discontinue any business license, where there is reason to believe that such business is a nuisance, a menace to public health or detrimental to the peace or morals: provided, that such revocation, withdrawal or discontinuance shall, when the action is taken on motion of, or at the instance of a member of the board, be by unanimous consent." This language does not suggest any notice to the licensee, and, so far as the statute is concerned, it is apparent that none is necessary when the license is revoked on the motion of a member and by unanimous vote of the board, and that they may act *ex parte* and arbitrarily, and the only protection to the innocent holder of a license lies in the unanimity required for its revocation, and in the honesty, confidence, and efficiency of the members of the board as public officials, and the probability that it would be restored upon a showing that it had been unjustly or improperly annulled. Regardless of the requirements and validity of the statute, it is fairer and better that notice be given as was done in this case. By appearing the petitioner waived notice, but, as he objects to the sufficiency of the citation, we prefer to treat the case on the merits, and as if there had been no notice or appearance.

Section 2 of the act last mentioned provides another method of revocation, and for an investigation by the board, on the petition of a taxpayer, supported by 10 per cent. of the freeholders, but is also silent regarding notice to the licensee.

It becomes pertinent to determine whether the petitioner has a vested or contract right in his license, of which he cannot be deprived without formal process of law by the Legislature, or the city council through those statutory enactments, under the fifth amendment to the Constitution of the United States, providing that no person shall be deprived of life, liberty, or property without due process of law, or under the limitations of our state Constitution. In the latter document, section 2 of article 1 proclaims the fundamental truth that all political power is inherent in the people, that government is instituted for their protection, security, and benefit, and that they have the right to alter and reform the same whenever the public good may require. Section 20 of article 4 prohibits the Legislature from passing local or special laws for the assessment and collection of taxes, and article 10 requires the Legislature to provide for a uniform and equal rate of assessment and taxation and for a just valuation of all property. As held by this court in *Ex parte Robinson*, 12 Nev. 263, 28 Am. Rep. 794, and *Ex parte Cohn*, 13 Nev. 427, these limitations apply to taxes, and not to licenses, leaving the Legislature to regulate the latter with a free hand where

they do not encroach and discriminate in relation to taxes as properly and ordinarily understood, and without other restraint except the responsibility of the legislators to their constituents.

Questions kindred to the main one here have been carefully considered by a number of courts in our sister states, and by the Supreme Court of the United States, and the reasoning and conclusions reached are peculiarly applicable and convincing.

In *State v. Schmidt*, 65 Iowa 556, 22 N.W. 673, this language is used in the decision: "The law under which the permit was issued provides in express terms that if the defendant sold liquors for unlawful purposes the permit should be revoked. He received and accepted the permit under such condition. He was not, therefore, deprived of property when the permit was revoked. *Hurber v. Baugh*, 43 Iowa, 514. Therefore it cannot be said that the defendant has been deprived of property without due process of law."

We quote extensively from *La Croix v. County Commissioners*, 49 Conn. 591:

"In the case of *Calder v. Kurby*, 5 Gray, 597, a license to sell intoxicating liquors had been granted for a certain period. Before the period had expired the license was annulled. It was urged upon the argument in behalf of the plaintiff that the license was a contract and within the protection of the Constitution of the United States. But the court overruled the claim. Mr. Justice Bigelow in giving the opinion says: 'The whole argument of the counsel for the plaintiff is founded on a fallacy. A license authorizing a person to retail spirituous liquors does not create any contract between him and the government. It bears no resemblance to an act of incorporation, by which, in consideration of the supposed benefits to the public, certain rights and privileges are granted by the Legislature to individuals, under which they embark their skill, enterprise, and capital. The statute regulating licensed houses has a very different scope and purpose. The effect of a license is merely to permit a person to carry on the trade under certain regulations and to exempt him from the penalties provided for unlawful sales. It therefore contained none of the elements of a contract. The sum paid for it was merely nominal, and there was no agreement, either express or implied, that it should be irrevocable. On the contrary, it is manifest that this statute, like those authorizing the licensing of theatrical exhibitions and shows, sales of fireworks and the like, was a mere police regulation, intended to regulate trade, prevent injurious practices, and promote the good order and welfare of the community, and liable to be modified and repealed whenever, in the judgment of the Legislature, it failed to accomplish these objects.'"

In *Martin v. State*, 23 Neb. 377, 36 N.W. 557, *Reese, C. J.*, delivering the opinion of the court, says: "But it is contended that, before the mayor and council can legally revoke the license, notice must be given to the licensee, in order that he may show cause, if any exists, why the license should not be revoked. In support of this contention, it is insisted that the license is a franchise, or public right, vested in the in-

dividual, and for which he has paid a consideration, and therefore it has all the necessary elements of property, under the provision of the Constitution that 'no person shall be deprived of life, liberty, or property, without due process of law.'"

In *Commonwealth v. Kinsley*, 133 Mass. 579, the court states: "A license had been duly granted to the defendant, and it had been revoked by the selectmen without giving him notice of their intention to revoke it. The keeping of a pool table for hire is one of many things affecting the public morals, which the Legislature can either absolutely prohibit or can regulate, and one common form of regulation is by requiring a license. A licensee takes his license subject to such conditions as the Legislature sees fit to impose, and one of the statutory conditions of this license was that it might be revoked by the selectmen at their pleasure. Such a license is not a contract, and a revocation of it does not deprive the defendant of any property, immunity, or privilege, within the meaning of these words in the Declaration of Rights, art. 12. . . ."

History tells us that from the early days of Egypt, Greece, and Rome the leading nations of the world have maintained restrictions upon the use of wine. The common law of England regulated the sale of ardent spirits, and the same policy has been pursued in this country from colonial days. Custom from time immemorial and the cases cited indicate that the Legislature, in the exercise of police power belonging to the state, could prohibit entirely, or impose such conditions as it deemed best for the issuance and annulment of permits to sell intoxicating liquors. They saw fit to authorize the city council to revoke licenses for the reasons and in the manner stated before. The one in question was granted to and accepted by the petitioner under these conditions and after their enactment. It is the rule that, where parties contract or act in contemplation of a statute then in force, its provisions are deemed to constitute a part of the agreement, just as though they had been incorporated in it. *Hutchins v. Town*, 118 N.C. 468, 24 S.E. 723, 32 L.R.A. 706, citing *Koonce v. Russell*, 103 N.C. 179, 9 S.E. 316; *Cooley, Const.Lim.* p. 265; *McCless v. Meekins*, 117 N.C. 34, 23 S.E. 99; *Strickland v. Pennsylvania*, etc. (Pa.) 26 Atl. 431, 21 L.R.A. 224.

From a general review of the authorities it appears that a license for the sale of liquors may be revoked before the expiration of the time for which it has been granted by act of the Legislature directly, or by the will of a majority of the voters expressed at an election, or by the board or mayor in their or his discretion, and with or without notice to the licensee, if statutory authority and conditions be pursued. It is apparent that the respondents acted within the letter and requirements of these statutory provisions, and that they are not unconstitutional.

The demurrer to the petition is sustained for the reasons indicated, and the costs of this proceeding are taxed against the petitioner.

NOTES

1. The federal Administrative Procedure Act 1946, § 9 (b), reads:

"Licenses.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been fully determined by the agency."

Cf. Note "Procedural Due Process in Occupational License Cases", 20 Neb.L.Rev. 24 (1941).

2. For a detailed treatment of drafting problems peculiar to bills for licensing and inspection act, see Final Report of the A.B.A. Committee on Legislative Drafting, Appendix C, "Abstract of Statutory Precedent", 46 Rep.A.B.A. 435-443 (1921).

3. For specific problems arising under licensing provisions see: (a) "Validity of statute or ordinance in relation to resale of tickets to places of amusement," 38 A.L.R. 613 and 58 A.L.R. 1236, and N.Y. General Business Law as added by Laws 1922, c. 590; Amended N.Y. Laws 1928, c. 600, § 1: Laws 1937, c. 699, Laws 1940, c. 614, § 1; (b) "Constitutionality of license statute or ordinance as affected by delegation of authority as to amount of bond of licensee", 107 A.L.R. 1506; (c) "Failure to procure occupational or business license or permit as affecting validity or enforceability of contract," 118 A.L.R. 646; and "Blue Sky Laws" 81 A.L.R. 128; (c) "Personal Liability of public officer for refusing to grant application for license", 85 A.L.R. 298; (d) "Power to exact license fees or impose a penalty for benefit of private individual or corporation", 19 A.L.R. 205.

SECTION 14. PUBLICITY

EXAMPLES OF PUBLICITY PROVISIONS

1. In Hanna and Turlington, "The Securities Act of 1933", 28 Ill.L.Rev. 482 (1933), the authors say: "The central idea in the Securities Act is to protect the investor by imposing upon the seller responsibility for full disclosure in advance of the sale. This notion of publicity as a safeguard is also basic to the British Companies' Act of 1929 to which frequent reference was made in the debates on the American legislative proposals."

2. N.Y. Personal Property Law, § 46, as added by N.Y.Laws, 1934, c. 738, § 1, amended by Laws, 1937, c. 700, § 1, Laws 1943, c. 588, subdivision (1):

Wage Assignments; when valid; amount collectible thereunder

1. No assignment of or order for the payment of any salary, wages, commissions, or other compensation for services to be earned in the future, securing or relating to any indebtedness aggregating less than one thousand dollars, shall be

valid for any purpose whatsoever unless: (a) such assignment or order shall be contained in a separate written instrument in which all printed matter is in at least eight point type and which shall have written or printed thereon in a size equal to at least ten point bold type the following title: "Assignment of Wages, Salary, Commissions or Other Compensation for Services," and shall have written or printed at the bottom thereof just above the place reserved for the signature of the assignor in a size equal to at least ten point bold type the following: "This is an Assignment of Wages, Salary, Commissions or Other Compensation for Services"; (b) such assignment or order shall, either in its text or in a writing permanently attached thereto, identify specifically and describe fully the transaction to which it relates, said description to include the name and address of the assignee, the identity of the merchandise sold or services rendered or other basis of the indebtedness, the date on and place at which payments are to be made; and on the back of the instrument shall be a summary of section forty-six of the personal property law; (c) such assignment or order is security only for the transaction or series of transactions identified specifically and described therein and no other such assignment or order exists in connection with the same transaction or series of transactions; (d) the salary, wages, commissions, or other compensation for services of the assignor amounts at least to the sum of fifteen dollars per week if the assignor is employed in a city with a population of two hundred and fifty thousand or more, and at least to the sum of twelve dollars per week if the assignor is employed elsewhere, and (e) the assignment or order is personally executed by the assignor and a copy of the assignment or order and of any papers attached thereto together with a copy or copies of any papers executed by the assignor pertaining to the transaction or series of transactions described in the assignment or order are delivered to the assignor.

3. N.Y. Stock Corporation Law, § 77:

§ 77. Financial statement to stockholders. Stockholders owning three per centum of the shares of any corporation other than a moneyed corporation may make a written request to the treasurer or other fiscal officer thereof for a statement of its affairs, under oath, embracing a particular account of all its assets and liabilities, and the treasurer shall make such statement and deliver it to the person making the request within thirty days thereafter, and keep on file in the office of the corporation for twelve months thereafter a copy of such statement, which shall at all times during business hours be exhibited to any stockholder demanding an examination thereof; but the treasurer shall not be required to deliver more than one such statement in any one year. The supreme court, or any justice thereof, may upon application, for good cause shown, extend the time for making and delivering such statement. For every neglect or refusal to comply with the provisions of this section the corporation shall forfeit and pay to the person making such request the sum of fifty dollars, and the further sum of ten dollars for every twenty-four hours thereafter until such statement shall be furnished.

4. N.Y. Correction Law, § 271, as added by N.Y. Laws 1931, c. 455; amended Laws 1933, c. 151, § 4; and sec. 272, as added by Laws 1931, c. 455, § 1.

§ 271. Board of visitors. There shall continue to be a board of visitors of each [such] reformatory, consisting of seven members who shall be appointed by the governor, by and with the advice and consent of the senate. Of the members of the board of visitors of the reformatory at Bedford Hills, two shall be women and one a physician of at least ten years' practice in his profession. The full term of office of each visitor shall be seven years. The present members of each such board are hereby continued in office until the expiration of the terms for which they were appointed managers or visitors, unless sooner removed as herein provided. Each such board of visitors shall appoint from among its members, a president and

a secretary. Such visitors shall receive no compensation for their services, but shall receive their reasonable traveling and other official expenses.

§ 272. General powers and duties of boards of visitors. Boards of visitors, with respect to the reformatories for which they are respectively appointed, shall have the powers and duties expressly conferred or imposed on them by this article and shall be directly responsible to the commissioner of correction with such other powers and duties, not inconsistent with law, as may be prescribed by rules of the department. Each board shall

1. Subject to the rules and statutory powers of the department, take care of the general interest of the reformatory and see that its design is carried into effect; have general supervision of the inmates with such powers as are delegated by the commissioner of correction; have general supervision of the grounds and buildings; and exercise supervision of the appointments and discharges of employees recommended by the superintendent.

2. Maintain an effective inspection of the reformatory, for which purpose the board, or a majority of its members, shall visit and inspect the reformatory at least once each month. Each board shall make a written report to the department within ten days after each inspection, such report to be signed by each member making the inspection. Such report shall state in detail the condition of the reformatory and of its inmates, and such other matters pertaining to the management and affairs thereof as in the opinion of the board should be brought to the attention of the department and may contain recommendations as to needed improvement in the reformatory or in its management.

3. Keep in a book provided for that purpose a fair and full record of their doings, which shall be open at all times to the inspection of the commission of correction and its members and authorized representatives of the department.

4. Hold regular meetings at least once each month.

5. Enter in a book, kept at the institution for that purpose, the date of each visit of each visitor.

6. Make from time to time such reports and furnish such information to the department as the commissioner of correction shall require.

7. Investigate, hear and ascertain the truth of all charges made against the superintendent or other officer or employee of the reformatory, issue subpoenas, take and hear testimony in respect to such charges and make its recommendations thereon to the authority having the power to discharge or remove. A witness attending before such board shall be entitled to the same fees as a witness attending before a court of record or a judge thereof, which shall be paid as other institutional charges. The resident officers shall admit such visitors into every part of the reformatory and its buildings, and exhibit to them on demand all the books, papers, accounts and writings belonging to the reformatory, or pertaining to its business, management, discipline or government, and furnish copies, abstracts and reports whenever required by them.

THE KANSAS MILLING COMPANY v. FRANK J. RYAN

Supreme Court of Kansas, 1940. 152 Kan. 137, 102 P.2d 970.

THIELE, J. This is an original proceeding in mandamus brought to compel the secretary of state to file a certificate of amendment of plaintiff's charter as a corporation and to issue a certified copy thereof to be recorded in the office of the register of deeds.

The motion for the writ alleges that plaintiff is a corporation duly organized under the laws of Kansas with its principal place of business at Wichita, and that defendant is the secretary of state of the state of Kansas; that plaintiff is authorized to and is engaged in the manufacture, sale and distribution of wheat products; that in 1939 the legislature of Kansas passed a new general corporation code, reference being made to certain sections hereafter mentioned; that the congress of the United States passed a new food, drug and cosmetic act which provides that a food shall be deemed to be misbranded if in package form unless it bears a label containing the name and place of business of the manufacturer (U.S.C.A. Tit. 21, § 343[e]), and it is alleged that under regulations promulgated under that act a trade name can be used by the manufacturer if the trade name has legally recognized identity, and legal recognition to do business under such trade name has been accorded to the manufacturer; that the plaintiff corporation has been using the names hereafter mentioned. That plaintiff is known to the public and its trade in connection with the sale of its products by those names in connection with its business, and, in order to comply with the federal act mentioned, to amend its charter authorizing its use of the names so that they will have a legally recognized identity. That, in accordance with statutory requirements, it was voted by the stockholders to amend its articles of incorporation by adding a new subdivision, reading as follows:

"That this corporation shall have the power to conduct the affairs and business of the corporation under the trade names of:

Marion Milling Company, Wichita, Kan.; Marion Milling Company, Marion, Ohio; St. Johns Mills, St. John, Kan.; The Lassen-Jackman Milling Company, Wichita, Kan.; Southern Milling Company, Wichita, Kan.; and Cereal Research Laboratories,

and all such other trade names as the board of directors may, from time to time, determine."

And thereafter on December 11, 1939, the amendment was duly certified as required by statute and tendered to the secretary of state together with a copy to be certified by him for filing with the register of deeds of Sedgwick county, with the requisite statutory fees; that the secretary of state refused to file the certificate of amendment, for the asserted reason the general corporation code did not contemplate such an amendment, and that the trade names set out in the amendment do not appear to be trade names. After making allegation that it had no adequate, plain and complete remedy at law, that it was entitled as a matter of right to have the certificate of amendment filed by the secretary of state, etc., and that it would suffer irreparable damage if it did not obtain relief, it prayed for a writ of mandamus to compel the secretary of state to file the certificate of amendment and to furnish it with a certified copy, etc. . . . It was later stipulated that the secretary of state does not contend that plaintiff is seeking to amend its charter to permit it to use additional names with fraudulent intent or to deceive persons dealing with it.

Plaintiff filed its motion for judgment on the pleadings on the ground the answer does not state a defense to the alternative writ, and the cause is submitted to us on the motion. . . .

Plaintiff's contention is that it has been using the suggested names in connection with its business in certain localities and that by reason thereof the names have legally recognized identity; that natural persons may lawfully transact business under trade names (*Badger Lumber Co. v. Collinson*, 97 Kan. 791, syl. ¶ 3, 156 P. 724) and the corporation may lawfully do likewise, and therefore it has the right to amend its articles of incorporation to so state. As a specific reason, it pleads the federal food, drug and cosmetic act, referred to above, and contends that if its trade names have legally recognized identity and there is legal recognition of its right to do business under those trade names, then its use of them may be continued with consequent nonviolation of the federal act. However persuasive the last contention argued may be, it is not controlling in determining whether or not it is entitled to the relief it seeks. That depends on the state law.

It is apparent that plaintiff is not seeking to use the names to identify certain containers in which its products are marketed, for if that were the case it could obtain ample protection by complying with G.S. 1935, ch. 81, pertaining to registration of trademarks, names, etc. It is apparent that what it desires is to use different names at different places in a sort of series of alter egos.

We note the contention of the defendant that the names are not trade names. A discussion of whether the names have the attributes of trade-marks, trade slogans, trade-mark names or trade names would lead into a field in which there is great confusion, and any conclusion reached would hardly be decisive of the question before us. Discussions may be found in *Hopkins on Trade-marks, etc.*, 4th ed., page 10, § 4; *Nims on Unfair Competition & Trade-marks*, 3d ed., 124, ch. 5; 26 R.C.L. 828; 63 C.J. 308-322. For our purposes we shall consider the names as being those properly applicable to business concerns doing a milling business at the locations mentioned for such length of time they were generally known and recognized, and trade names in that sense.

Without attempting a complete discussion, it may be said that in the field of corporation law generally there has been diversity of views concerning the right of a corporation to use an assumed or trade name in lieu of its legal name and its rights and liabilities where such a name has been used, as is indicated in 6 *Fletcher's Cyclopedia Corporations* (Perm. ed.), page 87 et seq. § 2442 . . .

And a discussion of the subject will also be found in 14 C.J. 307 et seq., 18 C.J.S. 560 et seq., 7 R.C.L. 126 et seq., and 13 Am.Jur. 268 et seq. And see the annotation in 56 A.L.R., 450.

We are of the opinion that whether the plaintiff is entitled to the relief it seeks is to be determined from our general corporation code, and the general policy of it as declared by or inferred from its provisions. The general corporation code has no provision expressly pro-

hibiting the use of trade names, and whether a corporation may do so is to be determined from the code generally. . . . It is true that generally individuals may use assumed or trade names, and that two or more persons may associate themselves together to conduct a business under such names, but it does not follow that three or more persons may associate to establish a corporation for the transaction of any business for which natural persons may associate and have the right to use assumed or trade names, for the reason that the right to incorporate is regulated and limited by the provisions of the general corporation code. In the case of the individual or partnership, there is generally unlimited liability for debt, but as to the stockholders of the corporation that is not true. The individual may change the name or title under which he does business as often as he chooses, so long as fraud, deceit, etc., are not involved. (See *Badger Lumber Co. v. Collinson*, supra.) Obviously, a corporation cannot do that, or if it can, the provisions of the code for amending its name and title are meaningless. If it be said that the corporation may have the right to use trade names without change of its corporate title, and that such names may be included in its articles of incorporation, either originally or by amendment, then the question arises as to the effect of designation of its resident agent under section 11C, and under what name or names the agent is to be designated. The articles of incorporation or any amendment must be recorded in the office of the register of deeds of the county where the registered office is located in this state, as is provided in sections 13 and 129. One of the names plaintiff seeks to use is "St. Johns Mills, St. John, Kansas." That designation would lead to the belief the concern was in Stafford county, Kansas, but an inquirer would search in vain in the office of the register of deeds of that county to find the articles of incorporation or any amendment thereto or the designation of any resident agent. Under section 18, the articles of incorporation must state the place where its registered office is located and the name and address of its registered agent, as it is required to have by section 142. Under section 143, it is required that every corporation have its name, not names, conspicuously displayed in large letters in its registered office, and following sections provide for change of location of its registered office and designation of its registered agent, and for the filing of certificates in the office of the register of deeds in the county where the new office is located. Certainly this does not contemplate that a corporation may be domiciled in one county and comply with the requirements of the statute insofar as its primary legal name and title is concerned, and then transact its business there and elsewhere under a series of names entirely different from its corporate name, and especially is this true where the trade name has a geographical connotation. If it be argued that the amendment setting forth the names will be filed in the county where the registered office is located, and that the public will then have notice, we direct our attention to the latter part of the proposed amendment, where after setting forth six specific trade names, the corporation is also to have power to transact business under "all such other trade names as the board of directors may, from time to time,

determine." If the provision for recording the articles of incorporation or amendments means anything, it would be futile with respect to "such other trade names," for no public record would disclose them. It may be observed, also, that if a corporation may include legally one or five or six trade names in its articles of incorporation, then it may just as legally include a score or more of them. We do not think the statutes contemplate or permit that such a thing be done.

If it be assumed that a corporation may have more than one name in which it is legally authorized to do business by reason of the inclusion of additional names in its articles of incorporation, then those names must, in order to comply with the provisions of section 11, be followed by the word "Incorporated" or the abbreviation "Inc." and those included in the proposed amendment are not.

To sum up, we are of the opinion that the general corporation code not having in it any permission for it so to do, a corporation may not, either in its articles of incorporation or by amendment thereto, obtain the right to conduct its business under a trade name or series of trade names in addition to its corporate name and title.

The writ of mandamus is denied.

NOTES

1. See N.Y.Penal Law, § 440, as amended by N.Y.Laws 1915, c. 446; Laws 1919, c. 224; Laws 1926, c. 202; Laws 1929, c. 58; Laws 1938, c. 428; Laws 1942, c. 865.

2. Matter of Birdwell, 268 App.Div. 642, 53 N.Y.S.2d 77 (1945):

"UNTERMYER, J. The petitioner Russell Birdwell is a public relations counsel of wide reputation, who maintains offices both in the United States and Europe. In August, 1944, he tendered to the County Clerk of New York County for filing a certificate in alleged compliance with section 440 of the Penal Law reciting the transaction of business under the designation 'Russell Birdwell and Associates', notwithstanding that the certificate revealed that no other person was associated in business with him. The County Clerk refused to file the certificate, but upon application to the Special Term the certificate was directed to be filed as not in contravention of any provision of law. From that determination the County Clerk appeals.

"Even if it be assumed that the name under which the petitioner intends to do business is not expressly prohibited by section 924 of the Penal Law nor by section 82 of the Partnership Law, the County Clerk should not be required under legal compulsion to accept a certificate which is misleading to the public. (Cf. *People ex rel. Blossom v. Nelson*, 46 N.Y. 477; *People ex rel. Davenport v. Rice*, 68 Hun 24, 22 N.Y.S. 631.) The certificate offered for filing, by which the petitioner would conduct business as 'Russell Birdwell and Associates', although concededly he has no 'Associates', would inevitably have such a tendency. The statutes which expressly prohibit the use of the designations 'and company' or 'and Co.', do not imply that all other designations, no matter how misleading, are permissible. (*Barker v. Koenig*, 135 App.Div. 16, 119 N.Y.S. 777.)

"The petitioner asserts that the County Clerk has accepted for filing a certificate authorizing him to do business as 'Russell Birdwell Associates'. He maintains that there is no substantial difference between that designation and 'Russell Birdwell and Associates' and, accordingly, that the County Clerk should not have rejected the certificate which is the basis of this appeal. We are inclined to agree with the peti-

tioner that the difference between these two forms of designation is unsubstantial and almost imperceptible. However, the right to file under the designation 'Russell Birdwell Associates' is not before us on this appeal and, therefore, need not be considered by us.

"The order should be reversed, with twenty dollars costs and disbursements, and the application denied."

3. *Shattls v. Watson*, 295 N.Y. 582, 64 N.E.2d 285 (1945):

Appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered June 1, 1945, which affirmed, by a divided court, two orders of the Supreme Court at Special Term (Cohalan, J.), entered in New York County, one denying petitioner's motion to compel the Clerk of the County of New York to accept for filing under section 440 of the Penal Law two certificates of doing business under assumed names and the other adhering, upon reargument, to the original disposition of the motion. By the certificates tendered for filing petitioner sought to use the assumed names of "The Insurance Counselor" and "The Insurance Counselor's Organization". The remedy in the nature of mandamus was denied in the courts below. In the Court of Appeals petitioner contended that respondent's refusal was arbitrary and unreasonable because (1) no statute prohibited an individual from using a trade name with the word "insurance" in it, (2) that the use of the two assumed names sought did not violate any provision of law, and (3) that the prohibition contained in section 666 of the Penal Law limited the use of the word "insurance" only in a corporate title and not by an individual and was intended to implement the prohibition contained in section 9 of the General Corporation Law applying to corporations. Respondent argued that he should not be required to accept a certificate which is misleading to the public, citing *Matter of Birdwell*, 268 App.Div. 642, 53 N.Y.S.2d 77.

Order affirmed, with costs; no opinion.

Concur: Loughran, Ch. J., Lewis, Conway, Thatcher and Dye, JJ. Desmond and Medalle, JJ., dissent and vote to reverse and remit the proceeding to Special Term with instructions to grant the mandamus order prayed for, on the ground that the County Clerk has no discretion as to whether or not to accept for filing a certificate of doing business under an assumed name, where, as here, the use of the assumed name shown on the certificate does not appear to violate any law.

SECTION 15. SOME PREVENTIVE DEVICES

MARGARET V. LYBOLT, A PUBLIC ENEMY LAW FOR NEW YORK

(A Study Prepared for the New York Law Revision Commission.)
N.Y.Leg.Doc. (1935) No. 60 (K), 7-36. 1935 Rep.Rec.,
St.Law Rev.Comm. 593-622.

In the last few weeks the public has been aroused by a clamorous press to the necessity for "putting teeth" in the New York public enemy law. This statute, which was enacted to permit the harassing of professional criminals who could not be convicted of any specific offense, requires proof of an unlawful purpose on the part of the accused. Because it is impossible for the State to secure such proof, the statute has failed of its purpose, and hence the demand for its revision. Public enemy laws in other states have been more stringent,

but two of them have been declared unconstitutional.¹ Their fate warns us of the necessity for proceeding cautiously in any revision of the New York law.

The Vagrancy Laws

Public enemy laws are the modern offshoots of the statutes prohibiting vagrancy. Both may be justified more as preventive than as punitive measures. They are aimed at a course of conduct more or less innocent in itself because it will in all probability lead to crime.² Both are couched in broad and indefinite terms. In Anglo-American law, the vagrancy statute dates from the feudal period, when it was used to punish the fugitive serf.³ By 1597, however, it had assumed its modern role of a preventive. The statute of that year, 39 Eliz. c. 4, included in its definition of rogues and vagabonds

all wandering persons and common laborers, able in body and refusing to work for the wages commonly given.⁴

The act 5 Geo. 4, c. 83, passed in 1824, still remains on the statute books in England. It extended the definition of vagrancy to include offenses against public decency and acts which while not criminal, nevertheless verged on criminality. One of its broader provisions is as follows:

Every suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street with intent to commit felony . . . shall be deemed a rogue and vagabond. . . .⁵

The New York Vagrancy Statute

Before the enactment of the New York public enemy act, there existed in this state statutes under which many professional criminals might have been apprehended. Under Section 898-a of the Code of Criminal Procedure, a person who has been convicted as a thief, burglar, pickpocket, counterfeiter or forger and attends a gathering of people for an unlawful purpose is a disorderly person and may be imprisoned for not more than one hundred days. Under Section 512 of the Code of Criminal Procedure, one who has been adjudged an habitual criminal, if found in possession of tools used for the commission of crime or when found under circumstances which would lead to a belief that he is intending to commit some crime, is liable to punishment

¹ Those of Illinois and Michigan. *People v. Belcastro*, 356 Ill. 144, 190 N.E. 301 (1934); *People v. Alterie*, 356 Ill. 307, 190 N.E. 305 (1934); *People v. Licavoli*, 264 Mich. 643, 250 N.W. 520 (1933).

² 8 R.C.L. 339 (1929); 66 C.J. 399 (1934); 80 Pa.L.Rev. 565, 568 (1932).

³ Stephen's Hist.Crim.L. (1883) 267, 274.

⁴ *Id.* at 272.

⁵ § 4.

as a disorderly person if he cannot give a satisfactory account of himself to the magistrate. Under Section 887(10) of the Code of Criminal Procedure, "a person who has been more than once convicted as a pickpocket, thief, or burglar, and having no visible means of support, found loitering about steamboat landings, railroad stations, banking institutions, crowded thoroughfares, cars, omnibuses, hotels, or any public gatherings or assembly, and unable to give a satisfactory explanation of his presence" is declared a vagrant. All these sections, however, are too narrow to convict a person without a record, and require special circumstances which might not always be present or might be difficult to prove.

Section 887(1) of the Code of Criminal Procedure is broader in defining as a vagrant "a person who, not having visible means to maintain himself, lives without employment." The constitutionality of this subdivision of the New York statute is none too clear. It would not be held void for indefiniteness, since the term "without visible means of support" is the classical phrase employed in vagrancy statutes in almost every state, and has so often been construed that its meaning is well-defined.¹¹⁶ An objection that might be urged, however, is that it deprives the accused of due process in punishing mere idleness. It penalizes a state of being which the accused may, in times of unemployment, be helpless to remedy. The New York law, unlike the statutes upheld in *Ex parte Strittmatter*¹¹⁷ and *Ex parte Karnstrom*,¹¹⁸ does not require any act such as "loitering" or "wandering" to accompany the state of being without visible means of support. In sustaining the validity of the statute prohibiting "tramping or wandering from place to place" without visible means of support, the court in the *Karnstrom* case remarked that it did not penalize mere poverty and that one going from place to place seeking employment was not within its terms. If the New York statute is to be construed to mean that it does not include persons without visible means of support who have made an honest effort to procure employment, it is defective in not so providing. To insure its constitutionality, subdivision 1 might be amended to include a provision like that appearing in the statutes of sixteen other states to the effect that the prohibition does not extend to those who make an honest effort to procure employment.¹¹⁹ The

¹¹⁶ *Ex parte Taft*, 284 Mo. 531, 225 S.W. 457 (1920).

¹¹⁷ 58 Tex.Cr.R. 156, 124 S.W. 906, 137 Am.St.Rep. 937, 21 Ann.Cas. 477 (1910).

¹¹⁸ 297 Mo. 384, 249 S.W. 595 (1923). In *ex parte Hudgins*, 86 W.Va. 526, 103 S.E. 327, 9 A.L.R. 1361 (1920), the court held unconstitutional a statute providing that every able-bodied male between sixteen and sixty except students who should fail to work at least thirty-six hours a week, should be held a vagrant. *Contra*, on ground that it was war measure, *State v. McClure*, 7 Boyce 265, 105 A. 712 (Del.1919).

¹¹⁹ *Ariz.Code* (Struckmeyer, 1928) § 4868; *Ark.Dig.Stat.* (Crawford and Moses, 1921) c. 43, § 2801; *Cal.* Penal Code (Deering, 1931) pt. 1, tit. 15, c. 2, § 647; *Hawaii Rev.Laws* (1925) c. 288, § 4492; *Idaho Code Ann.* (1932) c. 46, § 17-4601; *Ind.Ann.Stat.* (Burns, 1933) c. 46, § 10-4602; *Kan.Rev.Stat.Ann.* (1923) c. 21, § 21-2409; *Mont.Rev.Code* (Choate, 1921) c. 54, § 11521; *Nev.Comp.Laws* (Hillyer, 1929) c. 18, § 10302; *Ohio Gen.Code* (Page, 1926) c. 20, § 13409; *Okl.Stat.* (Harlow, 1931) c. 15, § 2581; *Ore.Code Ann.* (1930) § 14-720; *Pa.Stat.Ann.* (Purdon, 1930) tit. 18, § 2031; *Utah Rev.Laws Ann.* (1933) c. 58, § 103-58-1; *Va.Code Ann.* (1930) c. 111, § 2808; *Wash.Rev.Stat.Ann.* (Rem. 1932) c. 10, § 2688.

California statute might well be used as a model since it could not easily be attacked as unconstitutional for indefiniteness. It reads as follows:

Every person without visible means of living who has the physical ability to work, and who does not seek employment, nor labor when employment is offered him, is a vagrant.¹²⁰

Prosecution under Subdivision 1 of the vagrancy statute should prove as effective in curbing organized crime as a statute penalizing consorting. A defendant convicted under this section may receive a sentence of six months as in the case of conviction under Section 722.¹²¹ Trial for vagrancy is summary.¹²² As an objection to the enforceability of Subdivision 1, however, it has been contended that magistrates of New York City refuse to convict under it if the defendant is in the possession of money when arrested. Authority on the possession of funds as a defense to a charge of vagrancy is meager, but it would seem that the requirement of visible means of maintenance refers to a source of income over a period of time. A dictum to the effect that possession of money is not a good defense in a prosecution for vagrancy is contained in the concurring opinion of *People v. Cramer*.¹²³ In support of this contention is an article in *Justice of the Peace*, where it is said of the defendant,

It then becomes less a question of how many coppers he has upon him than of what is his mode of life, whether he works, lives on his friends, enjoys a private income or is unable to say how he lives.¹²⁴

While possession of money should not be a defense, it is possible that prosecution of professional criminals under the vagrancy statute might be defeated by incorrect rulings. To eliminate this possibility, a provision that possession of funds is not a defense might be inserted in Section 887 of the Code of Criminal Procedure. Should this amendment be made, it would seem that all the undesirables included in the terms of Section 722(11) might be apprehended under this subsection of the vagrancy statute. Only those criminals who could prove a lawful means of support would have a valid defense, but those same defendants would in all probability have sufficient means to forfeit bail and avoid conviction under Section 722.

If a new public enemy law is adopted, it will take the form either of a vagrancy statute or of a statute prohibiting consorting. Of the two, the former is preferable. Its constitutionality is less doubtful than that of a statute penalizing mere association, and if well drafted,

¹²⁰ Cal. Penal Code (Deering, 1931) Pt. 1, tit. 15, c. 2, § 617.

¹²¹ Code Crim.Proc. § 892.

¹²² *People v. Harding*, 115 Misc. 298, 189 N.Y.S. 657 (1921). C.Crim.Proc., § 702 refers only to crimes and misdemeanors created by the Penal Law. *People v. Van Houton*, 13 Misc. 603, 35 N.Y.S. 186, aff'd 91 Hun 638 (1895).

¹²³ 139 Misc. 545, 247 N.Y.S. 821 (1930). See *Branch v. State*, 73 Tex.Cr.R. 471, 165 S.W. 605 (1914).

¹²⁴ 95 *Justice of the Peace* 540 (1931).

it should prove equally enforceable. Statutes aimed at consorting are rare in the United States and those enacted have been held invalid. The vagrancy statute, on the other hand, has in its favor the force of tradition and the respectability of long use.

Is a Public Enemy Act Desirable?

Before amending Section 722 of the Penal Law or prosecuting professional criminals under the vagrancy law, it should seriously be considered whether any such step is wise or necessary. In general the press is in favor of strengthening Section 722(11).¹²⁵ The New York Herald Tribune, however, has expressed its disapproval of the bill making consorting *prima facie* evidence of unlawful purpose. The concluding paragraph of an editorial appearing in that paper on February 9, 1935, after a roundup of criminals by the New York City police reads as follows:

. . . The Brownell bill would now eliminate the safeguard as to unlawful purpose. One cannot help regarding this with mistrust. It is true that prohibition is now past; it is true that the present administration of the Police Department has earned great public confidence, and it is still true that the immunity of our prominent criminals is a chief scandal of the times. But dropping the safeguard opens such patent opportunities to police corruption and tyranny under an incompetent administration that one must pause; while this very "round-up" is itself a pretty bad advertisement of the rough-and-ready character of police justice. It is not easy to believe that all 646 ought to be given six-month sentences, and it is harder to believe that the police can always discriminate properly. Nor can one welcome what is, at best, only a palliative for deep-seated diseases of our penal system which the public and the lawmakers between them are still too lazy to face.

Both the vagrancy law and Section 722(11) in its present form, may find ample justification in the fact that they tend to prevent crime. That has always been the defense of the vagrancy statutes, and that defense can be applied as forcibly to statutes prohibiting consorting for unlawful purpose. The crime menace would be reduced inestimably both in amount and violence if the professional criminal were forced to play a lone hand. Nevertheless it is undeniable that the immediate object of the public enemy laws is not prevention of future crime but punishment for past. They are used as a cheap substitute for prosecution of more specific offenses. As such, they are a reflection on our criminal procedure. They are comparable to the federal income tax statute when used as a weapon against some of our notorious gangsters. They tend to make the law the object of derision. It is somewhat absurd to sentence a defendant to six months for vagrancy or disorderly conduct when he is unpunished for extortion, robbery or homicide. Prosecution for the specific crime of which the

¹²⁵ N. Y. World Telegram, Jan. 16, 1935.

defendant is guilty is always more effective than reliance on a statute which penalizes the accused for what he is, rather than for what he has done.

STATE OF MINNESOTA *ex rel.* PEARSON *v.* PROBATE COURT

Supreme Court of the United States, 1940.

309 U.S. 270, 60 S.Ct. 523, 84 L.Ed. 744, 126 A.L.R. 530.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Appellant, Charles Edwin Pearson, petitioned the Supreme Court of Minnesota for a writ of prohibition commanding the Probate Court of Ramsey County, and its Judge, to desist from proceeding against him as a "psychopathic personality" under Chapter 369 of the Laws of Minnesota of 1939. A proceeding under the statute had been brought in the Probate Court for the commitment of appellant and an order for his production and examination had been issued.

Appellant contended that the statute violated the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution, U.S.C.A. After hearing upon an alternative writ, the Supreme Court overruled these contentions and quashed the writ. 205 Minn. 545, 287 N.W. 297. The case comes here on appeal. Jud. Code Sec. 237(a), 28 U.S.C. § 344(a), 28 U.S.C.A. § 344(a).

The statute, in Section 1, defines the term "psychopathic personality" as meaning "the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons".

Section 2 provides that, except as otherwise therein or thereafter provided, the laws relating to insane persons, or those alleged to be insane, shall apply with like force to persons having, or alleged to have, a psychopathic personality. There is a proviso that before proceedings are instituted the facts shall first be submitted to the county attorney who if he is satisfied that good cause exists shall prepare a petition to be executed by a person having knowledge of the facts and shall file it with the judge of the probate court of the county in which the "patient" has his "settlement or is present". The probate judge shall set the matter down for hearing and for examination of the "patient". The judge may exclude the general public from attendance. The "patient" may be represented by counsel and the court may appoint counsel for him if he is financially unable to obtain such assistance. The "patient" is entitled to compulsory process for the attendance of witnesses in his behalf. The court must appoint two duly licensed doctors of medicine to assist in the examination. The proceedings are to be reduced to writing and made parts of the court's records. From a finding of the existence of psychopathic personality, the "patient" may appeal to the district court.

READ & MACDONALD U.C.B.LEG.

After setting forth the general principles which governed its determination, the state court construed the statute in these words [205 Minn. 545, 287 N.W. 297, 302]: "Applying these principles to the case before us, it can reasonably be said that the language of Section 1 of the act is intended to include those persons who, by a habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire. It would not be reasonable to apply the provisions of the statute to every person guilty of sexual misconduct nor even to persons having strong sexual propensities. Such a definition would not only make the act impracticable of enforcement and, perhaps, unconstitutional in its application, but would also be an unwarranted departure from the accepted meaning of the words defined".

This construction is binding upon us. Any contention that the construction is contrary to the terms of the Act is unavailing here. For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it. *Supreme Lodge Knights of Pythias v. Meyer*, 265 U.S. 30, 32, 44 S.Ct. 432, 68 L.Ed. 885; *Guaranty Trust Company v. Blodgett*, 287 U.S. 509, 513, 53 S.Ct. 244, 245, 77 L.Ed. 463; *Hicklin v. Coney*, 290 U.S. 169, 172, 54 S.Ct. 142, 144, 78 L.Ed. 247; *Georgia Railway & Electric Co. v. Decatur*, 295 U.S. 165, 170, 55 S.Ct. 701, 703, 79 L.Ed. 1365. Moreover, as it was the manifest purpose of the court to determine definitely the meaning of the Act, we accept the view presented by the Attorney General of the State at this bar, that the court used the word "include" as defining the entire class of persons to whom the statute applies and not as describing merely a portion of a larger class. In advance of a decision by the state court applying the statute to persons outside that definition, we should not adopt a construction of the provision which might render it of doubtful validity. *Stephenson v. Binford*, 287 U.S. 251, 277, 53 S.Ct. 181, 189, 77 L.Ed. 288, 87 A.L.R. 721.

This construction of the statute destroys the contention that it is too vague and indefinite to constitute valid legislation. There must be proof of a "habitual course of misconduct in sexual matters" on the part of the persons against whom a proceeding under the statute is directed, which has shown "an utter lack of power to control their sexual impulses", and hence that they "are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire". These underlying conditions, calling for evidence of past conduct pointing to probable consequences, are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime. *Nash v. United States*, 229 U.S. 373, 377, 33 S.Ct. 780, 781, 57 L.Ed. 1232; *Fox v. Washington*, 236 U.S. 273, 277, 278, 35 S.Ct. 383, 384, 59 L.Ed. 573; *Omaechevarria v. Idaho*, 246 U.S. 343, 348, 38 S.Ct. 323, 325, 62 L.Ed. 763; *United States v. Wurzbach*, 280 U.S. 396, 399, 50 S.Ct. 167, 168, 74 L.Ed. 508. Appellant's

criticisms are drawn from his interpretation of the statute and find no warrant in the statute as the state court has construed it.

Equally unavailing is the contention that the statute denies appellant the equal protection of the laws. The argument proceeds on the view that the statute has selected a group which is a part of a larger class. The question, however, is whether the legislature could constitutionally make a class of the group it did select. That is, whether there is any rational basis for such a selection. We see no reason for doubt upon this point. Whether the legislature could have gone farther is not the question. The class it did select is identified by the state court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law "presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." *Miller v. Wilson*, 236 U.S. 373, 384, 35 S.Ct. 342, 344, 345, 59 L.Ed. 628, L.R.A.1915F, 829; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 79, 31 S.Ct. 337, 55 L.Ed. 369, Ann.Cas.1912C, 160; *Semler v. Dental Examiners*, 294 U.S. 608, 610, 611, 55 S.Ct. 570, 571, 79 L.Ed. 1086; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400, 57 S.Ct. 578, 585, 81 L.Ed. 703, 108 A.L.R. 1330.

There remains the question whether, apart from definition and classification, the procedure authorized by the statute adequately safeguards the fundamental rights embraced in the conception of due process. In this relation it is important to note that appellant has challenged the proceeding *in limine* by seeking to prevent the probate judge from entertaining it. To support such a challenge, the statute in its procedural aspect must be found to be invalid on its face and not by reason of some particular application inconsistent with due process. In that light the argument on this branch of the case also fails.

As we have seen, the facts must first be submitted to the county attorney who must be satisfied that good cause exists. He then draws a petition which must be "executed by a person having knowledge of the facts". The probate judge must set the matter for hearing and for examination of the person proceeded against. Provision is made for his representation by counsel and for compelling the production of witnesses in his behalf. The court must appoint two licensed doctors of medicine to assist in the examination. The argument that these doctors may not be sufficiently expert in this type of cases merely invites conjecture. There is no reason to doubt that qualified medical men are usually available. Laws as to proceedings where persons are alleged to be insane are made applicable. Appellant says that the patient cannot be released on bail. The State contests this, insisting that he may be so released pending hearing or on appeal, pointing to *Mason's Minnesota Statutes*, 1938 Supplement, Section 8992-178. Appellant contends that if the court finds the patient to be within the

statute, he must be committed "for the rest of his life to an asylum for the dangerously insane." Mason's Minn.Stat., 1938 Supp., Sec. 8992-176. The State also contests this conclusion, maintaining that the commitment is without term and subject to the right of the patient, or any one interested in him, to petition the committing court for release at any time. Mason's Minn.Stat., 1938 Supp., Sec. 8992-143; Laws of 1935, Chap. 72, Sec. 143, as amended by Laws of 1939, Chap. 270, Sec. 8. The statute gives a right of appeal from the finding of the probate judge upon compliance with certain specified provisions of the Minnesota laws. Appellant contends that this excludes other provisions of laws relating to appeals in insanity cases. Again, appellant's position is contested by the State upon the ground that there is no express limitation or exclusion in the language of the statute and that other provisions governing appellate procedure apply. These various procedural questions and others suggested by appellant, do not appear to have been passed upon by the state court.

We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute, and the special importance of maintaining the basic interests of liberty in a class of cases where the law though "fair on its face and impartial in appearance" may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings. But we have no occasion to consider such abuses here, for none have occurred. The applicable statutes are not patently defective in any vital respect and we should not assume, in advance of a decision by the state court, that they should be construed so as to deprive appellant of the due process to which he is entitled under the Federal Constitution. *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 546, 34 S.Ct. 359, 363, 58 L.Ed. 713; *Utah Power & Light Co. v. Pfof*, 286 U.S. 165, 186, 187, 52 S.Ct. 548, 554, 76 L.Ed. 1038; *Stephenson v. Binford*, *supra*. On the contrary, we must assume that the Minnesota courts will protect appellant in every constitutional right he possesses. His procedural objections are premature.

The judgment is affirmed.

Affirmed.

WESTERN UNION TELEGRAPH CO. v. LENROOT

Supreme Court of the United States, 1945.
323 U.S. 490, 65 S.Ct. 335, 89 L.Ed. 414.

This case appears in Chapter 5, *infra*, p. 729.

MAYNARD E. PIRSIG, PROPOSED YOUTH CORRECTION ACT

28 Minn.L.Rev. 300 (1944).

[The text appears *supra* p. 146.]

Chapter 5

FORM OF LAWMAKING: THE PARTS OF A STATUTE

SECTION 1. BILL OR RESOLUTION

1. PETITION TO PARLIAMENT AND RESPONSE

14 Edw. III, Rot.Parl. ii 122-3.

(Translation by Faith Thompson, Ph.D.)

The tenure of the petition of Mr. Geffrey de Staunton' brought into this parliament some diverse torts and delays, according to that which is supposed, done to him not duely against the law by the justices of the Common Bench, in the plea, which is before them by the writ of the king, between the said Mgr. Geffrey, plaintiff, and Mr. Johan de Staunton of Eyleston', knight, and Amye his wife, defendants, of fifteen (land) oxen with the possessions in Eyleston, etc.

31. To our Lord the King and his council, his liege Bacheler Geffrey de Staunton' shows how he has plead for a long time before the justices of the Common Bench, Johan de Staunton, knight, and Amye his wife, concerning certain properties in Eyleston; and through the default of the said Johan the said Amye was received to defend his right, and after several impediments of the Services of Our Lord the King, and other delays, the said Amye vouched for her said baron as guarantor, which voucher the said Geffrey for a certain cause counter-plead, and awaited judgment: And since through protests, and in other manner not duely made in the suit of the said Amye, the said parties were put off until a fortnight from the Trinity last passed. Concerning which adjournment and delay the said Geffrey filed petition in the last parliament before Our Lord the King, together with the tenure of the record and lawsuit of the said plea. Which there seen and examined, the said petition was signed and answered in said parliament in the following manner:

The council is advised that by the law of the land the said Geffrey de Staunton, who is strange to the territory, is entitled to the property which he holds because he is not thrown out of this property by statute, nor by any other law; therefore the court should judge according to what the parties have plead, and it has delayed to the risk of both parties. And as to the last point of the record, there Amye said that if the court holds that she has to respond besides, she is ready to do this: It is agreed that she cannot obtain another response by the law of the land, nor any other response by protest to save him, from the hour that the parties had all agreed to decide in judgment, as it appears in the record, of which this petition makes mention. And upon this either the writ orders to the justices of the Bench, or the plea is, that they should go to judgment in the said plea, according to the

aforesaid opinion and advice, notwithstanding the aforesaid protest, as more fully appears by the said petition which remains in the chancellery. And of that petition and the endorsement of it the transcript is underwritten and begins as follows:

To Our Lord the King and his council shows Geffrey, son of William de Staunton, etc. Upon which petition and the endorsement of it a writ of the Great Seal was sent to the said justices of the Common Bench. Of which letter the transcript is undersigned and begins as follows:

Edward, by the grace of God, King of England and France, and Lord of Spain, to his justices of the Bench, etc. Together with the said transcript of the said petition and the endorsement of it, and the transcript of the tenure of the aforesaid record and lawsuit, of which the copy is undersigned and begins as follows:

Plea with Westm' in the presence of J. de Stonore and his fellow justices of the Bench of the King, on the day of St. Michael in a fortnight, in the year of the reign of King Edward III, from the 13th conquest, title xvii. Geffrey, son of William de Staunton, etc. Who having seen the same record and lawsuit, and the aforesaid petition and endorsement, if in the said plea the action was such, that then they should proceed to render judgment according to the aforesaid advice and agreement, and should grant by letter under the Privy Seal of which the copy is underwritten and begins as follows:

Edward, by the grace of God, Ruler of England and France, and Lord of Ireland, to the justices of the Common Bench, etc. And since because they did not want to do anything, notwithstanding the writs, or because they might show cause, etc., why they still have not wanted to do anything, or show cause, by which one believes and understands that they will still make adjournment to the great damage of the said Geffrey, and through the delay to cause his disinheritance. When he begged the said council that, for the sake of God, they might want to have consideration for the things above said, and to order the said justices that they should go to render judgment according to the cause plead before them, having consideration for the opinion of the said parliament and above said orders, before the session is completed, they should order that there should not be caused any other adjournment or delay to his disinheritance: Or they should order the justices to send their rolls and the said record and lawsuit into said parliament; that there, by assent of the parliament and of all, can be granted the judgment, and the judgment rendered, either for or against him, before the said session adjourns, considering the statutes made that no common law should be delayed or the judgment postponed through difficulty or opinions, but justice done to all, as Our Lord the King is held by his oath.

The response of this petition made in the said parliament follows:

Seen and read in the midst of parliament the said petition and the said transcript of the petition presented in the last parliament and the endorsement of it, and made the aforesaid transcripts of the ten-

ure of the said record of the said plea which comes to the chancellery, and of the writs of the Great Seal and Privy Seal made upon this and sent to the said justices, who are underwritten; it is assented to by all in the midst of parliament and ordered by the prelates, courts, barons, and others of the parliament, to Sir Thomas de Drayton, clerk of parliament, that he should go to Mr. Johan de Stonore and to his associates, justices of the Common Bench, and tell them that they should proceed to render judgment according to the cause plead before them, before the session adjourns, without adjourning or delaying the parties any more. And in case that they cannot accede, through difficulty of another cause, that then the said Sir Johan should bring with him the rolls and the record of the same plea to parliament, there to take final counsel what judgment will have to be made. Which Sir Johan and his associates brought to parliament, the next Monday before the feast of St. Margaret, the rolls and the record of the said plea. And assembled there chancellor, treasurer, justices of both Benches, barons of the Exchequer, and others of the king's council, and in said parliament seen and read the said lawsuit and record, and the same record plead and inscribed according to the cause, and in said parliament diligently debated, and examined in the same parliament, it is finally granted that the aforesaid Geffrey, who does not belong to the said territory, nor is heir of the party, but entirely foreign, should be received to aver that the said Thomas never had any claim in the said property; and that the said Amye as guarantor of the aforesaid Johan, her baron, does not have the aforesaid possession; what she before refused should not now be received, notwithstanding the protest contained in the said record. And if the opinion in the court should be, etc., but that the said Geffrey should recover seisin of the same lands. Therefore, in said parliament it is ordered to the justices, that they should go to their Bench to render judgment upon the things that were plead before them by the parties, and of which they sat in judgment, notwithstanding that the said Amye now asks to be received to the aforesaid property, which she expressly refused before; they should order that the said Geffrey should recover his seisin against the aforesaid Johan and Amye, etc.

2. ORDER TO PARLIAMENTARY COMMITTEES

14 Edw. III, Rot.Parl. ii 113.

7. Concerning which petitions and conditions, by command of Our Lord the King and agreement of the prelates, counts, barons, and commons being in said parliament, the hereinafter written were summoned to sit (have their sessions) until such time as they should have discussed them and put it (the conclusions reached) into a statute, to wit the Archbishop of Canterbury, the Bishops of Duresme and Cestr', and the treasurer; . . . the Counts of Derby, Arundell, and Hunteyngdon; . . . the Lords of Wake, and Percy, Mr. Rauf de Nevill, Mr. Geffrai de Scrop', Mr. Johan de Stonore, Mr. Robert de Sadyngton, and Robert Parnyng, with twelve knights of the counties,

whom the commons wanted to select. And let those very ones be summoned to decide upon the conditions and petitions affecting the clergy and to put them into a statute. And it is agreed that six citizens and burghers may be with them for discussion of the aforesaid things. And the names of the knights, citizens, and burghers follow; to wit, Roger de Chaundos, Piers Tylel, Johan de Orreton, Johan Turney, Edward de Seint, Thomas de Marleberwe, Rogier de Leuthe, Johan de Hayton', William Gramary, knights; and Th' de Wycombe, Robert de Morewode, Philip de Cayly, Johan de Rattelefden', Johan de Preston', Th' But, citizens and burghers. Which archbishops, bishops and the others thus summoned, heard and selected the said petitions by general assent and accord of all, putting into a statute the points and the articles which are perpetual. Which statute Our Lord the King, by assent of all present in said parliament, ordered to be engrossed and sealed and firmly observed throughout the Kingdom of England; and which statute begins, "To the honour of God, etc."

8. And concerning the points and articles which are not perpetual, but for a time, so has Our Lord the King, by assent of the nobles and commons caused to be done and sealed, his letters patent which begin in this manner, "Edward, etc., May you know that as prelates, counts, etc."

3. STATUTE

14 Edw. III. st. 1 and Cap. V.

Statutes made at Westminster Anno 14 Edw. III, Stat. 1 and Anno primo of his Reign of France, and Anno Dom. 1340: To the Honour of God and of Holy Church, by the Assent of the Prelates, Earls, Barons, and others assembled at the Parliament holden at Westminster the Wednesday next after Midlent, in the Fourteenth Year of the Reign of our Lord King Edward the Third of England, and the First Year of his Reign of France; the King, for the Peace and Quietness of his People, as well great as small, doth grant and establish the Things underwritten, which he will to be holden and kept in all Points perpetually to endure.

Delays of Judgment in other Courts shall be redressed in Parliament; ITEM. Because divers Mischiefs have happened for that in divers Places, as well in the Chancery, as in the King's Bench, the Common Bench, and in the Exchequer before the Justices assigned, and other justices to hear and determine deputed, the Judgments have been delayed, sometime by Difficulty and sometime by divers Opinions of the Judges, and sometime for some other cause; (2) it is assented, established, and accorded, That from henceforth at every Parliament shall be chosen a Prelate, two Earls, and two Barons, which shall have Commission and Power of the King to hear by Petition delivered to them, the Complaints of all those that will complain them of such Delays or Grievances done to them; (3) and they shall have Power to cause to come before them at Westminster, or else where the Places of any of them shall be, the Tenor of Records and Processes of such Judg-

ments so delayed, and to cause the same Justices to come before them, which shall be then present, to hear their cause and reasons of such Delays; (4) which Cause and Reason so heard, by good Advice of themselves, the Chancellor, Treasurer, the Justices of the one Bench and of the other, and other of the King's Council, as many and such as they shall think convenient, shall proceed to take a good Accord, and make a good Judgment; (5) and according to the same Accord so taken, The Tenor of the said Record, together with the Judgment which shall be accorded, shall be remanded before the Justices, before whom the Plea did depend, and that they hastily go to give Judgment according to the same Record; (6) and in case it seemeth to them, that the Difficulty be so great, that it may not well be determined without assent of the Parliament, that the said Tenor or Tenors shall be brought by the said Prelate, Earls, and Barons, unto the next Parliament, and there shall be a final Accord taken what Judgment ought to be given in this Case; (7) and according to this Accord it shall be commanded to the Judges, before whom the Plea did depend, that they shall proceed to give Judgment without Delay. (8) And to begin to do Remedy upon this Ordinance, it is assented, that a Commission and a Power shall be granted to the Archbishop of Canterbury, the Earls of Arundel and Huntington, the Lord of Wake, and the Lord Ralph Baffet, to endure till the next Parliament. (9) And though the Ministers have made an Oath before this Time, yet nevertheless to remember them of the same Oath, it is assented, that as well the Chancellor, Treasurer, Keeper of the Privy Seal, the Justices of the one Bench and of the other, the Chancellor, Barons of the Exchequer, as the Justices assigned, and all they that do meddle in the said Places under them, by the Advice of the same Archbishop, Earls, and Barons, shall make an Oath well and lawfully to serve the King and his People. (10) And by the Advice of the said Prelate, Earls and Barons, be it ordained to increase the Number of the Ministers when Need shall be, and them to diminish in the same Manner; (11) and so from Time to Time, when Officers shall be newly put in the said Offices, they shall be sworn in the same Manner.

NOTE

For the origin and historical development of the use of "petitions" or "bills" in the English Parliament, see Gray, "The Influence of the Commons on Early Legislation", 34 *Harvard Historical Studies* (1932). The author says at p. 47: "A measure introduced for parliamentary consideration was throughout the (fifteenth) century called indifferently a petition or a bill. . . . Indeed from the early years of the reign of Edward III petitions were called bills."

VISOR v. WATERS

Supreme Court of Pennsylvania, 1936. 320 Pa. 406, 182 A. 241.

The opinion of President Judge Hargest is as follows:

This case comes before us upon a petition for mandamus and the return thereto.

The return raised some questions which were abandoned at the argument, and it is now conceded that the court should pass upon the merits of the petitioners' claim. The facts averred in the petition are admitted, and a stipulation has been filed showing that the petitioners all performed clerical services, except the Sergeant at Arms.

The petitioners, along with others, were appointed in the House of Representatives January 17, 1933, and their compensation was fixed by the Act of July 1, 1919, P.L. 717 (46 P.S. § 21 et seq.), upon a per diem basis. They served during the 1933 regular session. On November 27, 1934, they each received a letter from the chief clerk of the House of Representatives notifying them that the General Assembly would convene Tuesday, January 1, 1935, saying, "Under the law, you are a returning officer, Session of 1935. You will please report for services on above date. If not reelected you will, for this service, receive round trip mileage and per diem pay for 10 days, or until your successor is elected."

The petitioners returned to perform their duties on January 1, 1935. On that date the House of Representatives adopted a resolution, in part, as follows: "That all officers and positions of employment in the House of Representatives be declared vacant with the following named exceptions." The petitioners were not within those excepted from the operation of the resolution. Their successors were not elected until January 14, 1935. They claim compensation at their per diem rate, for twelve days, until their successors were elected. The defendants contend that they are entitled to one day only.

Section 10 of article 3 of the Constitution of Pennsylvania provides, in part: "The General Assembly shall prescribe by law the number, duties and compensation of the officers and employees of each House."

Article 6, § 4, provides, in part: "Appointed officers, other than judges of the courts of record and the Superintendent of Public Instruction, may be removed at the pleasure of the power by which they shall have been appointed."

The Act of July 1, 1919, P.L. 717 (46 P.S. § 21 et seq.), providing for the election and appointment of officers and employees of the General Assembly and fixing their compensation and duties, provides in paragraph 2 of section 1 (46 P.S. § 21, par. 2), for the clerical and other positions in the House of Representatives, and provides with certain exceptions, that they shall be elected by the House of Representatives.

Section 2 of the act (46 P.S. § 22) provides: "All officers and employees of the General Assembly shall be elected or appointed in the odd-numbered years, at the opening of each regular biennial ses-

sion, and shall serve until ten days after the opening of the next General Assembly or until their successors are selected and have qualified."

Section 3 (46 P.S. § 23) provides for the compensation of the various clerks and other employees, some at a salary and others on a per diem basis.

Section 5 (46 P.S. § 25) provides: "All the officers and employees provided for in this act shall return as such to the next regular biennial session of the Legislature following that for which they were elected or appointed, and those who shall not be reelected or reappointed or elected or appointed to some other office in the Legislature shall be allowed their regular per diem compensation, except the assistant clerks, the journal clerks, assistant journal clerks, reading clerks, assistant reading clerk, executive clerk, desk clerks, and message clerks, who shall each receive ten dollars per diem for ten days or until their successors are duly elected or appointed and have qualified."

There are several interesting and somewhat difficult questions which arise in this controversy: (1) Are the petitioners included in those for whom the act provides a ten-day compensation upon returning to the next legislative session? (2) Are they officers within the meaning of article 6, section 4 of the Constitution, removable at the pleasure of the appointing power? (3) Is their relation to the state one of contract? (4) Is there any constitutional provision prohibiting the Legislature from fixing the terms of those who are not officers?

[After answering the first two questions affirmatively, the Court continued:]

(3) It is also contended by the petitioners that if the resolution dismissing them has the effect of releasing the commonwealth from liability for their pay, that resolution would be unconstitutional, since it would impair the obligation of the contract between them and the commonwealth. There is no merit in this contention. While it is settled that the contract clause of the Federal Constitution prohibiting any state from passing a law violating the obligation of a contract applies to a state as well as to individuals (6 R.C.L. 33, paragraph 325; 12 Corpus Juris 996, paragraph 608), it is also settled by a multitude of decisions that the employment by the state of officers and agents to carry on the functions of government does not constitute a contract which cannot be abrogated by the state. In *Commonwealth v. Tice*, 282 Pa. 595, 597, 128 A. 506, 507, it is said: "The Legislature may deal with such offices absolutely as it pleases, and may even abolish them altogether, since they are not grants, contracts, or obligations which cannot be impaired by an act of the Legislature. It necessarily follows that it may abridge or extend the terms, change the duties, and increase or reduce the compensation of persons already in office." 8 Cyc. 954. See, also, 12 Corpus Juris 1017. . . . The incumbent of a legislative office has no vested rights therein and may be entirely deprived of the same by an abolition of the office." So "it may also shorten or lengthen the term of service," *Newton v. Mahon-*

ing County Commissioners, 100 U.S. 548, 559, 25 L.Ed. 710, even though "this may include a part of the term of the office then unexpired." *Fisk v. Jefferson Police Jury*, 116 U.S. 131, 134, 6 S.Ct. 329, 330, 29 L.Ed. 587; *Butler v. Pennsylvania*, 10 How. 402, 13 L.Ed. 472; *Robertson v. Miller*, 276 U.S. 174, 48 S.Ct. 266, 72 L.Ed. 517; *United States v. Fisher*, 109 U.S. 143, 3 S.Ct. 154, 27 L.Ed. 885.

But the Legislature has not attempted to do any of these things, the attempt is made only by the House of Representatives.

(4) As already pointed out, section 10, article 3, of the Constitution provides that "The General Assembly shall prescribe by law the number, duties and compensation of the officers and employees of each House." Without this constitutional provision, it would be clear that each House could fix the number, duties, compensation and terms of its own officers and employees. With this constitutional provision, it takes some action as a General Assembly, and not the action of each individual House, to fix them. This constitutional provision has found expression in the act of 1919 which fixes the number, compensation, duties, and terms of the officers and employees, and provides in the cases of the employees in question that they shall be elected by the House of Representatives. The purpose of the act in fixing the term of service of those elected at the beginning of one session to run ten days or until their successors are appointed into the next session, is apparent. It was intended that the new session of the Legislature should be organized with persons skilled in the duties so that the machinery of government should operate as smoothly as possible. Here then is a positive statutory provision. Is this statutory provision to be overcome and the statute ignored because there is a settled rule of law that, generally speaking, the appointing power has the right to dismiss? Was section 4, article 6, of the Constitution, which provides that appointed officers, other than judges of the courts of record and the superintendent of public instruction, may be removed at the pleasure of the power by which they shall have been appointed, intended to extend that well-settled principle, applicable to employees, to appointed public officers? Did the Constitution refer only to officers because the right of removal of employees was too plain to be expressed in the fundamental law? As against this suggestion, is not the proper construction of section 4 of article 6 of the Constitution that it intended to leave open the right of the Legislature to regulate both the appointment and removal of all public employees below the grade of officers? Where the Legislature is not inhibited by any constitutional prohibition, it is always free, by statutory enactment, to change the settled principles of law. It is also free to regulate by law the machinery for running the government, municipal or state. The Legislature can determine when and under what circumstances a municipality (a subordinate agency of the state) may or may not discharge its employees. That being so, it is not beyond question that each constituent House of the Legislature may join in an Act of Assembly surrendering the right of that House, in the interest of governmental efficiency, to the discharge without cause of its employees, and agreeing

that a term should be fixed for them? This is illustrated in the civil service acts. *Commonwealth v. Hasskarl*, 21 Pa. Dist. R. 119.

It is a settled rule that one Legislature may not bind another, and no action by one House could bind a subsequent session of that same House, but when the constituent bodies have united in a statute, a single House, by a mere resolution, cannot set aside and nullify the positive provisions of a law. *Commonwealth v. Bitner*, 294 Pa. 549, 144 A. 733; 54 *Corpus Juris*, 720, 722. A new law can do that, but nothing less than a law can. *Butler v. Pennsylvania*, 10 How. 402, 13 L. Ed. 472.

[Mandamus issued ordering respondents to pay amounts claimed by petitioners.]

Argued before FRAZER, C. J., and KEPHART, SCHAFFER, MAXEY, DREW, LINN, and BARNES, JJ.

PER CURIAM. The judgment in this case is affirmed on the full and comprehensive opinion of the learned president judge of the lower court.

Judgment affirmed at appellants' costs.

UNITED STATES CONSTITUTION

Article I, § 7.

All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of

the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

UNITED STATES REVISED STATUTES

Title I, § 8.

Resolving Clause. The resolving clause of all joint resolutions shall be in the following form: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled."

NOTE

In *Hawes & Co. v. Wm. R. Trigg & Co.*, 1909, 110 Va. 165, at p. 201, 65 S.E. 538, Cardwell, J., said: "The difference between an Act of Congress and a joint resolution is, that the former governs all persons under the jurisdiction of the enacting power, while the latter is but a rule for the guidance of the agents and servants of the sovereign."

L. LITTLEJOHN & CO. v. UNITED STATES.

Supreme Court of the United States, 1926.
270 U.S. 215, 46 S.Ct. 244, 70 L.Ed. 553.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

The court below sustained a challenge to its jurisdiction, and this direct appeal followed.

October 9, 1919, in New York Harbor the steamships *Antigone* and *Gaelic Prince* collided. Serious injury resulted to the latter and its cargo. February 19, 1921, relying upon the Suits in Admiralty Act of March 9, 1920 (chapter 95, 41 Stat. 525 [Comp.St.Ann.Supp.1923, §§ 1251 $\frac{1}{4}$ –1251 $\frac{1}{4}$ l]), the owners seek to recover damages. The Act of March 3, 1925, c. 428, 43 Stat. 112 (Comp.St.Supp. 1925, §§ 1251 $\frac{3}{4}$ —1 to 1251 $\frac{3}{4}$ —10), is not applicable. They allege that the collision resulted from the fault of the *Antigone*. Also that—

At all times mentioned herein prior to the 13th day of October, 1919, and particularly on the 9th day of October, 1919 the date of the collision hereinafter mentioned, the steamship *Antigone* was owned by a private person or merchant who was solely entitled to the immediate and lawful possession, operation, and control of said vessel. At no time prior to said 13th day of October, 1919, was the said steamship *Antigone* owned, either absolutely or pro hac vice, by the United States of America, nor by any corporation in which the United States of America or its representatives owned the entire outstanding capital stock, nor lawfully in the possession of the United States of America or of such corporation, nor lawfully operated by or for the United States of America or such corporation. On the 13th day of October, 1919, the respondent United States of America became, ever since has been, and now is in the lawful possession of the steamship *Antigone*,

but at no time has the United States of America held the legal title to or been the absolute owner of said steamship *Antigone*.

The United States appeared specially and suggested that when the collision occurred they owned, possessed, and controlled, the *Antigone*, and therefore the court was without jurisdiction. This was denied, and evidence was taken upon the consequent issue. Having considered the evidence, the court held that the United States owned the vessel and were navigating her, with a crew employed by the War Department, in transporting supplies and troops. The libels were accordingly dismissed for want of jurisdiction.

If the established facts show such ownership, possession, and control, then, under the doctrine of *The Western Maid*, 42 S.Ct. 159, 257 U.S. 419, 66 L.Ed. 299, to which we adhere, the decree is clearly right.

The history of the matter is this. The *Antigone*—then the privately-owned German merchantman *Neckar*—took refuge within the United States prior to April 6, 1917, when war with Germany was declared. By Joint Resolution of May 12, 1917, c. 13, 40 Stat. 75, being Comp.St.1918, Comp.St.Ann.Supp. 1919, §§ 8146rr, 8146s (copied in the margin,¹) Congress authorized the President to take over to the United States the immediate possession and title of any vessel within their jurisdiction which at the time of coming therein was owned by any corporation, citizen or subject of an enemy nation, or was under register of any such nation. By Executive Order of June 30, 1917, the President affirmed that the *Neckar* was such a vessel, and ordered that "the possession and title" be taken over through the United States Shipping Board. He further authorized that board to repair, equip, man, and operate her. It accordingly took her, July 17, 1917, and thereafter a naval board appraised her. Subsequently she was transferred to the Navy Department, renamed the *Antigone*, and later transferred to the Army Transport Service. October 9, 1919, she sailed under a master, officers and crew of the United States Transport Service from New York bound for Brest, from which port she was to return with troops.

¹ Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and, through the United States Shipping Board, or any department or agency of the government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign, or coastwise.

Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation.

Appellants say that the rules of international law as recognized by the United States forbade them from confiscating German vessels within their jurisdiction at outbreak of the war, and that the Resolution of May 12, 1917, should be so interpreted as to harmonize with these rules. They further insist that thus interpreted the Resolution only gave authority to detain and operate the *Antigone* as enemy property, leaving title in the original German owners and the vessel subject to ordinary maritime liens. Our attention is called to the course pursued by the British government and to certain decisions of their courts. The *Chile*, 1 Br. & Col. Prize Cases, 1; The *Gutenfels*, 2 Br. & Col. Prize Cases, 36; The *Prinz Adalbert*, 3 Br. & Col. Prize Cases, 70, 72; The *Blonde* [1922] L.R. 1 A.C. 313, 334.

Both Great Britain and Germany were parties to Convention VI of the Second Hague Peace Conference, 1907,² and the action of the former, referred to by counsel, was taken in view of obligations thus assumed. The United States did not approve that convention, and the cited cases involved problems wholly different from the one here presented.

It is unnecessary to consider how far the ancient rules of international law concerning confiscation of enemy property have been modified by recent practices. In the absence of convention every government may pursue what policy it thinks best concerning seizure and confiscation of enemy ships in its harbors when war occurs. The Hague Conference (1907) recognized this and sought by agreement to modify the rule. The *Blonde*, supra, page 326. Our problem is to determine the result of action taken under a joint resolution of Congress whose language is very plain and refers only to enemy vessels. It authorized the President to take "possession and title," and, obeying, he took them. We do not doubt the right of any independent nation so to do without violating any uniform or commonly accepted rule of international law; and Congress had power to authorize the action irrespective of any general views theretofore advanced in behalf of this government. Certainly courts within the United States must recognize the legality of the seizure; the duly expressed will of Congress when proceeding within its powers is the supreme law of the land.

² Article 1. When a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

Art. 2. A merchant ship unable, owing to circumstances of force majeure, to leave the enemy port within the period contemplated in the above article, or which was not allowed to leave, cannot be confiscated.

The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.

Brown v. United States, 8 Cranch, 110, 122 (3 L.Ed. 504):

"That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed no power of condemnation can exist in the court."

See *Miller v. United States*, 11 Wall. 268, 20 L.Ed. 135; *The Blonde*, *supra*.

The decree of the court below is affirmed.

WATTS v. UNITED STATES

Circuit Court of Appeals of the United States, 1947. 161 F.2d 511.

MCCORD, CIRCUIT JUDGE. W. W. Watts was convicted on two counts of an information which charged that he had willfully and unlawfully sold certain automobiles at prices in excess of ceilings fixed by Maximum Price Regulation No. 540 as amended, in violation of the Emergency Price Control Act of 1942, as amended, and the Price Control Extension Act of 1946, 50 U.S.C.A. Appendix, § 901 et seq. On each count Watts was fined \$1,000 and sentenced to imprisonment for one year, the sentences of imprisonment to run concurrently. . . .

After the motions for a continuance, for dismissal of the information, and for a bill of particulars had been denied, defendant moved to stay the proceedings in order that he might file complaint against the Price Administrator in the Emergency Court of Appeals under Title 50 U.S.C.A. Appendix, § 924. In the motion, defendant's basis of attack was that the sales had been made in August, 1946, and that the Emergency Price Control Act of 1942 had expired and the Price Control Extension Act of 1946 was ineffectual to extend it. On appeal, as on the trial, appellant attacks the Act of 1942 as being unconstitutional, and further contends that in any event an extension of the Act could not constitutionally be accomplished by passage of a joint resolution, approved by the President. The constitutionality of the Emergency Price Control Act of 1942 had been upheld prior to defendant's complaint. *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L. Ed. 834. Moreover, the joint resolution, approved by the President, was an effective constitutional method for extending the Act. A joint resolution of the House and Senate, when approved by the President, has the effect of law. Constitution, Art. I, Sec. 7; *United States ex rel. Levey v. Stockslager*, 129 U.S. 470, 9 S.Ct. 382, 32 L.Ed. 785; *Wells v. United States*, 9 Cir., 257 F. 605, 610; *Black's L.D.*, 3rd Ed., Resolution, citing 6 Op. Atty. Gen. 680. The motion for stay of proceedings and for leave to file application in the Emergency Court of

READ & MACDONALD U.C.B. LEG.

Appeals was not a motion required to be granted by the cited statute. The motion was properly overruled by the court.

. . . No reversible error appearing, the judgment is affirmed.

THE CONSTITUTION OF MINNESOTA, Article 4.

Section 12. No money shall be appropriated except by bill. Every order, resolution or vote requiring the concurrence of the two houses, (except such as relate to the business or adjournment of the same,) shall be presented to the governor for his signature, and before the same shall take effect, shall be approved by him, or being returned by him with his objections, shall be repassed by two thirds of the members of the two houses, according to the rules and limitations prescribed in case of a bill.

Section 13. The style of all laws of this state shall be: "Be it enacted by the legislature of the state of Minnesota." No law shall be passed unless voted for by a majority of all the members elected to each branch of the legislature, and the vote entered upon the journal of each house.

ST. PAUL & CHICAGO RAILWAY CO. v. BROWN

Supreme Court of Minnesota, 1877. 24 Minn 517.

This action was brought in the district court for Ramsey County, pursuant to a joint resolution of the state legislature approved March 11, 1873, (Laws 1873, p. 283), against the defendants Brown and others as trustees of the Minnesota Hospital for the Insane, and against the defendant C. K. Davis, as governor of the state, to establish the title of the plaintiff to a large quantity of swamp lands, granted to the state by act of Congress. The joint resolution was as follows:

Whereas, By an act of the legislature of the state of Minnesota entitled "An act granting lands to aid the Saint Paul and Pacific Railroad Company in the construction of their branch railroad from Saint Paul to Winona," approved March 6, 1863, there was granted to said railroad company swamp lands of the state of Minnesota to the amount of fourteen full sections to the mile of said branch road, to aid in the construction thereof; and

Whereas, By an act of the legislature of said state, entitled "An act to appropriate swamp lands to educational and charitable institutions therein named, and for the purpose of erecting a state prison," approved February 13, 1865, swamp lands of the state, not otherwise disposed of prior to the passage of said act, were directed to be selected and set apart for certain state institutions therein named, large amounts of which lands have been under act so selected and set apart; and

Whereas, The title to the said lands so selected and set apart for said institutions is disputed by the Saint Paul and Chicago Railway Company; therefore

Be it resolved by the Legislature of the State of Minnesota:

Section I. That the Minnesota Hospital for Insane, the Deaf, Dumb and Blind Asylum, the State Prison, and each of the normal schools of this state, by and in their respective names, or in the names of the trustees or other officers having the superintendence or control of said institutions, and the Saint Paul and Chicago Railway Company in its corporate name, are hereby empowered to institute and defend all such actions and legal proceedings in the proper courts of this state as may be necessary to try and determine all questions concerning the title to any swamp lands granted to, or selected or set apart for, any of said institutions, or said Saint Paul and Pacific Railroad Company for its Winona branch, under any act of the legislature of this state; and all of the above-named institutions and Saint Paul and Chicago Railway Company, under and by the names aforesaid, shall have the same power to sue and be sued, to defend and be defended in the courts of this state, in reference to any questions concerning the title to such lands, as if they were natural persons.

Section II. That the actions and legal proceedings hereby authorized to be commenced and defended, may be either upon an agreed case, or be conducted in the usual way of civil actions; and the decision and judgment of the court therein, so far as respects the title to said lands, or any portion thereof, and the right to their use, enjoyment and disposition is concerned, shall be binding upon the parties to said action or proceedings, and upon the state of Minnesota, in the same manner and to the same extent as in other civil actions; but no order, decision or judgment shall be rendered in any such proceeding or action against any such institution for any costs, charges or disbursements incurred therein, nor for the recovery of any damages for the withholding of any of said real property or lands, nor for the rents, issues or profits thereof, nor in any manner affecting any property other than such lands belonging to any such institution or to the state, nor creating or declaring any liability or obligation for the payment of any money against the said state, or any such institution.

Attorneys for respondents (Brown et al., trustees) in arguendo:
The defendants being only the executive agents and trustees of the state, and the plaintiff attacking them in their official capacity, the plaintiff is not entitled to bring or maintain this action against them, for the reason that the court has no jurisdiction over them in the capacity in which they are sued. This is, in legal effect, a suit against the state, and no state can be sued—certainly not unless it waive its sovereignty, and authorize the suit by an act having the full force and effect of law. The joint resolution of 1873 has no such effect, for the constitution (Art. 4, s. 13,) requires that the style of all laws shall be "Be it enacted," etc. When new laws are to be passed or existing laws repealed, it must be done by bill, in the style and form prescribed by the constitution, and duly enacted into law. The joint resolution is at most merely a formal expression of the sense or sentiment of the legislature.

GILFILLAN, C. J. The case comes here upon appeal from an order sustaining demurrers to the complaint . . . Demurrers were interposed on the part of the governor, on the ground that the court has not jurisdiction over him . . . ; and on the part of the trustees, on the ground that the court has no jurisdiction of the persons or of the subject of the action . . .

The demurrer on the part of the governor was properly sustained, on the ground that the court has no jurisdiction over him. The duties of the governor sought to be enforced are duties belonging to him as executive of the state, and not as an individual. *Rice v. Austin*, 19 Minn. 103. He is not subject to the control of the judiciary in the performance of such duties, and no action or proceeding before any court will lie against him to compel such performance. Nor can the joint resolution of the legislature, referred to in the complaint, bring him under such control. The independence of each of the three departments of the government—the executive, legislative and judicial—rests upon the constitution, Article 3, and cannot be affected by any legislative act, although it may be approved by the governor at the time it passes.

The same ground of demurrer taken by the trustees is not well founded. The exemption from control by the judiciary on the part of the governor, does not extend to mere administrative agents, who are created, and their powers and duties defined, by the legislature. The courts may entertain suits against them as against any merely ministerial officers.

The subject-matter of the action is property belonging to the state, and the action, though nominally against the trustees, is virtually against the state, to determine its right in the property involved. The exemption of the state from actions by its citizens is not based on any constitutional provision, but merely on grounds of public policy. A waiver of such exemption does not trench upon the independence of any department of the government. There can be no doubt that the legislature may waive such exemption, nor that its consent to do so may be expressed by joint resolution, passed in the manner prescribed by the constitution as effectually as in the more formal mode by bill. It is to matters of this character that Section 12, Article 4 of the constitution relates. The joint resolution of 1873 is an answer to the objection that the action is virtually against the state. . . .

The order appealed from, so far as it sustains the demurrer of the defendant Davis, is affirmed. So far as it sustains the demurrer of the other defendants, it is reversed, but without costs.

NOTE

In Kennedy, "Drafting Bills for the Minnesota Legislature," (1946), pp. 22-23, the author says: "Until recent years differentiation between the several types of resolutions, memorials as well, was very vague in Minnesota legislative practice, but there is at present being evolved an agreement upon the functional jurisdiction of each style of measure which is generally observed."

"Joint Resolution. A Joint Resolution is a high form of expression of the legislative will, the passage of which may be affected only by roll call, as in the case of a Bill, and approval by the Governor. A Joint Resolution is not, in itself, a law, but for a number of limited purposes it has the force of law. It is often employed for purposes, short of law, in which it is expedient or necessary to express the joint will and action of the Legislature and the Governor. It may be and has been used for the ratification of amendments to the Federal Constitution, but the proper vehicle for the exercise of this purely legislative function is the Concurrent Resolution. It is frequently employed to express the state's attitude and recommendation with respect to matters of national or general concern.

"Concurrent Resolution. A Concurrent Resolution is an expression of facts, principles, opinions, or the legislative will with respect to subjects or matters not requiring executive approval. It may be introduced in either House, but passage requires concurrence by the other. It is the proper vehicle for the ratification of proposed amendments to the Federal Constitution; for directing actions by State departments; for authorizing legislative investigations participated in by both Houses, where no appropriation of public funds is involved, and for any other procedure to which both Houses are parties. It is often employed to express sorrow over the death of a person who has served in both Houses of the Legislature.

"Resolution. A Resolution (simple resolution) is an expression of the will, wish, view, or opinion of the House adopting it. Concurrent action is not required. It may be employed by the House which has acted last to request return of a measure from the other House or from the Governor, for correction, amendment, or reconsideration. It is the customary vehicle for expression with respect to the death of members of the body adopting it. For any purpose not requiring action by both Houses it may be used in the same manner as the Concurrent Resolution.

"Memorial. A Memorial is a petition or prayer, usually addressed to the President, the Congress, or some official or department of the United States government, requesting an action which is within the jurisdiction of the official or body addressed. The procedure with respect to the passage of Joint, Concurrent, and simple Memorials is the same as for resolutions, except that a roll call is not required for the adoption of any memorial. A Joint Memorial calls for the Governor's signature, and therefore becomes an expression of the mutual or joint desire of the legislative and executive authorities."

SWANN v. BUCK

High Court of Errors and Appeals for Mississippi, 1866. 40 Miss. 268,

ELLETT, J., delivered the opinion of the Court.

The defendant in error, who was elected in October, 1862, to the office of district-attorney of the third judicial district, composed of the counties of Tunica, Coahoma, Bolivar, Washington, Issaquena, and Warren, instituted this proceeding in the Circuit Court of Hinds county, against the auditor of public accounts, to obtain a writ of mandamus requiring the auditor to issue a warrant on the treasurer for the sum of \$2,407, the amount claimed by the appellee to be due to him on account of his salary from October, 1863, to May 22, 1865. On the hearing of the case a peremptory mandamus was awarded, and from this judgment a writ of error is prosecuted. . . .

The present case, then, being in its general character a proper one for the application of this writ, the issuance of it is resisted, on the ground that a legislative prohibition exists against it.

By the "act concerning the salaries of officers," (Rev. Code, 140 article 1), it is enacted, "that the following annual salaries shall be allowed, and paid in quarterly payments, after being audited according to law, to the several officers hereinafter named, to wit: to each district-attorney the sum of \$1,500." By article 32, Rev. Code, 108, it is made the duty of the auditor of public accounts "to examine, state, settle, and audit, all accounts, claims or demands whatsoever against the State, arising under any act or resolution of the legislature, and to grant to every claimant, authorized to receive the same, a warrant on the state treasury," etc.

If the rights of the relator depended exclusively upon these provisions, the propriety of awarding a peremptory mandamus would be quite apparent. But at the last session of the legislature various acts and resolutions were adopted, bearing directly upon this subject, among which is a joint resolution, approved October 25, 1865, in the following words: "Resolved, by the legislature of the State of Mississippi—That the auditor of public accounts be, and he is hereby directed to issue no more warrants upon the treasurer for the payment of money, until further orders."

This joint resolution, though it takes the form of a mere mandate to the officer, must, if entitled to have any effect at all, be construed as a repeal, or at least as a suspension of the provisions of the code on the subject of the issuance of warrants, and as taking away from the auditor all power to issue a warrant on the treasury for the payment of money until otherwise authorized by law.

The relator contends that this resolution forms no defense to his application for a mandamus, for the following reasons, to wit:

1. That it is void for want of an enacting clause, in the language prescribed by the constitution.
2. That it was not required to be read or passed with the forms prescribed in case of a bill, and therefore cannot operate to repeal a law formally enacted, not being of equal dignity.
3. That if otherwise valid, it would impair the obligation of the contract between himself and the State, and would take away his vested rights under that contract; and
4. That it did not take effect at all until after the date of the judgment in his favor in the court below, and therefore can have no application.

1. The first question is whether the resolution is void for want of a sufficient enacting clause; and this involves another question, to wit, whether the legislature has the constitutional power to pass a joint resolution at all, to have the force and effect of a law.

By the fourth section of the third article of the constitution, the legislative power of the State is vested in the two branches, which constitute the legislature, and it is ordained that "the style of their laws shall be: Be it enacted by the legislature of the State of Mississippi." As the style of this resolution is, "Resolved by the legisla-

ture of the State of Mississippi," if a literal adherence to the formula prescribed by the constitution is required, it would follow that the resolution is wholly void. The question is one that does not seem to have received a judicial decision, so far as we have been able to discover; but in a work cited on the law and practice of legislative assemblies, by Mr. Cushing, the opinion is expressed that this form of enactment must be strictly pursued, and that no equivalent language will be sufficient. In the absence of any authoritative adjudication, we are not prepared to adopt this conclusion. The argument against requiring a literal compliance with any form of words in the enacting clause, as a condition of giving effect to a statute, would be very strong on the score of convenience; for the plainest expressions of the legislative will, and the most urgent in their character, would be constantly liable to be defeated by the slightest omission or departure from the established phraseology. No possible good could be achieved by such strictness, and the greatest evil might result from it. There are no exclusive words in the constitution negating the use of any other language, and we think the intention will be best effectuated by holding the clause to be directory only. It is necessary that every law should show on its face the authority by which it is adopted and promulgated, and that it should clearly appear that it is intended by the legislative power that enacts it that it should take effect as a law. These conditions being fulfilled, all that is absolutely necessary is expressed. The word "resolved" is as potent to declare the legislative will as the word "enacted." It is true that a resolution may or may not take effect as a law, depending upon the occasion and object of its use. It may be resorted to as a vehicle to convey the opinions or wishes of the legislature on any subject, without prescribing any rule of conduct to be observed. But whenever a joint resolution does undertake to lay down a rule of conduct for any portion of the people of the State, it becomes a law, and will take effect as such, notwithstanding the use of the word "resolved" in its style, instead of the word "enacted." The requirement of the constitution is thereby substantially complied with, and the will of the legislature sufficiently declared.

Joint resolutions, having all the force and effect of laws, are common in the legislative practice of this State, and are to be found among the acts of almost every session, and applicable to almost every variety of subjects. Appropriations of money from the treasury to various objects have frequently been passed in this form, and no objection has ever been raised to their validity. They are expressly recognized by the constitution, which provides that they shall be presented to the governor and be approved by him, before they take effect, or, if disapproved, shall be repassed by both houses, according to the rules and limitations prescribed in case of a bill (article 5, section 16.) By the separate rules of each branch of the legislature, they are required as acts and addresses to be signed by the presiding officers; and by the joint rules of the two houses, they are required to be enrolled, examined and signed, and presented to the governor for approval, in the same manner, and by the same committee, as in the case of bills. Though

generally, but not universally, confined to administrative, and local or temporary matters, they form nevertheless one of the known and recognized modes of legislation.

The Constitution of the United States contains the very same provisions in reference to the presentment of bills, orders, resolutions, and votes to the President for his approval, that are found in the State constitution. In reference to "bills," this approval is necessary "before it become a law," and in reference to orders, resolutions, and votes, "before the same shall take effect;" upon which a distinction was attempted to be founded in the argument. Yet the constant practice of the congress has been to enact important measures of legislation, chiefly of the character before referred to, by joint resolution. Both Constitutions contain the same clause, "that no money shall be drawn from the treasury, but in consequence of appropriations made by law." And the constant practice, both in Congress and the legislature, has been to make important appropriations of public money from the treasury, by joint resolution; thereby showing, that in the usage and practice of these assemblies, a resolution is regarded as a law, and is in all respects of equal force and effect.

Such a practical interpretation of the constitution, sanctioned by long usage and acquiescence, and hitherto, so far as we can discover, wholly unquestioned, is entitled to great weight, and ought not to be departed from unless under circumstances of the most imperative character.

The constitutions of a number of the States contain the provision, that "every law enacted by the legislature shall embrace but one subject, and that shall be expressed in the title;" and among these States are Louisiana and California. In the construction of this clause, the courts of the former State have held it to be improper to give it too vigorous and technical a construction. By following in its applications the rules of a nice and fastidious verbal criticism, the action of the legislature would often be frustrated, without fulfilling the intentions of the framers of the Constitution. [*Municipality No. 3 v. Michoud*] 6 La. Ann. 605, 608. In California this section of the Constitution is regarded as merely directory. Such was the contemporaneous exposition adopted and acquiesced in by the legislature, and tacitly assented to by the courts. *Washington v. Murray*, 4 California, 388. These observations we think justly apply to the clause of our Constitution prescribing the enactment clause of laws, which was no doubt intended to promote uniformity and precision, without being designed as a condition, upon the strict and literal fulfillment of which, the validity of the law should depend.

2. In support of the second objection, it was urged that as the constitution does not mention resolutions, in prescribing the forms and ceremonies to be observed in the passage of bills, therefore a resolution is not of equal dignity with a bill, and cannot be employed to repeal a general law.

We cannot perceive the force of this position. All legislative acts, duly enrolled, signed by the presiding officers of both houses, and ap-

proved by the governor, it appears to us, must stand on an equal footing as to dignity, and must equally prevail as the act of the sovereign power of the State, whether they be "enacted," or only "resolved."

It was insisted also that by a joint rule of the two houses of the legislature, joint resolutions are only required to be read on two several days, and therefore the court must presume that this resolution was passed after two readings only, and hence did not become a law. On the production of the rules of the legislature, no such rule was found to exist, and the foundation of the argument fell to the ground. But if the fact had been otherwise, we could not have indulged the presumption insisted upon, for in the case of *Green v. Weller*, 32 Miss. 650, in reference to this very question, this court, after stating the provisions of the constitution requiring bills to be signed by the presiding officers of the two houses, and to be approved and signed by the governor, and the statutory regulation that all bills thus authenticated shall be deposited in the office of the secretary of state, say—"When an act of the legislature has passed through these forms, which are shown upon its face to have been complied with, and it is filed in the secretary's office, it becomes a record, and has all the legal incidents of a record, by the rules of the common law; and all the effect, as evidence of the authenticity and validity of the act, which the parliament rolls of statutes had in England." And again, "it must of necessity have been intended that the act so sanctioned, and required to be preserved, shall constitute a record, with the incidents, appertaining to such a record at common law, importing absolute verity which no evidence is allowed to contradict, and a compliance with all the forms necessary to its validity." Having established the proposition that the act thus authenticated and preserved, is a record, and upon settled principles of evidence, incapable of contradiction, the court go on to rule, that if this were not so, yet this court cannot take judicial notice of the journals of the legislature in order to ascertain the true state of facts. . . .

Reversed and petition of relator dismissed.

NOTES

1. In *Hoyt v. Sprague*, 103 U.S. 613 at pp. 635-6 (1880), Bradley, J., referring to a joint resolution of the Rhode Island legislature, said: "But another objection to the validity of the joint resolution is that it was not in proper form, in not being preceded by the proper enacting clause. The constitution declares that the style of the laws shall be: 'It is enacted by the General Assembly as follows.' If this requirement is anything more than directory, it cannot be decreed to apply to that species of enactments which are usually denominated joint resolutions, and which are often used to express the legislative will in cases not requiring a general law. The practice of the Congress of the United States, and of almost every legislative body in the country, may be adduced to show that a resolution of the nature now under consideration could not have been within the intent of the provision referred to."

2. *State v. Cunningham*, 39 Mont. 197, 103 P. 497 (1909), held void a joint resolution which had no enacting clause. The Montana Constitution contained a provision declaring: Article 5, sec. 20, "The enacting clause of every law shall be as

follows: 'Be it enacted by the Legislative Assembly of the State of Montana.' " The court construed the Constitutional provision as "mandatory and prohibitory because there is no exception to their requirements expressed anywhere in the Constitution".

SECTION 2. THE TITLE

A. *Introductory*

U. M. ROSE, TITLES OF STATUTES

5 A.B.A.Rep. 221, 222-228 (1882).

. . . It is of course well known to you all that, until within a comparatively recent period, the title of a statute was only a name, having no further significance than a mark of identification, and that at present such titles have acquired a fixed place in the constitutional law of a large majority of the American states.

To a casual observer, nothing might seem more arbitrary, or even capricious, than such a result; but a very brief review will serve to show that it is the orderly outgrowth of natural causes of the most lasting character, and wholly inseparable from the conditions in which they take their rise.

Lord Coke commends certain statutes for being shortly penned; and says that "it was the wisdom of ancient parliaments to comprehend much matter in few words."¹

Another characteristic might be referred to as serving to distinguish the old statutes mentioned. They had no titles; for it is said that the title of an act is but a new usage, dating from about the 11th Henry VII.² At first the title was usually framed by the clerk of that house in which the bill first passed, and it was seldom read more than once. Being commonly written in red ink, these titles were for a time called *rubrics*.³

Evidence might be adduced to show either that the clerks were somewhat careless in the discharge of this duty, or that they did not conceive any necessary connection as existing between the contents of a statute and the title or name by which it was to be called.

At any rate, it is clear that the courts could not rely upon a title thus affixed by a mere ministerial officer as affording any evidence of what the legislature meant. For the purposes of interpretation, the clerk had no special advantages over those possessed by the courts; he was also without judicial training, and without the salutary influence derived from the responsibility attached to the judicial office.

After the practice had changed, and when titles had come to be affixed to bills in the way that is customary at the present time,

¹ 2 Inst. 306, 401.

² 1 W.Blackst., 95.

³ Poulter's Case, 11 Rep. 29.

the courts continued to disregard them as means of interpretation. Chief Justice Holt said:

"It is true that the title of an act of Parliament is no part of the law or enacting part, no more than the title of a book is part of the book; for the title is not the law, but the name or description given to it by the makers."⁴

This comparison of the title of an act with the name of a book was perhaps more forcible at the time it was made than it would be now; for in the time of Lord Holt the fashion of giving conceited and far-fetched titles to books was extremely prevalent. At any rate, the title was regarded as affording "no legislative import."⁵

Gradually, however, in the development of the law, titles of statutes have come to be considered as aids to interpretation, at least in cases of great doubt. But their position as such is quite subordinate, and is not very well defined.

Mr. Dwarries admits that the title is a part of a statute in a popular sense, but will not consent that it shall be so considered in a legal sense. The distinction is not important; the only practical question being as to what weight, if any, shall be given to the title in the process of construction. But here, as in many other things, it would seem that there is a fair prospect that popular views will ultimately prevail.

That the title of a statute may be referred to in order to ascertain the intent of the legislature, in case of serious doubt is now well settled, both in England and in this country.⁶

Probably less effect is given to the titles of acts of Congress than to the acts of other legislative bodies, growing out of the custom of Congress to insert in the same statute the most incongruous provisions, having no reference to the matter specified in the title. In *Hadden v. Collector*,⁷ the court cites a number of acts of Congress of that kind. In the case of appropriation bills, it is common in Congress to insert a variety of the most dissimilar matters in one bill. In respect of these the title must be disregarded wholly, each clause requiring a separate scrutiny, and a construction according to its own separate merits.⁸

Mr. Sedgwick, after mentioning the gradual change in the law in respect of the influence of titles on interpretation, says:

"It seems to me on the whole, however, that the original rule is the true one. The title is rarely a matter of legislative debate or scrutiny; and though it may, and doubtless does, give a general idea of the

⁴ *Mills v. Wilkins*, 6 Mod. 62.

⁵ *Attorney General v. Weymouth, Ambler*, 22.

⁶ *Stradling v. Morgan*, Plow. 203; *King v. Cartwright*, *King v. Marks*, 3 East, 160; *Cohen v. Barrett*, 5 Cal. 195; *Flynn v. Abbott*, 16 Id. 358; *Harris v. San Francisco*, 52 Id. 553.

⁷ 5 Wall. 110.

⁸ 7 Opinions Attorneys General.

purpose of the act, still it is precisely in cases of nicety and doubt that it cannot with safety be relied upon." ⁹

The suggestion is certainly an acute one, as it may well be inferred that the same carelessness or want of skill in the use of language which would serve to render the enacting part of a statute ambiguous, would also pervade the title, which is usually the work of the same author. Yet as the works of men are commonly by no means of uniform quality, cases may well arise of doubtful enactments annexed to titles of extreme clearness. The spirit of modern jurisprudence tends to discountenance general and sweeping rules for discarding testimony which may result at times in willful blindness. . . .

One serious difficulty in giving much weight to titles is to be found in the fact that many of the titles of acts are designed to conceal rather than to explain their contents; devised with a view to obtain the support of careless or confiding legislators, who may be induced to vote for a bill simply because its title recommends it as being promotive of a praiseworthy object. Statutes of this kind are very common—statutes of which it might be said, in the language of the Shakespearean drama, that their

" . . . titles

Hang loose about them, like a giant's robes

Upon a dwarfish thief."—Mach., act v., sc. 2.

An instance of this kind may be found in a bill said to have been lately introduced in Congress, under the title of "A Bill for an Act to Reduce Taxation." This title was sufficiently captivating, but on examination it was found that the bill, if enacted, would increase the rate of taxation on every article of taxation mentioned in it.

It is clear that if the courts could qualify laws procured in this fraudulent manner, by softening the rigor of the enacting part by the fine qualities of their titles, the real intent of the majority of the legislature voting for them might be reached in a roundabout way; but usually this could not be done without giving greater weight to the title than to the enacting part. . . .

B. Constitutional Requirements

STATE v. TOWNSHIP COMMITTEE OF NORTHAMPTON

Supreme Court of New Jersey, 1888. 50 N.J.L. 496, 14 A. 587.

DEPUE, J. This writ brings up the proceedings of the township committee of the township of Northampton, in the county of Burlington, for paving Mill street, in the town of Mount Holly. The improvement was authorized and executed, and the assessments therefor made, under a statute passed March 27, 1882. Supp.Revision,

⁹ Sedgw., Stat. and Const.Law, 51.

1058. The act provides that whenever the citizens of any township of this state shall, at any special or annual town meeting, pass a resolution by a two-thirds vote ordering the paving or macadamizing of any street or streets, road or roads, or part or parts thereof, within the bounds of said township, and shall specifically appropriate money for that purpose, the township committee shall cause the same to be paved or macadamized in accordance with such resolution. The act authorizes the township committee to fix grades, to decide the kind and quality of pavement or roadbed, to cause streets to be curbed, to contract for the work, to make assessments for benefits to defray the cost of the improvement, sell lands for the collection of assessments, etc. The Twenty-eighth section provides that nothing therein contained should give the township committee of any township any control of or supervision over any road or roads, or part of the same, lying and being within the limits or boundaries of any incorporated town, borough, or city, being within the limits or bounds of any township, and which road or roads are now by law under the control and supervision of the municipal authorities of any such town, borough, or city. The act is entitled "An act authorizing the township committees, in any township in this state not containing an incorporated city or borough wholly or in part within its limits, to pave or macadamize any street or streets, road or roads, or part or parts thereof, within said township," etc.

Mount Holly is not an incorporated city or borough. It is an incorporated town lying and being within the bounds of the township of Northampton, incorporated for special and limited purposes, without any control or supervision over roads within its corporate limits. It is a municipality created for special and limited purposes, of the character of that which was under consideration in *State v. Troth*, 34 N.J.L. 377-386, on error, 36 N.J.L. 422. Within the principles laid down by this court in that case, and approved by the court of errors, though the decision of this court was reversed on other grounds, Mount Holly is, for the purposes of control, and supervision over roads, part of the township of Northampton. The objection that this act does not apply to roads in Mount Holly, because the town is not mentioned in the title, is without foundation. It may be added that section 28 may be rejected without impairing the legal effect or efficiency of the act; for it is inconceivable that a town, borough, city or other municipality having by its charter complete control of its streets should be affected by a law on the subject of roads relating to townships because such borough, city, or municipality happened to be within the bounds of a township.

An objection arising upon the construction of this act, in connection with its title, is more formidable. Upon such a construction, it is contended that the act is a local and special law, within paragraph 11, § 7, art. 4, of the constitution, which declares that the legislature shall not pass private, local, or special laws in any of the following enumerated cases, among which is enumerated "laying out, opening, altering, and working roads or highways," and which en-

joins upon the legislature to pass general laws providing for the cases enumerated. The body of the act applies to all the townships of this state. A law embracing all cities or all townships is a general law, within the meaning of this clause of the constitution; for, as was said by Mr. Justice Dixon in *State v. City of Trenton*, 42 N.J.L. 487, these bodies, because of their marked peculiarities, are by common consent regarded as distinct forms of municipal government, and so constituting classes by themselves. This principle has been repeatedly adopted and acted upon. . . . But the enacting part of the act is qualified and restrained by the title. In the title the legislature announces its purpose to legislate, not for all the townships of this state, but only with respect to such of them as do not contain an incorporated city or borough either wholly or in part within the limits of the township. The constitutional mandate that the object of every law shall be expressed in its title, has given the title of an act a twofold effect. It has added additional force to the title, as an indication of legislative intent, in aid of the construction of a statute couched in language of doubtful import, and it also operates as a constitutional limitation upon the enacting part of the law. The enacting part of a statute, however clearly expressed, can have no effect beyond the object expressed in the title. To maintain any part of such a statute, those portions not embraced within the purview of the title must be excised; and, if the superaddition to the declared object cannot be separated and rejected, the entire act must fail. . . . To maintain this act in any particular, it must be construed as a law applicable only to such townships as do not contain any incorporated city or borough wholly or in part within the township limits. The act as construed, in subordination to its title, sufficiently designates the townships to which its provisions were intended to apply. But designation, by description or otherwise, will not fulfill the essential qualities of a general law, within this constitutional provision. The only classification allowed is that which embraces a group of objects distinguished by qualities and characteristics sufficiently marked and important, having regard to the purposes of the legislation, to make them a class by themselves, including all, excluding none, which pertain to the class. This rule has been so frequently enunciated that a citation of the authorities would be superfluous. The classification on which this act rests, is a classification setting apart townships not having an incorporated city or borough within the township bounds from the other townships in this state. The subject of the legislation—grading, making, and working roads—is one that is common to all the townships of this state, as well as to the townships set apart for this scheme of legislation. There is no quality which distinguishes the townships so circumstanced from the other townships of this state, or the roads in such localities from other highways in this state. A classification of this character is plainly insufficient to answer the essentials of a general law. It is conceded by counsel that, under the classification adopted, the act would apply to Northampton township, which has within its boundaries the incorporated town of Mount Holly, and not to the neighboring township of

Pemberton, for the reason that the latter township has an incorporated borough within its boundaries,—a condition of inequality in the application of this law that would arise in many of the counties of this state. For the reasons given, the proceedings under review should be set aside.

NOTES

1. All except the following seven states have constitutional provisions similar to that invoked in the principal case: Connecticut, Maine, Massachusetts, New Hampshire, North Carolina, Rhode Island and Vermont.

2. In *People of State of New York v. Parker*, 16 N.J.Misc. 471, 1 A.2d 54 (1936), the statute in question was entitled "An Act to secure attendance of witnesses from without the state in criminal proceedings." It was held that the title did not apply to compulsory attendance of witnesses who are within the state at criminal proceedings without the state. The court said: "Assuredly a title which is misleading, by reason of its specific and limited reference to one definite object where another is embraced in the act, is faulty. True, the title of a statute meets the constitutional requirement when it mentions the subject matter generally and is accompanied with a succinct indication of the legislation concerning it. The title of this statute is not expressive of such a general subject as to create the inference that the statute, under such title, contains provisions requiring witnesses from within this state to appear and testify in some other state."

RADER v. TOWNSHIP OF UNION

Supreme Court of New Jersey, 1877. 30 N.J.L. 509.

The opinion of the court was delivered by

BEASLEY, CHIEF JUSTICE. The plaintiff alleges that he did certain work on the public streets in the township of Union, county of Union, under a contract made with him by the road board incorporated in the name of "The Southeasterly Road District of the township of Union, in the county of Union," by the act of 29th of March, 1871, and that the obligation to pay this debt was transferred to the present defendant, the township committee of the township of Union, by the act which repeals the previous one, and which latter act was approved 1st of April, 1872. It is obvious that the plaintiff's right of action rests on one or both of these legislative enactments, and that if both of them are inoperative, such action must fail as against this demurrer. Both of these laws are called in question in this connection, and although the same objection is made to the two, still it will tend to perspicuity to treat them in turn. It should, however, be premised, that although this case has been before this court on previous occasions, the questions now to be disposed of have, for the first time, been placed before us for consideration.

The exception now taken to these statutes is, that they are in conflict with Placitum 3, of Section 7, of Article IV, of the constitution of this state, which is in these words, viz., "To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

The purpose of this provision is plainly two-fold; first, to ensure a separate consideration for every subject presented for legislative action; second, to ensure a conspicuous declaration of such purpose. By the former of these requirements, every subject is made to stand on its own merits, unaffected by "improper influences" which might result from connecting it with other measures having no proper relation to it; and, by the latter, a notice is provided, so that the public, or such part of it as may be interested, may receive a reasonable intimation of the matters under legislative consideration. These are the intents which the court, in its application of this clause of the constitution, is called upon to further, and, as far as may be practicable, to carry into effect. Let us see, then, how these two acts now *sub judice* will bear these tests.

The first of these laws was approved on the 29th of March, 1871, and it is entitled thus: "An act in relation to streets in Union township, in Union county." By its first section it sets off, by designated boundaries, a certain part of Union township, and then declares that the inhabitants of such part—to use its own language—"shall be, and they are hereby created, a body politic and corporate, to be called the 'Southeasterly Road District of the township of Union, in the county of Union,' for the purpose of laying out, opening and improving streets, roads, highways and public parks within the said boundaries, and for exercising the rights, powers and franchises conferred by this act, and shall be capable of suing and being sued, and of having and using a corporate seal." The next section directs that there shall be a board, to consist of five persons, to be called commissioners of public roads, whose duty it is made to exercise the powers therein conferred, and to whom is given exclusive control over the roads and highways within such district. In subsequent sections this board is clothed with full and exclusive authority "to lay out streets, avenues and public parks within the said district"—to enter upon and take lands for these purposes; the necessary machinery for assessing damages and benefits being provided. In a special section, power is given to connect any sewer in this district with any sewer to be built in the city of Elizabeth, and the act concludes with a provision for the annual election of the members of the board of commissioners. These are the substantial contents of the act in question.

There are two objections under this head, in the brief of the counsel of the defendants, that seem to me to be especially worthy of consideration and criticism.

The first is, that the act in question relates to more objects than one, some of which are not expressed in the title. The object of legislation is described to be streets in Union township, and in the body of the act power is given to construct a sewer and make public parks, and it is said such improvements are things by themselves, and have no relation to the general legislative project. With regard to the first of these specifications, I am inclined to think that the objection is not well founded. The making of a sewer may be said to be comprehended in a description purporting to relate to streets. A street can be, and

usually is, devoted in part to this use, and it would, therefore, seem that the introduction of this provision does not violate the unity of statutory object that is required to prevail. The principles laid down in the well-considered case of *State, ex rel. Walter, v. Town of Union*, 4 Vroom 351, appear fully to countenance this feature of the present act.

But the second point, I think, is more intractable, and cannot be brought into subjection to the same rule. The making and control of streets is a thing entirely different from the making of parks; the two have no connection, and neither is an adjunct to the other, and it is impossible, as it seems to me, to logically hold that a description of one embraces both. The rules that there must be a substantial unity in the statutable object as indicated by the title, is, in this instance, obviously violated. But I do not, on this account, conclude, as counsel appears to have done, that by reason of this illegality this entire statute is to be treated as a nullity. Such is not the legal rule, and no such consequence is denounced by the constitutional article in question, which merely prohibits, without defining the effect of, its infraction. It will answer every purpose of law, and of public policy, to declare, in such cases as the one now under advisement, the unlawful super-addition to the declared object of the statute to be inoperative and void. This can always be done when the objectionable feature stands by itself, and is separable, as a distinct thing, from the body of the act, and there is no reason to suppose that the portion thus eliminated constituted an essential motive to the enactment of the law. This I understand to be the usual rule of law regulating this subject, and, by its application to this case, it will be only the power to make parks that will be affected by the present objection, the body of the act being beyond its scope. This question was the subject of judicial consideration in Alabama, and was determined in a manner that is in harmony with the view just expressed. The case to which I refer is that of *Walker v. State*, reported in 49 Ala. 329, the statute then in question being entitled "An act to restrict the sale of personal property in certain cases," and which, in its body, contained a provision making punishable as a misdemeanor the wilful destruction of personal property on which there was an unsatisfied lien, and the result reached by the court was, that the constitutional provision that required but one subject to be embraced in a statute, was violated, but that, notwithstanding this illegality, the whole act was not void, but only the unlawful interpolations, they being severable from the other parts of the law.

But the other point on this same subject raised by counsel, has a wider scope, and, therefore, is of a more serious character, such point being, that the title of this statute does not truly express the object of the legislation which it embodies.

After a careful consideration of this subject, I have concluded that this exception is well taken, for I have failed to discover what effect is to be given to this constitutional provision, if it is not, in this case, to have the effect of annulling this law. It has been already said that the purpose of the provision requiring the object of the proposed law

to be expressed in its title, is to give notice of and publicity to the proposed legislation, and such purpose would be thoroughly frustrated, if a rule should be sanctioned having a scope sufficiently wide to embrace and to validate the present act. The title of this act is, "An act in relation to streets in Union township, Union county," and it will, on a moment's thought, be perceived how general such an allusion to the legislative purpose is. It is true, that it may be difficult to indicate, by a formula, how specialized the title of a statute must be; but it is not difficult to conclude that it must mean something in the way of being a notice of what is doing. Unless it does this, it can answer no useful end. It is not enough that it embraces the legislative purpose—it must express it; and where the language is too general, it will accomplish the former, but not the latter. Thus, a law entitled, "An act for a certain purpose," would embrace any subject, but would express none, and, consequently, it would not stand the constitutional test. And so, a law entitled "An act in relation to silk goods," would not indicate, in the faintest outline, a purpose to incorporate a body for the manufacture of such fabrics. Such titles would be idle and inefficacious for every purpose. And yet the latter example of a nugatory title is not unlike the one prefixed to the act under consideration. It is described as being in relation to streets in Union township, but its immediate purpose is to create a corporation to take charge of such streets. These streets, before the passage of this law, were in the hands of the officers of the township; the new scheme was to supersede such supervision, and to transfer it to a corporate board organized for that purpose. This was an important change, most materially affecting the property and personal rights of the inhabitants of the district embraced in the law; and yet it is certain the title of this statute would not have conveyed to such persons any intelligible intimation of the project in contemplation. This statute relates to the streets only because the organization it establishes is to have the control of them, but the object of the act is the establishment of such organization. Such object not being expressed in the title, I think the entire act is void.

But this resolution, with respect to this first point, is not conclusive of the issue on this demurrer. The questions touching the legality and effect of the act of the 1st of April, 1872, remain to be disposed of.

This statute is entitled "An act to repeal an act entitled 'An act in relation to streets in Union township, in Union county,' approved March 29th, 1877," and it effects the purpose thus indicated, by repealing the act already criticised. In its subsequent sections, it provides that such repeal shall not affect or impair any legal contracts made under the original act, and it authorizes and empowers the township committee of the township of Union, and their successors, to compromise and settle, if possible, with such contractors, and "to pay all just debts contracted by said commissioners for improvements under said act;" and to enable the township committee to execute these trusts and powers, such committee is "authorized to borrow such sums of money as may be necessary for that purpose, and to provide for the

payment of said sums so borrowed, by the issue of the bonds of said township." And it further enacts that the expenses for improvements may be assessed and collected in the mode appointed in the act repealed, and makes valid assessments already laid.

It is argued that this repealing act is void by reason of the same imperfection which has been found exists in the primary law, that is to say, that its title does not fairly express its object. The specification under this exception is, that the body of the act comprises objects not expressed in the title to the law.

I do not concur in this view. The objects which, it is insisted, are not indicated in the title, are the powers conferred on the township committee of Union, looking to the payment of debts due under the repealed statute. But I think such powers and their incidents are the necessary concomitants and dependencies of the repeal of this act. A provision for the payment of the existing debts was an inseparable accompaniment of a repealing law, for such a law could not be legally passed without some such provision being made. Nor could there be any doubt as to who would be responsible for such debts. The road district was a part of the township, and when, therefore, the organization of the district was abolished, the township organization revived, and it followed almost as a matter of course, that the latter would fall heir to the obligations of the former. All these things seem to follow in train on the repeal of this law, and, therefore, it was not necessary to indicate them in the title of the repealing law. If we look at this matter practically, we will see, I think, that in this instance the constitutional principle in question was not, in substance, infringed. This work upon the public streets, which forms the ground of this action, had been done; the inhabitants of this locality had the the benefit of such work, and were liable, by the express terms of the original act, to pay for it; when, consequently, they were notified by the title of the second law, that the former one would be repealed, they could not reasonably draw the conclusion that they were to be exonerated from those debts which had theretofore been incurred in their favor; nor could they have been surprised to find that they, as inhabitants of the township, were not relieved from the burthen that had rested on a portion of them as inhabitants of the road district. This clause of the constitution does not require the methods by which the object of the statute is to be effected, to be stated in its title; and the liquidation of the debts of a corporation whose charter is repealed, is an essential part of the process of the repeal of its charter. It may be true that this charging the entire township with the expense of the work done on the roads of a particular district, is a departure from the ordinary practice in this state, but whether such a departure shall occur is a matter for legislative discretion. I can have no doubt that the legislature could formally have declared that certain roads to be made in a township, should, contrary to the usual custom, be borne by the body of the township; and, granting this power, it seems impossible to deny the right to transfer to such corporation the burthen of paying for roads which may have been theretofore made in a particular district of such township.

This second statute is not, in my opinion, obnoxious to the charge of unconstitutionality. . . .

Let judgment be entered on this demurrer, for the plaintiff.

NOTE

In accord: *Warren v. Walker*, 167 Tenn. 505, 71 S.W.2d 1057 (1934).

H. L. SHAFFER & CO. v. PROSSER

Supreme Court of Colorado, 1936. 99 Colo. 335, 62 P.2d 1161.

BURKE, JUSTICE. Plaintiff in error is hereinafter referred to as the Shaffer Company, defendant in error as Prosser, and the United States Bond Company as the Bond Company.

Prosser revoked the license of the Shaffer Company as a dealer in securities. The district court sustained that action, and to review its judgment this writ is prosecuted.

Prior to October, 1930, Shaffer was president and manager of the Bond Company, and for a considerable time thereafter was a member of its board of directors, and was, and is, in control of the Shaffer Company. For all the purposes of this cause he was these respective companies and we so consider him.

The license in question was issued under the provision of chapter 95, p. 352, L.1931. Section 3, thereof, p. 355, provides for its issuance by the Secretary of State, and by section 5, p. 358, of the same act it might be canceled by the same officer. These powers and duties were transferred to the Attorney General by paragraph 2, § 13, art. 5, of chapter 37, p. 222, L.1933. These provide that the officer must find that the applicant for a license "is of good business repute," and that a license once issued may be revoked if it is shown that the licensee "is not of good business repute." . . .

2. It is contended that the act of 1931 because of defective title violates section 21 of article 5 of the State Constitution which provides that no bill shall be passed "containing more than one subject, which shall be clearly expressed in its title." Here the title is, "An Act Relating to Fraudulent Practices in Respect to Stocks, Bonds and Other Securities," and the point presented is that this gives no hint of licensing. In support of their position counsel rely upon *In re Breene*, 14 Colo. 401, 24 P. 3, and other Colorado cases. With none of these do we disagree. However, so varied is the practice of entitling legislative acts, and so divergent the questions raised under said section 21, that adjudicated cases are rarely helpful save as they announce broad general . . . rule that "particularity is neither necessary nor desirable; generality is commendable." . . . If the legislation "is germane to the general subject expressed in the title; if it is relevant and appropriate to such subject, . . . it does not violate this provision of the Constitution." Tested by these

rules, as well as by others laid down by the adjudicated cases in this jurisdiction, we doubt not this title is sufficient.

The judgment is accordingly affirmed.

LIEN v. BOARD OF COMMISSIONERS

IN RE HEGNE-HENDRUM DITCH NO. 1

Supreme Court of Minnesota, 1900 80 Minn 58, 82 N W 1094.

BROWN, J. This is a proceeding for the establishment and construction of a ditch under and pursuant to the provisions of chapter 97, Gen.Laws 1887. . . . Counsel for appellants do not question the regularity of the proceedings or the sufficiency of the evidence. They attack the constitutionality of the law under which the proceedings are conducted, and assign some errors in the refusal of the trial court to give some requests for instructions, which, because the evidence is not before us, are of minor importance. They contend that the statute is unconstitutional upon the grounds and for the reasons (1) that it authorizes the taking of private property for a private use; (2) that it provides for the levy of taxes which are not uniform or based upon the value of the property; (3) that the subject of the act is not expressed in its title; (4) that the act is void, because it is superseded by chapter 98. Gen.Laws 1887. These constitutional objections present the principal questions in the case.

The authority of the legislature to enact drainage laws is derived from the police power, the right of eminent domain, or the taxing power, and is undoubted. 10 Am. & Eng.Enc.Law (2d Ed.) 223. It is founded in the right of the state to protect the public health, and provide for the public convenience and welfare. . . .

Counsel for appellants contend that the act, construed from the standpoint of its title, has for its purpose and object the interests of private individuals, and not the public welfare or convenience. And, further, that, if it be construed as in the interests of the public good, it is void, because no such object or purpose is expressed in the title of the act. The title of the act is as follows: "An act to enable the owners of lands to drain and reclaim them when the same cannot be done without affecting the lands of others; prescribing the powers and duties of county commissioners and other officers in the premises, and providing for the repair and enlargement of such drains, and repealing certain acts therein specified, and declaring an emergency."

1. There can be no question but that the act is in the interests of the public, and for exclusively public purposes. No ditch can be established or laid out thereunder unless the county commissioners expressly find that it will be of "public utility, or conducive to public health or of public benefit or convenience." Section 1 of the act clearly shows that the intent and purpose of the legislature was to further and promote the public interests, and section 9 makes a finding of such public purpose an essential to the jurisdiction of the com-

missioners to proceed. This is clearly conclusive against appellants' contention that the objects of the statute are in furtherance of private interests. It does not matter that in accomplishing the public objects of the act private interests are advanced. Such a result is merely incidental, and does not affect the validity of the law. In determining the purpose of a statute, we must look to all its parts, not merely the title; and upon the whole statute, title and all, we hold that it should be sustained as a proper exercise of police power or of the right of eminent domain. It is immaterial upon which ground we place it.

2. Neither can there be any serious question as to the sufficiency of the title. It is not fatal that the objects and purposes of the act are not expressed in full in the title. Our constitution does not require the title of an act of the legislature to be so broad. It requires the subject of each act to be so expressed, but not the "purposes" or "objects" of the proposed statute. The objects of an act may not always appear from the subject as expressed in the title. *Suth.St.Const.* § 83; *State v. Cassidy*, 22 Minn. 312. And to require the objects to be there fully conveyed and expressed would lead to prolix titles, and tend to embarrass and inconvenience legislation. The object of requiring the title to express the subject of the act is to furnish the legislature with short and concise information concerning the proposed enactment. And if the subject, as expressed and named, be sufficiently broad and comprehensive to indicate the general purposes of the act, it is sufficient. *Burnside v. County Court*, 86 Ky. 423; *Ex parte Burnside*, 6 S.W. 276. Says the supreme court of Illinois: "The provision does not require that the subject of the bill shall be specifically and exactly expressed in the title; hence we conclude that any expression in the title which calls attention to the subject of the bill, although in general terms, is all that is required." *Johnson v. People*, 83 Ill. 436. A variety of instances where the title to statutory enactments is not near as expressive as the one under consideration is found in the books. *Suth.St.Const.* 92. In Indiana a drainage statute was entitled "An act concerning drainage," and it was held sufficient. *Wishmier v. State*, 97 Ind. 160. The title of the act in question is much broader than that of the Indiana statute, and that case is directly in point. See, also, *Supervisors v. Heenan*, 2 Minn. 330 (*Gil.* 281); *Bright v. McCullough*, 27 Ind. 223. In *State v. Cassidy*, 22 Minn. 312, the court, after citing some Minnesota cases, says: "The rule of construction established by these cases is still unquestioned in this court, and must, if adhered to, be decisive of the case now before it. Under such rule, as exemplified by these cases, if the legislature is fairly apprised of the general character of an enactment by the subject as expressed in its title, and all its provisions have a just and proper reference thereto, and are such as, by the nature of the subject so indicated, are manifestly appropriate in that connection, and as might reasonably be looked for in a measure of such character, then the requirement of the constitution is complied with." Although the title of this act is not as complete as it might have been made, we think that, within the rule laid down by these cases, there is a suffi-

cient compliance with the requirement of the constitution. The objections made by appellants' counsel are not, however, wholly without merit; but, reading the entire title, together and in connection with the act itself, there is no doubt in our minds as to its sufficiency, and we sustain it.

3. The claim made by appellants that the act in question was superseded and repealed by chapter 98, Gen.Laws 1887, is untenable. That act was passed at the same session of the legislature, and some six days later than the act in question. It is very true that a revised statute which covers and embraces the subject-matter of a prior statute, and which was evidently intended by the legislature as a substitute for it, operates as a repeal of the prior statute, whether it contains a repealing clause or not. The law on this subject is correctly summed up in 23 Am. & Eng.Enc.Law, 485: "Where two acts are not in express terms repugnant, but the later act covers the whole subject-matter of the earlier, not purporting to amend it, and plainly showing that it was intended as a substitute for the earlier, it will operate as a repeal thereof, though all the provisions of the two may not be repugnant. But there must be unmistakable intent manifested on the part of the legislature to make the new act a substitute for the old, and to contain all the law on the subject; for mere similarity in the provisions of the two statutes is not enough to effect a repeal, even though the similarity may be such as to cause confusion or inconvenience." By taking notice of the legislative journals, which we have the right to do, we find these two statutes before the legislature at one and the same time. Chapter 98 was introduced in the house of representatives on January 28th; but chapter 97, which appellants contend was repealed by said chapter 98, was not introduced until February 20th following. Chapter 98, having been first prepared and introduced, could not possibly have been intended as a substitute for, or a revision of, chapter 97, the bill for the enactment of which had not then ever been before the legislature. The conclusion is inevitable that both acts were intended as independent statutes. . . .

Order affirmed.

NOTES

1. In a footnote to Manson, "The Drafting of Statute Titles," 10 Ind.L.J. 155 (1934) at pp. 156-157, the author states:

"The constitutions of Louisiana, Michigan, New Jersey, Virginia, and West Virginia use the word 'object'; thirty-four use 'subject'; and those of Georgia and Mississippi use a combination of 'subject-matter' and 'subject.' In the beginning, 'subject' and 'object' were of about equal choice in usage. In 1845 the Constitution of Texas contained an 'object' clause (Article VII, Sec. 24), which was changed to the 'subject' clause as it now stands. The Supreme Court of Texas has held that the change of words did not change the essential meaning of the provision—*Adams v. San Angelo Water Works Co.*, 86 Tex. 485, 25 S.W. 605. The first Constitution of California (1849) contained an 'object' clause; the title-body clause as introduced into the 1878 Constitutional Convention contained 'subject'; the Committee on the Legislative Department and the Convention in its debates were not aware of any change and referred to the clause as being precisely the same as the wording of

their 1949 Constitution, so the substitution was inadvertent—Debates and Proceedings of the Constitutional Convention of California of 1879.

"It is sometimes attempted to distinguish between 'object' title-body clause provisions and 'subject' title-body clause provisions on this basis: that the 'object' of an act is its aim or purpose, while the 'subject' of an act is the matter to which it relates or with which it deals—*Louisiana v. Ferguson*, 104 La. 49, 28 So. 917, 81 Am.St.Rep. 123; see: *State v. Steinwedel*, 203 Ind. 457, 180 N.E. 865. This attempted classification is misleading. All efforts to differentiate between 'object' and 'subject' in connection with title-body clause provisions are confusing and useless—See: *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S.E. 141, 12 A.L.R. 1121, and *Fahcy v. State*, 21 Tex.App. 146, 11 S.W. 108, 11 Am.St.Rep. 182; *Spencer v. Hunt*, 109 Fla. 248, 147 So. 282, and *Pinder v. Board of Sup'rs*, 146 So. (La. App.) 715.

"Rather, judicial interpretation has rendered 'object,' 'subject,' 'general object,' 'general subject,' and 'general purpose' equivalents. These terms are used interchangeably and without distinction by the courts. The decisions of other jurisdictions are quoted and relied upon without distinction because of the wording of the title-body clause involved. 'Object' and 'subject' are so interwoven that courts often misquote the particular wording of the title-body clause of their own jurisdiction—*State v. County Judge*, 2 Iowa 280; *Board of Education v. Straub*, 182 Mich. 665, 148 N.W. 716. In *Cote v. Village of Highland Park*, 173 Mich. 201, 139 N.W. 69, the court says that 'provisions requiring the *object* of an act to be expressed in its title and limiting the act to one *subject* are embodied in the constitutions of many of our States.' There has never been such a title-body clause provision. The conclusion is that it is immaterial whether the title-body clause contains 'object,' 'subject,' or 'subject-matter.' All such provisions receive like treatment. They were all adopted to accomplish the same results; and this difference in wording was not meant to indicate different means for accomplishing these results."

Can you reconcile *Rader v. Township of Union* and *In re Hegne-Hendrum Ditch No. 1*, supra, with the author's conclusion?

2. In the Permanent Rules of the Minnesota House of Representatives, rule 4b, reads, in part:

"The title of every bill must give its single subject and briefly state its purpose as far as practicable."

STATE v. PROBATE COURT OF RAMSEY COUNTY

Supreme Court of Minnesota, 1939. 205 Minn. 545, 287 N.W. 297.

GALLAGHER, CHIEF JUSTICE. On April 27, 1939, James A. Cook, a police officer of the city of St. Paul, filed in the probate court of Ramsey county a petition verified on information and belief, charging one Charles Edwin Pearson with being a psychopathic personality as defined by c. 369, Session Laws of Minnesota, 1939, and praying for his commitment according to law. On certification by the county attorney of his satisfaction that good cause existed for the institution of the proceedings, the probate court issued an order requiring the sheriff of Ramsey county forthwith to bring the said Pearson before the court and another order fixing a hearing on the petition for May 5, 1939, at two o'clock P.M.

Before the service of these orders, relator applied to this court for a writ of prohibition and on his verified petition attacking the consti-

tutionality of the act under which the proceedings were instituted we issued a temporary writ prohibiting the probate court from proceeding with the hearing until the further order of this court. The matter is now here on relator's application to make the writ permanent.

Because of a recognized need for legislation to deal with sex offenders and a belief, shared in by medical authorities and others, that sex crimes are committed because of a weakness of the will as well as of the intellect, the 1939 legislature enacted c. 369 entitled: "A Bill For An Act relating to persons having a psychopathic personality." Section 1 of the act reads: "The term 'psychopathic personality' as used in this act means the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons." . . .

2. It is urged by relator that c. 369, L.1939, is void because in violation of Article 4, § 27, of the constitution of Minnesota, which reads: "No law shall embrace more than one subject, which shall be expressed in its title." Cases of two kinds arise under this and similar constitutional provisions: (1) Those in which it is claimed that the title is so general in its terms that it does not fairly express the subject of the act, and (2) those in which it is claimed that the subject as expressed in the title excludes, by implication, certain provisions of the act. The instant case is of the first type. . . .

A title broader than the statute, if it is fairly indicative of what is included in it, does not offend the constitution. *State ex rel. Young v. Standard Oil Co.*, 111 Minn. 85, 126 N.W. 527; *Seamer v. Great Northern R. Co.*, 142 Minn. 376, 172 N.W. 765. Whether or not a title is expressive of the subject matter of an act must be determined with reference to practical considerations, the purpose of the constitutional provision, the approach adopted by this court to the problem in the past, and the disposition of other cases involving titles of similar brevity.

It is true that the term "psychopathic" is not a part of the working vocabulary of most people. Yet the reasonably well-informed recognize it as having reference to mental disorders. (See *The American Illustrated Medical Dictionary*, Fifteenth Edition, by Dorland, *supra*.) To those concerned with mental cases, it connotes a condition of the mind causing the person afflicted to be hopelessly immoral. In either case, the fact that the law deals with the sexually irresponsible would not come as a surprise to legislators or members of the public who might have occasion to read its title.

Since the title indicates that the act deals with persons of abnormal minds, the manner in and the mode by which the law is to operate are clearly germane to the subject expressed. That the statute is essentially the same in these respects as are the laws of this state which apply to insane, idiots and inebriates appears sufficiently to indicate this fact. . . .

Turning to recent decisions from other states having similar constitutional provisions, we find that the following titles have been considered not too general in a constitutional sense: "An Act Relating to Marriage and Divorce" (Titus v. Titus, 96 Colo. 191, 41 P.2d 244); "An Act Relating to Corporations" (759 Riverside Ave., Inc., et al. v. Marvin, 109 Fla. 473, 147 So. 848, 849); "An Act relating to disputes concerning terms and conditions of employment." (Fenske Bros. v. Upholsterers' Union, 358 Ill. 239, 193 N.E. 112, 114, 97 A.L.R. 1318); "An Act concerning husband and wife, and declaring an emergency" (Clark v. Clark, 202 Ind. 104, 172 N.E. 124, 126); "An act relating to cities of the first class" (City of Wichita v. Board of Com'rs of Sedgwick County, 110 Kan. 471, 204 P. 693, 694); "An Act relating to crimes and punishments" (Allen v. Commonwealth, 272 Ky. 533, 114 S.W.2d 757, 759); "An act concerning the welfare of children" (Richardson v. State Board of Control, 98 N.J.L. 690, 121 A. 457, 458, affirmed in 99 N.J.L. 516, 123 A. 720); "An act relating to warehouse receipts" (Commonwealth v. Rink, 267 Pa. 408, 110 A. 153).

We conclude, therefore, that the constitutional mandate is not violated by the title here in question. Its defects may offend the principles of legislative draftsmanship but not those of constitutional law.

KEDZIE v. TOWN OF EWINGTON

Supreme Court of Minnesota, 1893. 54 Minn. 116, 55 N.W. 864.

COLLINS, J. The constitutionality of certain legislation is put in question by this appeal. In 1883 there was passed by the legislature an act (Sp.Laws 1883, c. 135) entitled "An act for a township drainage act, authorizing the supervisors of townships in Kittson, Marshall, Polk, Norman, Cass, and Wilkin [counties] to issue bonds for certain purposes." The names of these counties were again mentioned in the first and fifth sections of the act. In 1887 there was passed an act entitled "An act to amend chapter one hundred and thirty-five (135) of the Special Laws of Minnesota of one thousand eight hundred and eighty-three, (1883.)" Sp.Laws 1887, c. 80. This last act, by means of its first section, attempted to amend the first by inserting among the counties specified in the first and fifth sections of the latter the names of 21 additional counties in this state, so that all of the provisions of the statute of 1883 would be made to apply to the townships in these last-mentioned counties. The bonds on which this action is founded were issued by one of these townships. As we regard the case, the claim made by respondent's counsel that the original act was unconstitutional, because the subject of the same was not expressed in its title, becomes of secondary importance, and need not again be alluded to. That the subject of the legislation attempted to be covered by the amendatory act of 1887 was not expressly in its title is so patent that any discussion in support of this assertion would be a waste of time. The amendment could not have been incorporated, and the counties therein named could not have been included, in the original statute, under its title, under the requirement found in article 4,

§ 27, of the state constitution, and the amendment in no manner enlarged the title of that statute. Of the numerous cases on this subject decided by this court, that of *Boom Co. v. Prince*, 34 Minn. 79, 24 N.W. Rep. 361, is probably the most in point. Order affirmed.

STATE ex rel. SHISSLER v. PORTER

Supreme Court of Minnesota, 1893. 53 Minn. 279, 55 N.W. 134.

COLLINS, J. The relator seeks by this proceeding to obtain immediate possession of the office of judge of the municipal court of the city of Mankato; he having been elected to that office at the city election held April 4, 1893. His claim is that the term of office of the respondent—who was last elected to the same office at the election held in 1891, duly qualified, and has since discharged the duties—expired on Monday, the 10th day of April, 1893. The question is whether the respondent's term of office is two or three years. The facts are that the city of Mankato was chartered and organized long prior to the year 1885. A municipal court for the city was created by Sp.Laws 1885, c. 119; the same being an act of the legislature entitled "An act to establish a municipal court in the city of Mankato, Blue Earth county, Minnesota." This was an independent act, providing for the establishment of the court, and defining its powers and jurisdiction, and was similar in all respects to like acts which have passed the legislature from time to time under the authority of that section of the constitution which provides for certain named courts, and for the creation of "such other courts, inferior to the supreme court, as the legislature may . . . establish by a two-thirds vote." It is conceded that this act has never been referred to directly by the legislature, except in an amendatory act now known as chapter 78, Sp.Laws 1887; the amendment relating simply to the salary of the judge of the court. By section 2 of the original enactment of 1885 it was provided that the qualified electors of the city of Mankato, at the city election to be holden on the first Tuesday in April of that year, and on the day of the city election every third year thereafter, should elect a judge of the court, who should hold his office for the term of three years, and until his successor was elected and qualified. By section 3 it was provided that there should also be elected a special judge of said court, whose manner of election, term of office, powers, duties, and qualifications, should be the same as those of the judge. Both of these officers were required to be residents and qualified electors of the city, persons learned in the law, and duly admitted to practice as attorneys in this state. By the terms of sections 2 and 3, vacancies in either of these offices were to be filled by appointment by the governor; the appointees to be qualified persons, and to hold office until the next annual city election occurring more than 30 days after the vacancy should have happened, when a judge or a special judge, or both, as the case might be, should be elected for a term of three years. We call attention to some of those provisions for the purpose of showing the painstaking care of the legislature when establishing the court,

which is a court of record, having civil jurisdiction in cases where the amounts in controversy do not exceed \$500. Its criminal jurisdiction is that of a justice of the peace, and is exclusive in the city. The respondent was first elected in April, 1888. There was no attempt made to elect a municipal judge from that time until the annual city election of 1891, when he was re-elected, as before stated. So it will be seen that respondent held the office for three years under his first election.

In the year 1887 an act was passed, (Sp.Laws 1887, c. 8,) entitled "An act to amend and consolidate the charter of the city of Mankato, state of Minnesota." This was really a new charter for the city. We find no reference to the municipal court, or the judges thereof, except in section 2, subc. 2, where it is provided that the elective officers of the city shall be a mayor, a municipal judge, treasurer, and city recorder. The recorder and treasurer are to be elected for two years, and "all other elective officers . . . shall hold their offices for one year, or until their successors are elected and qualified." There was also a provision which had the effect to continue in office all persons then holding office under the prior charter until the expiration of the terms for which they were elected or appointed. It is claimed by the relator that by this act the term of office of municipal judge was reduced from three years to one, and that, when respondent was elected in 1888, he was elected for but one year.

In the year 1889 various amendments were made to the act of 1887, by an act entitled "An act entitled 'An act to amend the charter of the city of Mankato in the state of Minnesota,' " now Sp.Laws 1889, c. 12. In section 2 of the act the elective officers of the city—mayor, municipal judge, etc.—were named, the same as in section 2 of the statute of 1887. An election was provided for the year 1889, and for every two years thereafter, and the term of office of every officer elected under the act was to commence on the second Tuesday of April of the year in which he was elected, and was to continue for two years. The only substantial change in the amendment of 1889, relating to elections or terms of office, was to substitute biennial for annual elections, and to make the terms of office for the respective officers two years, instead of one. It will have been noticed that a municipal judge was not elected in 1889. In the year 1891, Sp.Laws 1891, c. 47, another act was passed, entitled "An act to amend chapter 8 of the Special Laws of the State of Minnesota for the year 1887, entitled 'An act to amend and consolidate the charter of the city of Mankato, state of Minnesota,' as amended by chapter 12 of the Special Laws of the State of Minnesota for the year 1889, entitled 'An act entitled an act to amend the charter of the city of Mankato, in the state of Minnesota.' " This was, in substance, as was chapter 8, *supra*, a new charter. An election was provided for the first Tuesday in April, 1891, and every two years thereafter. The elective officers were to be a mayor, municipal judge, a special judge, treasurer, and recorder. These officers, it was provided, should be elected for two years, and until their successors were elected and qualified. The municipal court was not

mentioned in this act, nor were the judges thereof, except as above stated. Our attention has not been directed to any other legislation bearing upon the subject, and the relator rests his claim to immediate possession of the office on the amendatory statutes of 1887, 1889, and 1891, before mentioned, and in which he contends the term of the office in question was first reduced to one year, to take effect in the year 1888, when respondent was first elected, and then enlarged to two years, taking effect, as to respondent's second term, in the year 1891, when he was last elected.

It is the position of the respondent that the term of the judge of the municipal court, as fixed by the act of 1885, establishing the court, has not been changed or shortened by the so-called amendatory acts, because, if the language used therein could be given that effect, it would prove ineffectual; the subject-matter of such legislation not having been expressed, it is claimed, in the title to either of these various acts, as required by paragraph 27, art. 4, of the constitution, which provides that no law shall embrace more than one subject, which shall be expressed in its title. The main argument of counsel for the relator seems to be based upon their contention that the act of 1885, establishing the court, was an amendment to the then existing city charter, and upon its passage became incorporated into and a part of it, so that the subsequent enactments of the legislature amendatory of the charter affected the act. The city charter was not mentioned, and to create this court it was not necessary that it should be. That such an act might be styled as amendatory of a charter, or might be made a part of a city charter, either originally or by legislation subsequent to the granting of corporate powers, we do not now question, although the policy and wisdom of establishing such tribunals by independent and distinctive legislation are strongly suggested by the fact that they can only be lawfully created, under the constitution, by a two-thirds vote of the legislature, while acts relating to offices purely municipal need but a majority vote. But we are not to consider what might have been enacted as a part of the original charter, but what was enacted; so that, taking it for granted that a municipal court might have been provided and created in the charter act, without special reference to such court in the title, it was not. The city charter was wholly silent on the subject, and covered only such subjects as are ordinarily found in a charter. Nor was there anything in the act of 1885, establishing the court, indicating an intention to add it to, or make it a part of, the charter, or to amend any of the charter provisions; and whether that could have been done legally, under its title, may well be questioned. Of course the functions of the newly-constituted court were to be exercised within the limits of the municipality; and it was established, undoubtedly, at the instance and for the convenience of its residents. That its judges were to be chosen by ballot, by and from among the electors of the city, and that the city recorder was to be clerk of the court, was not significant, or of any greater effect than would have been a requirement that from among the qualified electors of the city the governor should appoint those officers. These provisions simply pointed at, and specified, the means and meth-

ods by which the court has to be equipped with its proper complement of officials. Prior to the passage of Sp.Laws 1885, c. 119,—an act to establish a municipal court in the city of Mankato, according to its title,—that city had been chartered by the legislature. The act or bill for the charter was full and complete, and the subject embraced therein was tersely, but clearly, expressed in its title. It is probable that the subject-matter covered by said chapter 119 might have been incorporated into this original legislation, or, with a proper and suggestive title, the act creating the court might have been lawfully passed as an amendment to the charter. But this was not the course which was pursued. Instead of adopting a title which would have indicated a purpose to amend the charter, or make the new law a part of it, the exact object of the legislation was expressed. Two laws were then in force, separate and distinct enactments,—one creating and chartering a city, but making no provision for a municipal court, nor was it essential that it should; the other establishing such a court, and not referring at all to the city charter. The fact that the law establishing a judicial tribunal might have been made a part of the charter originally, or by amendment, does not affect the fact that such was not the course of the legislature. Nor can it have weight when considering the legislation through which it is urged the term of office of the municipal judge, as fixed in chapter 119, has been reduced to the term of two years.

The constitutional requirement as to the entitling of laws has often been discussed in the opinions of this court. The substance of what has been said, so far as we need to repeat it at this time, is that an amendatory law is for the amendment, not of what might have been enacted under the title of the original statute, but of what was enacted. Hence the sufficiency of the title of an act merely declared to be amendatory of a prior law, to justify the legislation which may be enacted under it, depends, not alone upon the fact that the title of the original statute was so comprehensive that the legislation in question might have been properly enacted in such prior law, but it depends also upon the nature and extent of the prior enactment, to amend which is the declared purpose or subject of the later act. And when the title of an act is such that the legislature can be deemed to have been fairly apprised of its general character by its subject, as expressed in such title, and all the provisions of such act have a just and proper reference thereto, and are such as, by the nature of the subject so indicated, are manifestly appropriate in that connection, and might reasonably be looked for in a measure of such a character, the title is sufficient. *State v. Cassidy*, 22 Minn. 312; *State v. Klein*, Id. 328; *State v. Smith*, 35 Minn. 257, 28 N.W.Rep. 241. Applying this language to the case at bar, it will be seen that it is of no materiality that the matter found in and covered by the act establishing the court might have been germane to the subject embraced in the original charter, and have been sufficiently expressed in the title to that law, for the nature and extent of the charter itself must be consulted. And when we are examining the title to the amendatory act of 1891, under which relator claims his right to an immediate possession of the office,

and the titles to the acts of which that was an amendment, we are to inquire whether the legislators were fairly informed by such titles of the nature and character of the proposed legislation. In view of the independent charter provisions in existence at the time of the enactment of the law establishing the court, and the title of that law, would amendments to the latter be looked for in measures which, if dependence could be placed upon their titles, related solely to the charter? We think not. The titles to these amendatory acts, if the legislation embraced therein was designed to affect the provisions of chapter 119, were very misleading, and well calculated to accomplish the mischief the constitutional requirement was expressly designed to prevent. As the subject of that part of the legislation heretofore referred to in Sp. Laws 1887, c. 8, Sp. Laws 1889, c. 12, and Sp. Laws 1891, c. 47, was not expressed in the titles of either of these acts, the term of office of the judge of the municipal court for the city of Mankato remains at three years. Order to show cause discharged.

STATE ex rel. OLSON v. ERICKSON

Supreme Court of Minnesota, 1914. 125 Minn. 238, 146 N.W. 364.

DIBELL, C. On January 5, 1914, the relator tendered to the respondent, the county auditor of Hennepin county, his affidavit of candidacy for the office of representative from the 33d legislative district of the state on a party ticket at a primary election to be held September 15, 1914. The auditor refused to receive and file the affidavit. He is the officer with whom filings are made. An alternative writ of mandamus was issued. By Laws 1912, c. 2, § 2, amending R.L.1905, § 182 (Gen.St.1913, § 336), candidates for judicial offices, county superintendents of schools and municipal officers in cities of the first class were nominated upon separate ballots designated as nonpartisan ballots. By Laws 1913, c. 389, § 2, amending R.L.1905, § 182, as amended by Laws 1912, c. 2, § 2, members of the Legislature are also nominated upon separate nonpartisan ballots. By R.L.1905, § 181, and Laws 1912, c. 2, § 1, the general primary election for 1914 would be held on Tuesday, seven weeks preceding the general November election, that is, on September 15, 1914. By Laws 1913, c. 389, § 1, amending R.L.1905, § 182, as amended by Laws 1912, c. 2, § 1, the date of the general primary is changed to the third Tuesday in June preceding the general November election. There are other changes made in the primary law some of which will be noted as we proceed. The court quashed the alternative writ and the relator appeals. The question is whether chapter 389, Laws 1913, is constitutional. . . .

1. The Constitution, art. 4, § 27, is as follows:

"No law shall embrace more than one subject, which shall be expressed in its title."

Similar constitutional provisions are found in other states. Sometimes the word *object* instead of *subject* is used. If there is a difference in the application of them the word *subject* is less restrictive than

the word *object*. *Lien v. Board*, 80 Minn. 58, 82 N.W. 1094; *State v. Cassidy*, 22 Minn. 312, 21 Am.Rep. 765.

The title of Laws 1913, c. 389, is as follows:

"An act to amend sections 181 and 182 of the Revised Laws 1905, as amended by chapter 2 of the General Laws, Special Session 1912, section 184 of the Revised Laws 1905, as amended by chapter 226, General Laws 1907, and chapter 95, General Laws 1909, and chapter 2, General Laws, Special Session 1912, section 187, Revised Laws 1905, section 200, Revised Laws 1905, section 213, Revised Laws 1905, and section 217, Revised Laws 1905, all as amended by chapter 2, General Laws, Special Session 1912, and to repeal a part of section 18 of chapter 2, Special Session 1912."

The Revised Laws have no title as that term is generally understood. The amendment of 1913 could not have referred to them by title. It could have added the words, "relating to primary elections," or similar words, and had it done so no question would likely be made as to the sufficiency of the title. The body of law included in Revised Laws 1905 was the result of a revision by an official commission. The revision was adopted by an act entitled "An act to revise, consolidate and codify the general laws," approved April 18, 1905. The title was appropriate. *State v. Great Northern R. Co.*, 100 Minn. 445, 111 N.W. 289, 10 L.R.A., (N.S.,) 250. This act provided that the revision should be known as Revised Laws 1905. The sections amended by the act of 1913 are a part of chapter 6 of the revision. The sections referring to primary elections were enacted under a general head of "Nominations by direct vote." The section headings, as they now appear in the revision, were in the revision as enacted by the Legislature. By Laws 1905, c. 218, providing for the editing and annotating of the revision, the sections were required to be numbered consecutively throughout. Before they were numbered by chapter. As the revision went through the Legislature section 181, under a different number, was a part of chapter 6, and under the general head of "Nominations by direct vote," and with the section heading as is now indicated in the revision. The same is true of the other sections. Chapter 6 referred to elections and completely covered the subject of general elections and primary elections. The revised laws are required to be designated as "Revised Laws 1905." R.L.1905, § 5504.

There are two definite purposes of the constitutional provision herebefore quoted. One is to prevent fraud upon the public and the Legislature by permitting the passage of acts the nature of which their titles do not disclose. Another is to prevent the passage of unrelated measures by a combination of interests each particularly concerned with one or more and careless of the others. . . .

Illustrations are plentiful in territorial days of legislation induced by one or both of the motives against which the constitutional provision is directed. In *State v. Shevlin-Carpenter Co.*, 99 Minn. 158, 108 N.W. 935, 9 Ann.Cas. 634, the present Chief Justice, in considering the purpose of this provision of the Constitution, and as an illustration of the

practices which the Constitution sought to avoid, referred to Laws 1855, c. 24, where, under an act entitled "An act to incorporate the Root River Valley and Southern Minnesota Railroad Company," the Legislature incorporated the railroad, located the county seat of Fillmore county, declared Wright county duly organized, and provided for the appointment of certain officers for it. This illustration may be supplemented by reference to an act a year earlier, Laws 1854, c. 42, entitled "An act relative to sheep and swine," which, after regulating the running at large upon the open commons of the animals of the kind mentioned, provided that "no person shall be eligible to hold any office under the laws of this territory, who has not been a resident of this territory for six months preceding his election or appointment." These are exaggerated instances, but they are practical illustrations of the legislation with which the framers of the Constitution were familiar.

With the purpose of the constitutional provision in view we come directly to a consideration of the single question whether the title of an amendatory act referring by number to the sections of the revision, as such revision is amended by specified chapters of subsequent session laws, and repealing certain session laws, without reciting by descriptive words the matter to which the revision or the amendatory act itself relates, or giving the titles of the session laws, is constitutionally sufficient. In support of the view that such an amendment is constitutional as against the claim that its subject is not expressed in its title, we cite as typical a statute of Maryland entitled "An act to amend article ninety-five of the Code of Public General Laws by adding an additional section thereto," which was upheld in *Second German, etc., Ass'n v. Newman*, 50 Md. 62, where the court said:

"It was not necessary to state in the title, that the section to be added to the Code, related to the subject of usury; the reference to the particular article in the Code, which relates only to the subject of usury, clearly indicated the subject of the law." . . .

. . . The weight of authority undoubtedly is that an amendatory act, such as chapter 389, is not unconstitutional because of a failure to state the subject in the title more precisely than by a reference to the statutes and laws amended. We adopt such view.

NOTE

For a critical study of the title provision based on New Jersey law and experience, see Sinclair, "A Constitutional Restraint on Bill Styling", 2 U. of Newark L.Rev. 35 (1937).

C. Titles and Section Headings As Aids to Interpretation

CAMINETTI v. UNITED STATES

Supreme Court of the United States, 1916.

242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442, L.R.A.1917F, 502, Ann.Cas.1917B, 1168.

MR. JUSTICE DAY delivered the opinion of the court: . . .

In the Caminetti Case, the petitioner was indicted in the United States district court for the northern district of California, upon the 6th day of May, 1913, for alleged violations of the act. The indictment was in four counts, the first of which charged him with transporting and causing to be transported, and aiding and assisting in obtaining transportation for a certain woman from Sacramento, California, to Reno, Nevada, in interstate commerce, for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his mistress and concubine. A verdict of not guilty was returned as to the other three counts of this indictment. As to the first count, defendant was found guilty and sentenced to imprisonment for eighteen months and to pay a fine of \$1,500. Upon writ of error to the United States circuit court of appeals for the ninth circuit, that judgment was affirmed. 136 C.C.A. 147, 220 F. 545. . . .

It is contended that the act of Congress is intended to reach only "commercialized vice," or the traffic in women for gain, and that the conduct for which the several petitioners were indicted and convicted, however reprehensible in morals, is not within the purview of the statute when properly construed in the light of its history and the purposes intended to be accomplished by its enactment. In none of the cases was it charged or proved that the transportation was for gain or for the purpose of furnishing women for prostitution for hire, and it is insisted that, such being the case, the acts charged and proved, upon which conviction was had, do not come within the statute. . . .

Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. *Hamilton v. Rathbone*, 175 U.S. 414, 421, 44 L.Ed. 219, 222, 20 S.Ct. 155. There is no ambiguity in the terms of this act. It is specifically made an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for "any other immoral purpose," or with the intent and purpose to induce any such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice. . . .

In *United States v. Bitty*, 208 U.S. 393, 52 L.Ed. 543, 28 S.Ct. 396, it was held that the act of Congress against the importation of alien women and girls for the purpose of prostitution "and any other immoral purpose" included the importation of an alien woman to live in concubinage with the person importing her. . . .

But it is contended that though the words are so plain that they cannot be misapprehended when given their usual and ordinary interpretation, and although the sections in which they appear do not in terms limit the offense defined and punished to acts of "commercialized vice," or the furnishing or procuring of transportation of women for debauchery, prostitution, or immoral practices for hire, such limited purpose is to be attributed to Congress and engrafted upon the act in view of the language of § 8 and the report which accompanied the law upon its introduction into and subsequent passage by the House of Representatives.

In this connection, it may be observed that while the title of an act cannot overcome the meaning of plain and unambiguous words used in its body . . . the title of this act embraces the regulation of interstate commerce "by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes." It is true that § 8 of the act provides that it shall be known and referred to as the "White Slave Traffic Act," and the report accompanying the introduction of the same into the House of Representatives set forth the fact that a material portion of the legislation suggested was to meet conditions which had arisen in the past few years, and that the legislation was needed to put a stop to a villainous interstate and international traffic in women and girls. Still, the name given to an act by way of designation or description, or the report which accompanies it, cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.

Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation. . . .

But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See *Mackenzie v. Hare*, 239 U.S. 299, 308, 60 L.Ed. 297, 300, 36 S.Ct. 106.

The fact, if it be so, that the act as it is written opens the door to blackmailing operations upon a large scale, is no reason why the courts should refuse to enforce it according to its terms, if within the constitutional authority of Congress. Such considerations are more appropriately addressed to the legislative branch of the government, which alone had authority to enact and may, if it sees fit, amend the law. . . .

The judgment in each of the cases is affirmed.

MR. JUSTICE MCKENNA, dissenting:

Undoubtedly, in the investigation of the meaning of a statute we resort first to its words, and, when clear, they are decisive. The principle has attractive and seemingly disposing simplicity, but that it is not easy of application, or, at least, encounters other principles, many cases demonstrate. The words of a statute may be uncertain in their signification or in their application. If the words be ambiguous, the problem they present is to be resolved by their definition; the subject matter and the lexicons become our guides. But here, even, we are not exempt from putting ourselves in the place of the legislators. If the words be clear in meaning, but the objects to which they are addressed be uncertain, the problem then is to determine the uncertainty. And for this a realization of conditions that provoked the statute must inform our judgment. Let us apply these observations to the present case.

The transportation which is made unlawful is of a woman or girl "to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice." Our present concern is with the words "any other immoral practice," which, it is asserted, have a special office. The words are clear enough as general descriptions; they fail in particular designation; they are class words, not specifications. Are they controlled by those which precede them? If not, they are broader in generalization and include those that precede them, making them unnecessary and confusing. To what conclusion would this lead us? "Immoral" is a very comprehensive word. It means a dereliction of morals. In such sense it covers every form of vice, every form of conduct that is contrary to good order. It will hardly be contended that in this sweeping sense it is used in the statute. But, if not used in such sense, to what is it limited and by what limited? If it be admitted that it is limited at all, that ends the imperative effect assigned to it in the opinion of the court. But not insisting quite on that, we ask again, By what is it limited? By its context, necessarily, and the purpose of the statute.

For the context I must refer to the statute; of the purpose of the statute Congress itself has given us illumination. It devotes a section to the declaration that the "act shall be known and referred to as the 'White Slave Traffic Act.'" And its prominence gives it prevalence in the construction of the statute. It cannot be pushed aside or subordinated by indefinite words in other sentences, limited even there by the context. It is a peremptory rule of construction that all parts of a statute must be taken into account in ascertaining its meaning, and it cannot be said that § 8 has no object. Even if it gives only a title to the act, it has especial weight. *United States v. Union P. R. Co.*, 91 U.S. 72, 82, 23 L.Ed. 224, 229. But it gives more than a title; it makes distinctive the purpose of the statute. The designation "white slave traffic" has the sufficiency of an axiom. If apprehended, there is no uncertainty as to the conduct it describes. It is commercialized vice, immoralities having a mercenary purpose, and this is confirmed by other circumstances. . . .

This being the purpose, the words of the statute should be construed to execute it, and they may be so construed even if their literal meaning be otherwise. . . .

It is hardly necessary to say that the application of the rule does not depend upon the objects of the legislation, to be applied or not applied as it may exclude or include good things or bad things. Its principle is the simple one that the words of a statute will be extended or restricted to execute its purpose. . . .

Language, even when most masterfully used, may miss sufficiency and give room for dispute. Is it a wonder, therefore, that when used in the haste of legislation, in view of conditions perhaps only partly seen or not seen at all, the consequences, it may be, beyond present foresight, it often becomes necessary to apply the rule? And it is a rule of prudence and highest sense. It rescues from crudities, excesses, and deficiencies, making legislation adequate to its special purpose, rendering unnecessary repeated qualifications, and leaving the simple and best exposition of a law the mischief it was intended to redress. Nor is this judicial legislation. It is seeking and enforcing the true sense of a law notwithstanding its imperfection or generality of expression.

There is much in the present case to tempt to a violation of the rule. Any measure that protects the purity of women from assault or enticement to degradation finds an instant advocate in our best emotions; but the judicial function cannot yield to emotion—it must, with poise of mind, consider and decide. It should not shut its eyes to the facts of the world and assume not to know what everybody else knows. And everybody knows that there is a difference between the occasional immoralities of men and women and that systematized and mercenary immorality epitomized in the statute's graphic phrase "white slave traffic." And it was such immorality that was in the legislative mind, and not the other. The other is occasional, not habitual,—inconspicuous,—does not offensively obtrude upon public notice. Interstate commerce is not its instrument as it is of the other, nor is prostitution its object or its end. It may, indeed, in instances, find a convenience in crossing state lines, but this is its accident, not its aid.

There is danger in extending a statute beyond its purpose, even if justified by a strict adherence to its words. . . .

I am authorized to say that the CHIEF JUSTICE and MR. JUSTICE CLARKE concur in this dissent.

MACKEY v. MILLER

Circuit Court of Appeals of the United States, 1903. 126 F. 161.

[This case appears *supra*, p. 406.]

STATE ex rel. EMERSON v. ERICKSON

Supreme Court of Minnesota, 1924. 159 Minn. 287, 198 N.W. 1000.

DIBELL, J. Alternative writ of mandamus issued by the Hennepin district court on the relation of Irving H. Greenberg, a minor, by Ray G. Emerson, his guardian ad litem, commanding Al. P. Erickson, the county auditor, to issue a hunting and trapping license to the relator. The court sustained the demurrer of the county auditor to the writ and the relator appeals.

1. Section 21, c. 426, p. 634, Laws 1923, provides that no person shall hunt or trap without first having procured a license. Section 28 provides that "no license shall be required of any person under twenty-one years of age." This section is headed "Fees." It establishes a schedule of fees. It is the contention of the relator that it should be construed as if there were after the word "license" the word "fee." We cannot sustain this contention. The language is plain. It is not inconsistent with section 21. It does not require construction. 3 Dunnell, Minn.Dig. sec. 8938. The relator places stress upon the word "fees" placed at the head of the section as supporting his view that it refers only to fees and not at all to licenses. This word does not appear in the engrossed act nor in the various headlines of the sections of the chapter. Section headlines are inserted by the secretary of state under legislative authority as a matter of convenience of reference. G.S.1913, sec. 4942. They do not determine construction. . . .

The trial court was right in holding that section 28 must be read as excepting minors from the necessity of procuring licenses; that the exception is unconstitutional as class legislation granting a privilege to favored persons; that only the exception is unconstitutional, and that the other portions of the act, among them the requirement of a license, apply to minors.

Order affirmed.

BROTHERHOOD OF RAILROAD TRAINMEN v.
BALTIMORE & O. R. CO.

Supreme Court of the United States, 1947.
331 U.S. 519, 67 S.Ct. 1387, — L.Ed. —.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Our concern here is with the intervention rights of representatives of railroad employees in a suit brought against the railroad under § 16(12) of the Interstate Commerce Act, 49 U.S.C. § 16(12), 49 U.S. C.A. § 16(12).

The origin of this suit is to be found in an order issued by the Interstate Commerce Commission on May 16, 1922. Chicago Junction Case, 71 I.C.C. 631. The Commission there approved the purchase by the New York Central Railroad Co. (Central) of all the capital stock of the Chicago River & Indiana Railroad Co. (River Road); it also

authorized the leasing to River Road of all the properties of the Chicago Junction Railway Co. (Junction) for 99 years and thereafter, at the lessee's option, in perpetuity. Among the properties in question were trackage and switching facilities at the Union Stock Yards, Chicago, Illinois, connecting with various trunk lines. Prior to the Commission order, the practice had been for the trunk line railroads to use their own power and crews to move their empty and loaded livestock cars over these tracks to and from the loading places in the Union Stock Yards. For the privilege of so moving their cars, the railroads were charged \$1.00 per car, loaded or empty.

The Commission made various conditions to its approval of the proposed transactions. The third condition provided: "The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central." 71 I.C.C. at 639. This condition is still in effect, the Commission's decision and order having been found to be valid and binding on all parties in a proceeding in the District Court in 1929.

The trunk line railroads have continued to use their own power and crews in moving their livestock cars over the trackage operated by River Road and have paid River Road the amount of \$1.00 per car. But on January 25, 1946, Central and River Road notified the railroads that on and after February 1, 1946, the cars would be moved over this trackage by means of the power and crews of River Road and that the handling charge would be \$12.96 per outbound loaded car. Soon after this new practice went into effect, the trunk line railroads (appellees herein) brought this suit for preliminary and permanent injunctions under § 16(12) of the Interstate Commerce Act against Central, River Road and Junction. . . .

A stipulation of facts was then filed. After describing the change in handling the cars, it pointed out that this change resulted from a settlement between the River Road and the Brotherhood of Railroad Trainmen of a labor dispute over the work involved in these livestock car movements. The Brotherhood was the bargaining agent under the Railway Labor Act, 45 U.S.C.A. § 151 et seq., for the River Road trainmen. . . . The Brotherhood thereafter filed its motion to intervene generally as a party defendant, alleging that the primary purpose of the suit was to nullify its agreement with River Road and to deprive the Brotherhood members of the work they were performing under that agreement and that the Brotherhood members were therefore indispensable parties. The contention was made that the Brotherhood had an unconditional right to intervene by virtue of § 17(11) of the Interstate Commerce Act and Rule 24(a) (2) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c; and 28 U.S.C. § 45a, 28 U.S.C.A. § 45a, was later added in support of this contention. But the motion to intervene was denied by order, without opinion.

The District Court then allowed an appeal to this Court from its order denying intervention. The appellee railroads moved to dismiss

the appeal on the ground that such an order was not final and hence was not appealable, the Brotherhood not being entitled to intervene as a matter of right. We postponed further consideration of the question of our jurisdiction to review the order to the hearing of the appeal upon the merits. 330 U.S. —, 67 S.Ct. 870. . . .

First. It is unquestioned that the Brotherhood is the duly designated representative of the River Road trainmen.

Second. The right of intervention granted to such a representative by § 17(11) applies to a court proceeding under § 16(12) of the Act, the plain language of § 17(11) extending its reach to "any proceeding arising under this Act."

On this point, however, the appellee railroads contend that § 17(11) must be confined to proceedings before the Interstate Commerce Commission, to the exclusion of court proceedings. In support of this contention, they point to the fact that § 17 as a whole is primarily concerned with Commission procedure and organization. That fact is emphasized by the heading of § 17 as it appears in the Statutes at Large, 54 Stat. 913, and the United States Code, 49 U.S.C. § 17, 49 U.S.C.A. § 17, a heading that reads: "Commission procedure; delegation of duties; rehearings." The inference is then made that paragraph (11), with which we are concerned, must be limited by that heading and by the general context of § 17 as a whole. The result of the contention is that the phrase "any proceeding arising under this Act," as found in paragraph (11), is rewritten by construction to refer only to "any proceeding before the Commission arising under this section."

We cannot sanction such a construction of these words. It is true, of course, that § 17 is concerned primarily with the organization of the Commission and its subdivisions and with the administrative disposition of matters coming within that agency's jurisdiction. At least ten of the twelve paragraphs of § 17 deal with those matters. And before § 17 was cast into its present form in 1940, all five of its paragraphs related exclusively to those matters. Congress rewrote the section when it enacted the Transportation Act of 1940, 54 Stat. 898, continuing and modifying previous provisions and consolidating and including matters which had formerly been scattered throughout the Act. At the same time, however, it was expressly recognized that certain paragraphs were being added which were entirely new, paragraphs which went beyond purely administrative matters. Thus the pertinent committee reports stated that "A new paragraph (9) is included providing that orders of a division, an individual Commissioner, or a board shall be subject to judicial review as in the case of full Commission orders, after an application for rehearing has been made and acted upon." And as to paragraph (11), it was said that "A new paragraph is added at the end of section 17 providing that representatives of employees of a carrier may intervene and be heard in any proceedings arising under part I affecting such employees." By such language in their reports, the framers of § 17 recognized the obvious

fact that certain provisions of that section deal with something more than might be indicated by the heading.

That the heading of § 17 fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact. That heading is but a short-hand reference to the general subject matter involved. While accurately referring to the subjects of Commission procedure and organization, it neglects to reveal that § 17 also deals with judicial review of administrative orders and with intervention by employee representatives. But the headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. *United States v. Fisher*, 2 Cranch 358, 386, 2 L.Ed. 304; *Cornell v. Coyne*, 192 U.S. 418, 430, 24 S.Ct. 383, 385, 386, 48 L.Ed. 504; *Strathearn S. S. Co. v. Dillon*, 252 U.S. 348, 354, 40 S.Ct. 350, 351, 64 L.Ed. 607. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

Here the meaning of § 17(11) is unmistakable on its face. There is a simple unambiguous reference to "any proceeding arising under this Act" or, as the House committee paraphrased it, to "any proceedings arising under part I." There is not a word which would warrant limiting this reference so as to allow intervention only in proceedings arising under § 17 or in proceedings before the Commission. The proceedings mentioned are those which arise under this Act, an Act under which both judicial and administrative proceedings may arise. The instant case is a ready illustration of a judicial proceeding arising under this Act; a suit of this nature is authorized solely by § 16(12) of the Act. Hence it is a proceeding to which the right of intervention may attach by virtue of § 17(11).

Nor do we perceive any reason of statutory policy why the framers of § 17(11) should have wished to confine the right of intervention by employee representatives to proceedings before the Commission. Occasions may arise, as in this case, where the employee representatives have no interest in intervening in the original administrative proceeding, but where they have a very definite interest in intervening in a subsequent judicial proceeding arising under the Act. When the framers have used language which covers both types of proceedings, we would be unjustified in formulating some policy which they did not see fit to express to limit that language in any way. . . .

We thus conclude that § 17(11) gives the Brotherhood an absolute right to intervene in this proceeding, making it unnecessary to discuss

whether, and to what extent, the Brotherhood would have had such a right apart from § 17(11). It follows that we have jurisdiction to consider the appeal on its merits. And in the exercise of that jurisdiction, we reverse the judgment of the District Court denying leave to the Brotherhood to intervene.

Reversed.

NOTE

See "Interpretation of Statutes; The Relevance of Headings," 199 L.T. 186 (1945).

D. Drafting Titles

MINNESOTA ATTORNEY GENERAL'S MEMORANDUM ON FORM OF BILLS, 1941

Rule 4. The title of every bill should be in general terms, stated as briefly as possible. It should be broad enough to cover the subject-matter of the bill, but unnecessary particulars, which might make the title unduly restrictive and perhaps invalidate provisions of the act not coming within the specified purposes, should be avoided.

Note: See the so-called 1925 Reorganization Act, Laws 1925, Chapter 426. In this case, the title of the preliminary draft of the bill attempted to enumerate all of the various subjects dealt with, and would have covered half a printed page. Fortunately it was boiled down to the model title finally adopted: "An Act in Relation to the Organization of the State Government." This title and many others of commendable brevity have been sustained by the Supreme Court.

Rule 5. If a bill amends or repeals existing laws, the title should state first the general subject, followed by reference to the statutes amended or repealed, also mentioning the addition of new provisions, if any.

Note (a). The phrase "and adding new provisions" is to be included in the title only if the act contains separate sections which are entirely new, in addition to sections which amend or repeal existing statutes. Technically this phrase may not be necessary, but it is advisable in order to avoid a possible court ruling that express reference to amendments or repeals in the title would restrict the application of the act thereto. See the following note.

Note (b). Reference in the title to statutes amended or repealed is not essential to the validity of an act, if the general subject be properly stated. For some reasons it might be preferable simply to state the general subject and avoid any reference in the title to statutes amended or repealed. For example, if the title expressly refers to certain statutes to be amended or repealed, but inadvertently omits to refer to other statutes amended or repealed by the body of the act, or to new provisions added by the act (as may occur through oversight either in the original drafting or where amendments are made while the bill is pending), the provisions not mentioned in the title might be held void. On the other hand, it is desirable to refer in the title to statutes amended or repealed for the information of members of the legislature and others interested. The practice is sanctioned by long usage and is required by the legislative rules. Hence it should be followed, with extreme care to see that all the original statutes affected are mentioned in the title, and that if new provisions are included in the same bill, and suggested clause as to "adding new provisions" is incorporated in the title. . . .

Note (c). The following form has been much used: "A bill for an act to amend Mason's Minnesota Statutes of 1927, Section —, relating to

_____." This form, while technically sufficient, is objectionable for the following reasons:

(1) It has been held by the Supreme Court to restrict the effect of the act to the amendment specified in the title, invalidating additional new matter, if any, in the body of the act;

(2) It does not inform the reader at first glance of the general subject of the act, as is done by a title in the form recommended under Rule 5, stating the general subject first:

(3) It is more inconvenient to amend such a title in case further provisions are added to the bill after introduction.

CARL H. MANSON, THE DRAFTING OF STATUTE TITLES

10 Ind.L.J. 155, 165-167 (1934).

Method of Statement. If general terms are chosen for the title language, they must suggest a unified, congruent core of material, either natural or developed by practice. More specific language usually has the effect of limiting the scope of the act.

It is not necessary to set forth in the title, any of the ordinary means of accomplishing the object of the act. The stating of the object and the means in the title does not make duality or plurality of objects; nor does additional descriptive matter in the title which applies to only a portion of the body. The statement of the means alone in the title may be sufficient if the object can be derived from them. When both the object and the means are stated in the title, the scope of the act should be limited to those means, unless the title clearly indicates that others are included in the body.¹ As a general rule, any title enumeration of powers, duties, penalties, rights, rules, etc., or descriptive clauses, etc., ordinary or extraordinary, will render the title restrictive in scope to such enumeration and clauses. If the scope of the act is desired to be greater, make such clear in the title.

After the object is stated, descriptive clauses must be excluded unless they can be added without making the scope of the act ambiguous. It is often difficult to determine whether a long title indicates the legislative intent that the scope of the act be restricted to those things named or that it indicates an intent to cover the entire field in a broad way; leads to uncertainty as to what will be the decision of the court.²

Number references to other statutes alone in the title should not be relied upon to state the object of an act. They lead to errors and give insufficient notice of the contents of the bill or statute.³ Such a prac-

¹ For example: "An act to prevent deception in the manufacture and sale of imitation butter by prescribing the containers in which such imitation butter must be sold." The statement of the means to be employed to avoid deception limits the scope to such means.

² Lengthy titles are not to be encouraged. They make it difficult to determine whether the court will hold such a title indicative of a general treatment of the subject-matter in the body or that such a title limits the scope of the body to the specific enumerations in the title.

³ Example: "An act to amend section thirteen of act number thirty-five of the public acts of Michigan for the year eighteen hundred sixty-seven, as amended by act number twelve of the public acts of Michigan for the year eighteen hundred

tice also applies to the naming of the compiler's sections and is vigorously condemned by the courts. If number references and explanatory words are used together, the words are held to state the object, limit the scope, and explain the numbers, though in fact, some of the numbers may refer to other matters, beyond the scope of the words, but germane. These other matters would be sustained if sufficiently stated in the title, but fall, though numbers indicate them, since the explanatory words in the title are taken as the object and limit of the scope. The safest method is to use sufficient words in the title without reliance upon number of references. The only value of these numbers is as a ready reference to the statutes amended.

Amendatory Acts. The purposes of the title-body clause require amendatory acts to be considered as distinct from the acts which they amend. The repeated statement that an amendment can contain any provision, which might have been incorporated in the act amended under its title, is too general. If the title of the amendatory act is merely a repetition of the title of the original act, the amendment can contain any provision which may have been included in the original act except as qualified by intervening development and practices, which may make the provision no longer germane to the original act or a radical change which requires special title designation.

If the title of the amendatory act states, along with the title of the original act, the amendments to be made, other provisions, though they could have been included in the amendatory act under a title which solely restated the title of the original act, cannot be included in this amendment. This statement of the nature of the amendment restricts the scope of the act thereto.⁴

The scope of the amendatory act may be enlarged by its title so that it is greater than that of the original act, thus sustaining provisions which could not have been included under the original title; any idea to the contrary hampers legislation.

NOTE—DRAFTING AMENDATORY STATUTES

43 Harv.L.Rev. 1143 (1930).

The form of statute which in its title and purview recites no more than that it is an act to amend a certain section of the code or session laws seems wholly inadequate in failing to give notice of the subject of the enactment. A common and more satisfactory device is, therefore, to follow the citation in the title with a brief statement of the subject to which the act relates. If there has been a previous amend-

ninety-three, and act number two hundred thirty-four of the public acts of Michigan for the year nineteen hundred one, being section six thousand four hundred forty-six of the Compiled Laws of eighteen hundred ninety-seven." 101 P.A. 1905.

⁴ For example: "An act to amend 'An act relative to justices' courts in the city of X.,' by fixing the compensation of such justices." The additional phrase limits the scope of the amendatory act to matters concerning the compensation of the justices.

ment, the citations of the intervening amendatory acts will also be given, both in the title and the purview. But difficulties arise in the case of session laws when the draftsman includes in the title of the amendatory act the full title of the act to be amended. And the effect of piling Pelion on Ossa is achieved if the subject to which the act relates is also added, or if the original title is repeated in the purview. This problem is somewhat simplified by the modern device of short titles, but even these add confusion when the original act has been amended and the title of the amendatory act recites the title and citation of the original act plus the citations of all intervening amendments.

A brief reference to the subject of a particular amendment is far more instructive to a hurried lawyer than the title of the whole act. And the practice revealed in each instance so far considered of inserting the citation to the act amended in both the title and purview of the amendatory act produces needless repetition. It should be sufficient to state in the title of the amendment that it is an act to amend an act relating to a particular subject, and then to reserve the citation for the purview. But in a few states the practice has gone too far in this direction, failing to disclose in the title that the act in question is an amendment. The title should reveal two things at a glance: the subject matter of the act in brief, and the fact that it is amendatory. A citation to the original act is, of course, essential, but a single reference to it in the purview should suffice.

Illustrative Styles in Titles

CHAPTER 1, NEW YORK LAWS, 1929

An Act to amend chapter three hundred and forty-eight of the law of nineteen hundred and twenty-seven, entitled "An act to create a commission for the purpose of making a study and a comprehensive survey of the port of Buffalo and the Niagara frontier district to determine the feasibility of the creation and establishment of a port authority to be known as the Buffalo and Niagara frontier port authority, which port authority shall have power and authority over the development, control and operation of port facilities within the district," in relation to the report of the commission.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section two of chapter three hundred and forty-eight of the laws of nineteen hundred and twenty-seven, entitled "An act to create a commission for the purpose of making a study and a comprehensive survey of the port of Buffalo and the Niagara frontier port authority, which port authority shall have power and authority over the development, control and operation of port facilities within the district," is hereby amended to read as follows: . . .

CHAPTER 6, LAWS OF WISCONSIN, 1929

An Act to amend section 9 of chapter 564, laws of 1907, as amended by chapter 36, laws of 1921, relating to the county court of Fond du Lac county.

The People of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

Section 1. Section 9 of chapter 564, laws of 1907, as amended by chapter 36, laws of 1921, is amended to read: . . .

CHAPTER 4, PUBLIC ACTS OF CONNECTICUT, 1929

An Act Amending an Act Providing for a State Athletic Commissioner

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section four of chapter 243 of the public acts of 1925 is amended to read as follows: . . .

MINNESOTA LAWS, 1933, CHAPTER 149

An act to amend Section 1, Chapter 257, Laws of 1927, as amended by Chapter 341, Laws of 1931, forbidding the pledge of assets by banks and trust companies, except in certain instances.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Banks may not pledge assets—exceptions.—Chapter 257, Laws of 1927, as amended by Chapter 341, Laws of 1931, is hereby amended to read as follows: . . .

MINNESOTA LAWS, 1933, CHAPTER 228

An act relating to Town Roads.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. **Definitions.**—The words, "Town Road" and "Town Roads" shall mean those roads and cartways which have heretofore been or which hereafter may be established, constructed and improved under the authority of the several town boards, and also all roads lying wholly within one township and not within the limits of any city or village including roads therein established by use.

Section 3. Inconsistent acts repealed.—All Laws, Acts or parts thereof inconsistent herewith are hereby repealed. . . .

CHAPTER 41, PUBLIC ACTS OF CONNECTICUT, 1929

An Act Concerning Construction of Building for the State.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 63 of the general statutes is amended to read as follows: . . .

MINNESOTA LAWS, 1933, CHAPTER 254

An act making 1931 Supplement to Mason's Minnesota Statutes of 1927, prima facie evidence of the statutes therein contained. . . .

NOTE

The device of providing a "short title" by which reference may be made to an act serves to reduce superfluous and cumbersome language in both the titles and purviews of amending statutes. See the Securities Act of 1933, *supra*, p. 506.

SECTION 3. THE PREAMBLE

HUNTWORTH v. TANNER.

Supreme Court of Washington, 1915.

87 Wash. 670, 152 P. 523, Ann.Cas.1917D, 676.

CHADWICK, J. Plaintiff brought this action to restrain a threatened arrest and prosecution for alleged violation of Initiative Measure No. 8, being popularly known as the Employment Agency Law. Prior to the last general election there was initiated a measure entitled:

"An act to prohibit the collection of fees for the securing of employment or furnishing information leading thereto and fixing a penalty for violation thereof."

Upon the initiation of the measure the Attorney General, as required by law, submitted to the secretary of state a ballot title in form as follows:

"An act to prohibit the collection of remuneration or fees from workers for the securing of employment or furnishing information leading thereto, and providing a penalty for violation thereof."

This was printed upon each of the ballots, and became, under the statute, a notice of the measure and its provisions to the electors of the state.

At the general election the law was adopted. It is in form as follows: "Be it enacted by the people of the state of Washington:

"Section 1. The welfare of the state of Washington depends on the welfare of its workers and demands that they be protected from conditions that result in their being liable to imposition and extortion.

"The state of Washington therefore exercising herein its police and sovereign power declares that the system of collecting fees from the

workers for furnishing them with employment, or with information leading thereto, results frequently in their becoming the victims of imposition and extortion and is therefore detrimental to the welfare of the state.

"Sec 2. It shall be unlawful for any employment agent, his representative or any other person to demand or receive either directly or indirectly from any person seeking employment, or from any person on his or her behalf, any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto.

"Sec. 3. For each and every violation of any of the provisions of this act the penalty shall be a fine of not more than one hundred dollars and imprisonment for not more than thirty days." Laws 1915, p. 1.

It is alleged by plaintiff that for many years he has conducted, by himself and his predecessors in interest, a business known under the trade-name of "Pacific Teachers' Agency"; that the business is successful and remunerative; that its activities are entirely confined to and that it enjoys the confidence, support, and patronage of school-teachers, and those either engaged or concerned in educational affairs throughout the states of Washington, Idaho, Oregon, Montana, and the territory of Alaska, and elsewhere. The character of the business and the manner in which it is conducted is alleged to be as follows:

"That said school-teachers have dealt and deal with the plaintiff for the purpose of obtaining employment as school-teachers, and use said agency as a medium through and by means of which their qualifications and ability to teach may be inquired into and ascertained by school district officers, and their previous professional records submitted or presented to such officers or to any municipality, school district, or other public body desiring to employ teachers for investigation and as a means to facilitate further investigation of their qualifications by such officers or public bodies before entering into contracts of employment.

"That in the performance of services by plaintiff for teachers so seeking employment, he investigates by written or personal communication their professional records and previous standing in the communities where lately employed, solicits on their behalf and receives reports and confidential information from educational institutions and authorities familiar with their scholarship, professional preparation and attainments, experience, character, and personal characteristics, for the purpose of determining their fitness and availability for employment as school-teachers. That such information so obtained is indexed by plaintiff and kept in a convenient form in suitable record books, and preserved permanently for the use and benefit of such persons, for the inspection of employers of teachers, in carrying on correspondence with teachers and prospective employers, and in making and furnishing copies of such records whenever called upon to do so by such teachers or employers. That for such services plaintiff charges and receives in advance a fee of \$2 from each person soliciting his services. That such sum is usually insufficient to defray the actual cost to plaintiff of the services hereinbefore referred to."

The teacher agrees to pay 5 per cent. of the first year's salary if a situation is obtained.

The business of plaintiff has been conducted under, and is subject to, an ordinance of the city of Seattle entitled:

"An ordinance to license and regulate certain trades and occupations in the city of Seattle, and providing penalties for the violation thereof."

It is alleged that the defendants, acting in their respective capacities, maintain and contend that plaintiff is guilty of violating the provisions of Initiative Measure No. 8, and that they declare that they will subject him to arrest and prosecution in the courts of the state. Plaintiff contends that his business is a legitimate business; that it has been carried on and operated in an honest and fair manner, and has contributed to the welfare of the people who deal with the people who deal with and through him; that he has at no time been guilty of any impositions or frauds or extortions, but has rendered faithful and efficient service to the entire satisfaction of his patrons. These things being true, he insists that Initiative Measure No. 8 is not, either by its terms or intendments, applicable to his business, and further, if it be so held, that the act is void in contravention of the Constitution of the state of Washington and of the fifth and fourteenth amendments to the Constitution of the United States, in that it deprives plaintiff of his liberty and property without due process of law; that it denies to him the equal protection of the laws, and abridges his privileges and immunities as a citizen of the United States; that it is discriminating and class legislation; and that it is an attempt to regulate interstate commerce. Plaintiff further alleges that, if arrested and prosecuted for a violation of the act, his business will be irreparably damaged; that he deals only with school-teachers, who are peculiarly punctilious in the observance of all law, and his arrest, if published in the newspapers and educational journals throughout the states in which he does business, will work a loss of confidence in him and his business, and that his present and possible future patrons will refrain from doing business with him, although his business may finally be held by the courts to be a lawful business; that unless his business is carried on without interruption its efficiency and value cannot be maintained; and that to discontinue it would result in total destruction.

These facts come to this court as admitted; the court having sustained a demurrer to the complaint and entered a judgment dismissing plaintiff's action with prejudice.

We are advised by counsel that the court below sustained the demurrer upon the theory that plaintiff's business falls within the prohibitions of Initiative Measure No. 8, and that the act is a valid exercise of the police power of the state. It is our judgment, after mature reflection, that we are not called upon to pass upon the constitutionality of the law. The case may be decided upon other grounds.

Appellant contends that the law does not include one who is conducting an agency patronized only by teachers and those who employ them; that the act by its words and intendments applies only to those who

may be classed as "workers" or workmen, and not to those who are engaged in professional service. He submits several definitions of the words "worker" and "workman."

Worker:

"One who, or that which, works; a laborer; performer; doer; as a worker in brass; worker of iniquity.

"One who, or that which, works; a laborer; a toiler; a performer.

"One who, or that which, performs work; a toiler."

Workman:

"A man employed in labor whether in tillage or manufactures; a worker; especially a skilled artificer or laborer.

"A laboring man; one who earns his living by manual labor.

"One who labors; one who is employed to do business for another."

"Laborer" is defined as one who performs physical or manual labor."

This argument is met by the suggestion that, although the ballot title and section 1 of the act use the word "workers," they are to be regarded as a preamble to section 2; the rule being:

"The preamble to a statute can neither expand nor control the scope and application of the enacting clause, when the latter is clear and explicit." Black on Interpretation of Laws (2d Ed.) § 84.

Many authorities are cited to sustain this proposition.

Section 2, which, it is said, is the enacting part of the law, uses the words "any person," and under the rule quoted we are called upon to hold that the act covers any person who may receive a fee for procuring employment for another or for furnishing any information leading thereto. Appellant meets this argument, saying that the purpose of the act was to protect laborers and workers only as distinguished from professional men and others, and that the terms and history of the law concur to sustain a judicial declaration that the words "any person" qualify and have reference only to those who take fees from the class designated as "workers" in the ballot title and section 1 of the act.

We are unable to follow the Attorney General in his interpretation of the law. To do so would be to thrust aside all other and equally important rules of statutory construction. While it may be true that the ballot title and section 1 are in a sense preambulatory, they nevertheless go further than to declare merely an evil and a purpose to correct it by legislation. A "preamble" is, strictly speaking, matter that is descriptive of the purpose of the law, making general reference to its objects. It is:

"A clause at the beginning of a Constitution or statute explanatory of the reasons for its enactment and the objects sought to be accomplished." Black's Law Dict.; 6 Words and Phrases, tit. Preamble.

A preamble is not without its uses. It is not to be entirely rejected where the statute is ambiguous, although it will not be resorted to to create a doubt or misunderstanding which otherwise does not exist. Where there is a doubt, it will be given its place as a component part of the act.

"A preamble is said to be the key of a statute, to open the minds of the makers as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute." Bouvier, *Law Dictionary*, tit. Preamble.

"When a statute is in itself ambiguous and difficult of interpretation, the preamble may be resorted to." *Den ex dem. James v. Du Bois*, 16 N.J.L. 285.

Where the intent of the law is the object of inquiry, it is said that:

A preamble "discloses the intention of the Legislature in enacting the statute." *Hanly v. Sims*, 175 Ind. 345, 93 N.E. 228, 94 N.E. 401.

"It is 'a good means,' says Lord Coke, to find out the meaning of the statute, and is a true key to open the understanding thereof.'" Lewis' *Sutherland*, *Stat. Const.* (2d Ed.) § 341.

Without multiplying authorities or discussing those cited, we think it may be laid down as a general rule that, if there is a broader proposition expressed in the act than is suggested in the preamble, the body or enacting part of the law will prevail over the preamble; but, if the body of the act can be given a construction that is consistent with the purpose as declared in the preamble, it will be so construed.

Under these rules section 1 is as much a part of the act as sections 2 and 3. It not only defines an evil and a purpose to correct it, but also recognizes and defines a certain class, "workers," as being the object of the law's solicitude, and, as a class, entitled to the protection of the police power. The preamble is not wholly descriptive. It is a declaration of a policy that is intended to advance the police power into a new field, and to bring within its protection a certain class of men, and to make a class amendable to it which has hitherto been unaffected by any law directed specially against it. The finding of necessity coordinates with section 2, for the reason that classes are defined. If the law were a general statute applying to all alike, the rule would be as contended. To limit the declarations of the act to sections 2 and 3 would require us to ignore section 1, and extend a law which is limited in its scope beyond its clear intent. If thus construed, it might well be questioned whether the law would be constitutional—granting for present purposes that the act in whole or in part does no violence to the fourteenth amendment to the Constitution of the United States, a question upon which we make no ruling; for an act of the character of the one now before us, in so far as it affects individuals who may have conducted a legitimate business fairly and honestly, would be clearly unconstitutional unless it can be said that the abuses growing out of the conduct of a certain kind of a business are so great as to warrant a holding that the general welfare demands that the innocent must limit or give up their calling for the common good. Such laws are sustained, not because a business is in itself unlawful, but because of the abuses attending its operation. Consequently, it is in the abuses, and not the business, that the law is rooted. The police power touches those things which offend against the welfare of society. It finds no resting place in that which is inoffensive. If the act be construed as

to include "any person" who may accept a fee for procuring employment for another without qualification, and without reference to the mischiefs declared in the preamble and sought to be remedied by the statute, it would be an unreasonable restraint, and probably be overturned in its entirety.

"The test of the [police] power is found in the effect the pursuit of the calling has upon the public weal, rather than in the inherent nature of the calling itself." *State ex rel. Davis-Smith v. Clausen*, 65 Wash. 156, 192, 117 P. 1101, 1112 (37 L.R.A. [N.S.] 466).

We have said that, to adopt the theory of the Attorney General, we would have to reject other rules of statutory construction. Having met and, as we believe, answered the contention that section 1 is not to be rejected as a preamble, but to be considered as a guide to the intent and purpose of the law, we shall endeavor to fortify our conclusion by reference to other rules.

Where a new statute is so ambiguous as to incite contrary opinion as to its meanings, the first resort is to discover the antecedent mischief. The mischief inducing the present act is not hard to find. It was to correct what society had come to regard as a wrong practiced upon those who for many reasons were unable to protect themselves against impositions and extortions. It was to protect a class that was powerless under existing conditions to protect itself.

As said by the Supreme Court of the United States in *Patterson v. Bark Eudora*, 190 U.S. 169, 23 S.Ct. 821, 47 L.Ed. 1002, when speaking of the federal statute prohibiting any person from demanding or receiving remuneration for providing employment for sailors:

"The story of the wrongs done to sailors in the larger ports, not merely of this nation, but of the world, is an oft-told tale."

Or, as the Court of Appeals of New York said when considering the constitutionality of a statute regulating employment agencies:

"The Legislature had the right to take notice of the fact that such agencies are places where emigrants and ignorant people frequently resort to obtain employment and to procure information. The relations of a person so consulting an agency of this character with the managers or persons conducting it are such as to afford great opportunities for fraud and oppression, and the statute in question was for the purpose of preventing such frauds and probably, for the suppression of immorality." *People ex rel. Armstrong v. Warden of City Prison*, 183 N.Y. 223, 76 N.E. 11, 2 L.R.A. (N.S.) 859, 15 Ann.Cas. 325.

The Supreme Court of Minnesota has noticed particular abuses incident to a class of business and impositions upon its patrons in the same way:

"The nature of the business and the character of those with whom the business is likely to be conducted, in point of intelligence, experience, and capacity for self-protection from fraudulent practices, are such that it might well be deemed necessary by the Legislature, as a matter of proper police regulation. . . . The propriety of police regulation seems apparent when it is considered that by means of such

agencies ignorant and credulous persons might easily be defrauded of their money under a mere pretense of employment to be afforded them in a distant part of the state, so that the fraud would not be discovered until the victim should have gone so far away as to be unlikely to trouble the fraudulent agent by prosecution." *Moore v. City of Minneapolis*, 43 Minn. 418, 45 N.W. 719. . . .

We conclude, therefore, that the acts of appellant and the business conducted by him are not within the terms or intendments of Initiative Measure No. 8, and that the court has jurisdiction to restrain the threatened prosecution. Whether the law is a proper exercise of the public power as to those falling within its terms we pass no opinion.

Reversed and remanded, with instructions to enter a perpetual injunction.

MORRIS, C. J., and HOLCOMB, PARKER, and MOUNT, JJ., concur.

MAIN, J. I am unable to concur in the views expressed in the majority opinion. Section 2 of the act provides that it shall be unlawful for "any employment agent" to receive or demand from "any person" a fee for furnishing such person with employment. This language is so plain as not to call for construction. It is obvious that the appellant comes within the terms of the act. It is true that section 1 of the act, which is in the nature of a preamble, and declares the general policy of the state, uses the word "workers," but to limit the meaning of the word "work" to those who perform physical labor is not sustained by the lexicographers defining the term, nor is it the common understanding of its meaning. The word "workers," as used in section 1, even though given the limited meaning, should not modify the plain language used in the operative section of the statute.

FULLERTON and ELLIS, JJ., concur.

NOTE

State v. Superior Court, 92 Wash. 16, 159 P. 92 (1916), held improper a preamble to a proposed initiative measure on the ground that it was no part of a law and there was "no need or place for the alleged declaration of purpose . . .". The court said: "In the entrance upon new fields of legislation, in order to justify the legislation 'to the impartial consideration of mankind,' preambles are frequently adopted. Thus, the framers of the Constitution of the United States explained their purpose to mankind by a preamble which for conciseness and brevity and general and comprehensive breadth of scope is unequalled. . . ."

"Both in England and in this country it was at one time a common practice to prefix to each law a preface or preamble stating the motives and inducement to the making of it; but it is not an essential part of the statute, and is now generally omitted. It is not only not essential and generally omitted, but it is without force in a legislative sense, being but a guide to the intentions of the framer. As such guide it is often of importance. In this sense it is said to be a key to open the understanding of a statute. The preamble is properly referred to when doubts or ambiguities arise upon the words of the enacting part. It can never enlarge. It is no part of the law. . . ."

DOWNING v. INDEPENDENT SCHOOL DIST. NO. 9

Supreme Court of Minnesota, 1940. 207 Minn. 292, 291 N.W. 613.

JULIUS J. OLSON, JUSTICE. Plaintiff's suit under our declaratory judgments act to have the court determine and establish her status and rights under her teacher's contract with defendant resulted in findings sustaining her contentions. Upon these judgment was entered later, and defendant appeals.

Plaintiff, a duly qualified teacher, was employed as such by defendant, an independent school district, under a written contract entered into in accordance with the provisions of 1 Mason Minn.St.1927, § 2903, as amended by L.1937, c. 161 (3 Mason Minn.St.1938 Supp. § 2903), for the school year of 1938-1939. This enactment, generally referred to as the "teachers continuing contract law," so far as here material, provides that a teacher's contract "shall remain in full force and effect . . . until terminated by a majority vote of the full membership of the school board or by the written resignation of the teacher before April 1st. Such termination shall take effect at the close of the school year in which the contract is terminated in the manner aforesaid." On March 8, 1939, defendant's school board, by a majority vote, adopted the following resolution:

"Whereas, there are pending before the Legislature of the State of Minnesota, certain bills which, if enacted into law, would materially decrease the amount of income for said School District for the ensuing years, and

"Whereas, the School Board of Independent School District No. 9, Itasca County, Minnesota, will be unable to determine until on or about the 22nd day of April, 1939, whether such measures will become laws, and

"Whereas, under Chapter 161, Laws of Minnesota for 1937, commonly known as the Teachers Tenure Act, the School Board of said School District must make any changes in teachers' contracts which are to take effect for the next school year on or before April 1st of this year, or must discharge such teachers by terminating their contracts before April 1st, which said contracts would then remain in force to the end of the school year, 1938-1939, and

"Whereas, the said School Board wish in fairness to all of their employees who come under the provisions of said Teachers Tenure Act to make no adjustments in salaries which are unwarranted by the final circumstances which will be determined on the basis of whether or not the aforementioned bills become laws;

"Now, therefore, be it resolved, by the School Board of Independent School District No. 9, Itasca County, Minnesota, at a meeting thereof duly called and legally held in the Nashwauk High School, at 7:00 p.m., on the 8th day of March, 1939, all members being present, that the assistant superintendent and all teachers now in the employ of said Independent School District No. 9, Itasca County, Minnesota, be discharged, effective at the close of the school year of 1938-1939, it being the intent of the said School Board that all teachers and other

employees coming within the provisions of Chapter 161 of the Laws of Minnesota for 1937, be discharged so that all such contracts will terminate at the close of the school year in 1939." (*Italics supplied.*)

On April 27, another board meeting was held at which a motion to re-elect all teachers for the ensuing year was lost "by an equally divided vote." At the next meeting, May 10, all board members being present, 70 of the teachers were unanimously re-elected for the ensuing year, but plaintiff and five others were not. At that meeting four of the remaining six teachers on motion to re-elect were unsuccessful "by an equally divided vote." Except as mentioned, no other action has been taken by the board in respect of plaintiff's employment. She is and has been at all times "ready, willing, and able to perform her said contract . . . , but has been and is refused permission to do so."

The court thought that "The natural and reasonable interpretation" of the "resolution and notice" was that the pendency of the mentioned legislative bills "would [if enacted] materially decrease" the district's tax income, hence it was "the desire of the school board to postpone" the making of future financial commitments "until after" the threatened legislation had been disposed of. That was the "interpretation and construction" given the resolution and notice by the "assistant superintendent and by this plaintiff and others of said teachers." The bills did not pass; hence the contingency, so the court held, upon which the resolution and notice depended, did not occur. For this reason it was thought that "there has been no determination" by the board "to terminate" plaintiff's employment contract.

At the outset of the trial defendant moved for judgment on the pleadings on the theory that there were no issuable facts involved. Its "contention" was that "the reasons set up in the preamble" of the resolution "are not to be taken into consideration" in its interpretation; "that the only [determinative] portion of that resolution . . . is the resolving clause which clearly states, 'it being the intent of the said school board that all teachers' " within the provisions of the act, " 'be discharged so that all such contracts will terminate at the close of the school year 1939.' " It therefore seems clear that if defendant's theory is correct it amounts to a torpedoing of the resolution amidship. Charity forbids the thought that any such purpose was intended if we read and consider the whole resolution. Equally so is any motion that by this wholesale discharge political pressure might be brought upon the members of the legislature having in hand the feared enactments. Nor may we impute bad or sinister motives on the part of counsel or the board to bring about a discharge of teachers without a clear majority of the board being in favor of so doing. With these preliminaries in mind and in view of the fact that there is no question here of the power of the board to discharge teachers nor of the teachers' right to receive notice of such discharge before the April 1st deadline is reached, we may proceed directly to the only question, which we think determinative. It is this: Do the facts disclosed by

the record justify the court's finding that there was no valid determination to discharge the teachers under and pursuant to the 1937 act?

1. The purpose of that act (L.1937, c. 161) was to do away with the then existing chaotic conditions in respect to termination of teachers' contracts. Until then in many cases teachers would be left in a state of uncertainty as to whether they would be re-elected for the ensuing year. In many instances this state of uncertainty ran over a period of months. The later in the year that a school board acted, the greater the teacher's disadvantage in event of discharge to find vacancies elsewhere. That was the situation sought to be remedied. Under it a deadline of April 1 was fixed. If no termination had been made prior thereto and adequate notice given to the teacher, absent mutual consent by the teacher and the board, the contract continued in full force and effect.

The resolution itself, if viewed in its entirety, leaves ample room for the court's view that the termination of the teachers' contracts here involved depended upon the passage of the feared hostile legislation. In the light of that statute and the deliberately chosen words of the resolution, is it reasonable to suppose that all teachers were discharged thereby? Would not such wholesale discharge in and of itself be subject to explanations? Surely a school board having in hand the conduct of two large schools employing 76 teachers did not intend to go out of the business of conducting its schools. What, then, motivated this wholesale discharge if it was not fear of inadequate tax income? If the bills did not pass there was nothing on the horizon to indicate justification for any such fear.

If we approach this situation as a practical matter it seems clear, or at least entirely probable, that the pending legislation and its effect upon future tax income were the motivating causes for the resolution. Upon the happening of that event alone depended the outcome. This resolution was prepared by a lawyer, not a layman. We have here a keen, alert, and able lawyer representing the board. His language was chosen with deliberate care. If the board intended to discharge all teachers, and that is what defendant's contention is, then everything said in the inducing, and to the layman compelling, "whereas" clauses was foreign to the discharge purpose and should have been left out entirely from the resolution. Is it not obvious that these were the clauses that naturally and properly appealed to the teachers as sound and compelling reasons for the deferment of final action on the part of the board until legislative adjournment? If in this resolution the inducing "whereas" clauses were expressed in the terms of exceptions or provisos, there could be no doubt that these would amply justify the court's conclusion. 17 C.J.S., Contracts, § 343. Does the fact that the same thought, purpose, and intent appear in the form of "whereas" provisos defeat the obvious plan and purpose? We think not.

2, 3. The "cardinal rule" in the interpretation of contracts (and this applies to statutes, ordinances, and the like) "is to ascertain the intention of the parties and to give effect to that intention if it can be

done consistently with legal principles." 12 Am.Jur., Contracts, § 227. The rules of interpretation "are not inflexible, their purpose being to reach the probable intent of the parties." They "are intended for persons of common understanding." Id. § 226. The nature, subject matter, and purposes thereof are to be looked for and ascertained in aid of interpretation. By what name an instrument is labeled is unimportant, for the writing "is not dependent upon any name given it by the parties or upon any one provision, but upon the entire body" of the instrument "and its legal effect as a whole." Id. § 242. Hence it is that "all contracts must be interpreted with reference to their subject matter." The court in Thomson Electric Welding Co. v. Peerless Wire Fence Co., 190 Mich. 496, 505, 157 N.W. 67, 70, correctly stated the rule here applicable: "In construing written agreements the actual undertaking of the parties is to be deduced from the entire instrument, taking into consideration, reconciling, and giving meaning to all its parts so far as possible, including recitals as well as operative clauses, and, when so considered, language which has a distinct meaning **standing alone** may, in the connection used, become doubtful or its meaning modified by other parts of the instrument, including particular recitals."

Here, as in that case, the recitals were (190 Mich. 502, 157 N.W. 69) "not necessary to a valid" instrument. But defendant selected them and "saw fit to adopt them in framing" its resolution. So electing in framing its resolution, it thereby employed the recitals to "serve as a preface or preliminary statement introducing the subject in relation to which" it was to function. And the court quoted with approval from *Torrance v. McDougald*, 12 Ga. 526, as follows (190 Mich. 504, 157 N.W. 69): "The rule of construction applicable to all writings, Constitutions, statutes, contracts, and charters, public or private, and even to ordinary conversation, is this: That general and unlimited terms are restrained and limited by particular recitals, when used in connection with them." That the recitals in this case are particular, not general, seems obvious.

Of similar import are *Duquesne Light Co. v. City of Pittsburgh*, 251 Pa. 557, 97 A. 85, Ann.Cas.1917E, 534; *Hanly v. Sims*, 175 Ind. 345, 93 N.E. 228, 94 N.E. 401. And in *Blaisdell v. Home Building & Loan Ass'n*, 189 Minn. 422, 249 N.W. 334, 86 A.L.R. 1507, the mortgage moratorium case, this court had for consideration nine "whereas" paragraphs. These recited the facts in respect to the existence of an economic emergency and declared that (L.1933, c. 339, § 1) "in view of the situation hereinbefore set forth" there was an "economic emergency . . . in the State of Minnesota." The court said (189 Minn. 428, 249 N.W. 336, 86 A.L.R. 1507): "The main proposition upon which this law must rest is the existence of 'a public economic emergency.' True, the legislature in section 1 of the law declares that it exists, and a preamble of nine 'whereases' seeks further to disclose the necessity for the law." The court thought that (189 Minn. 429, 430; 249 N.W. 337, 86 A.L.R. 1507) "in addition to the weight to be given the determination of the Legislature that an economic emer-

gency exists which demands relief," and after recital of many facts of economic history the opinion added: "With this knowledge the court cannot well hold that the Legislature had no basis in fact for the conclusion" reached. The Federal Supreme Court in reviewing that case referred to the preambles by saying that: "Attention is thus directed to the preamble and first section of the statute, which described the existing emergency in terms that were deemed to justify the temporary relief which the statute affords." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 420, 54 S.Ct. 231, 233, 78 L.Ed. 413, 419, 88 A.L.R. 1481. . . .

And, surely, it will not be seriously contended by anyone that the preambles of our National and State Constitutions are without significance in the interpretation of these our fundamental laws.

So it seems perfectly clear that we should not eliminate from consideration the inducing preambles here presented. They afford adequate explanations for the making of the resolving portion. With these it seems clear that the wholesale discharge of all teachers was far from any thought entertained by anyone connected with this affair. . . .

5. We conclude that the record sustains the findings made by the court, hence the judgment entered is right and is affirmed.

STONE, LORING, and PETERSON, Justices (dissenting).

The resolution here is unambiguous and, as we understand the foregoing opinion, would discharge the teachers but for the recitals. The recitals cannot make the clear and definite discharge ambiguous.

The preamble of the resolution is relevant only as a statement of the reasons for the resolution which follows. The effective declaration is "that the assistant superintendent and all teachers now in the employ of said . . . District . . . be discharged, effective at the close of the school year of 1938-1939, it being the intent [hereof] . . . that all teachers and other employees . . . be discharged so that all such contracts will terminate at the close of the school year in 1939."

So the effective declaration of the resolution, thrice repeated, is of intent to discharge the teachers and terminate their contracts as stated. That being so, the reasons stated for the action become immaterial. They are enlightening so far as they show that the purpose of the board was to terminate all pending teachers' contracts in order that they might have a free hand in respect to renewals. The action so taken was of course subject to re-employment. But so far as re-employment, or its possibility, is suggested by the resolution and by the notice thereafter given to the teachers, it was all a matter of intention for the future and not at all a matter of contract right. In short, the contract rights terminated pursuant to the resolution. Thereafter there was nothing left for the teachers except the intention to employ some or all of them as the board might in the future decide, and at rates of compensation to be later determined. . . .

The effect of the foregoing opinion is to violate the purpose of the enactment and render a definite discharge, compelled by statute under the circumstances, a nullity by considering matters and facts recited by way of explanation and not as part of the resolution itself.

This resolution has not been torpedoed. Worse, while undergoing inspection in the drydock of litigation, it has been destroyed by those whose duty it was to relaunch it in order that its plainly designated home port of purpose could be reached.

We think the judgment should be reversed.

NOTE

For a discussion of the principal case and an analysis of the use and effect of preambles see Note, 25 Minn.L.Rev. 924 (1941).

SECTION 4. THE ENACTING CLAUSE

SJOBERG v. SECURITY SAVINGS & LOANS ASS'N

Supreme Court of Minnesota, 1898.

73 Minn. 203, 75 N.W. 1116, 72 Am.St.Rep. 616.

START, C. J. . . . 1. The act of 1897 in question, authorizing the board of directors of building and loan associations, with the consent of the public examiner, to go into voluntary liquidation, contains no enacting clause whatever. The constitution (article 4, § 13) provides that the style of all laws of this state shall be, "Be it enacted by the legislature of the state of Minnesota." Is this provision mandatory or only directory? There is a conflict in the authorities upon this question. Of the cases which hold similar constitutional provisions directory, the case of *McPherson v. Leonard*, 29 Md. 377, may be regarded as the leading one. The constitution of Maryland provided that the style of all laws of that state shall be, "Be it enacted by the general assembly of Maryland;" and the provision was held directory only, and that a failure to comply with it did not render a statute void. There was a vigorous dissent in this case. The constitution of Missouri contains a similar provision; and in the case of *City of Cape Girardeau v. Riley*, 52 Mo. 424, it was held that the provision was directory only, citing *McPherson v. Leonard*. In the case of *Swann v. Buck*, 40 Miss. 268, it was held that where the enacting clause of a statute read, "Be it resolved," etc., instead of, "Be it enacted," etc., it was a substantial compliance with the provision of the constitution, which was practically like our own. This case, however, does not hold that a statute without any enacting clause is valid, for the gist of the decision was: "There are no exclusive words in the constitution negating the use of any other language, and we think the intention will be best effectuated by holding the clause to be directory only. It is necessary that every law should show on its face the authority by which it is adopted and promulgated, and that it should clearly appear that it is in-

tended that it should take effect as a law. These conditions being fulfilled, all that is absolutely necessary is expressed. The word 'resolved' is as potent to declare the legislative will as the word 'enacted.' There are other cases in which courts have applied the doctrine of directory statutory provisions to constitutional requirements, of which *Pim v. Nicholson*, 6 Ohio St. 177, is an example, in which it was held, contrary to the unbroken line of decisions in this court, that the constitutional provision that "no law shall embrace more than one subject, which shall be expressed in its title," was directory. The constitution of the state of Nevada provides: "The enacting clause of every law shall be as follows: 'The people of the state of Nevada represented in senate and assembly do enact as follows.'" Article 4, § 23. There is no essential difference in its legal effect between this language and that of our constitutional provision "that the style of all laws shall be, 'Be it enacted by the legislature of the state of Minnesota.'" In the case of *State v. Rogers*, 10 Nev. 250, it was held that a statute in which an attempt to comply with the constitutional provisions was made, but the words "senate and" were omitted from the enacting clause, was unconstitutional. The court, in its opinion, cites, compares, and analyzes all the decisions upon the question, and reaches the conclusion that the constitutional provision was mandatory. The courts of Indiana, Illinois, and North Carolina have respectively construed a constitutional provision, like the one now under consideration, mandatory. *May v. Rice*, 91 Ind. 546; *Burritt v. Commissioners*, 120 Ill. 322, 11 N.E. 180; *State v. Patterson*, 98 N.C. 660, 4 S.E. 350. In the *Seat of Government Case*, 1 Wash.T. 115, it was held that a statute without an enacting clause was void, although there was no constitutional provision requiring it. Mr. Cushing states the rule to be this: "An enacting clause is necessary to the validity of every statute, whether required by the constitution or not; and, where the enacting words are prescribed, nothing can be a law which is not introduced by those very words, even though others which are equivalent are at the same time used. Where the enacting words are not prescribed by the constitutional provision, the enacting authority must, notwithstanding, be stated, and any words which do this to a common understanding are doubtless sufficient; or words may be prescribed by rule, and in this respect much must depend upon usage." *Cush. Parl. Law*, § 2102. The question whether the entire absence of an enacting clause from a statute renders it void is an open one in this state. In the case of *Board of Sup'rs v. Heenan*, 2 Minn. 330 (Gil. 281), it was held that the provisions of the constitution prescribing the manner of passing bills in the legislature are imperative, and must be strictly followed. It is true that in the opinion in that case it was incidentally stated that many of the provisions in constitutions and statutes, though explicit in terms, are to be construed to be directory. This remark was purely obiter, and there is nothing in the opinion to suggest that a statute without a head—that is, an enacting clause—would be valid. Upon both principle and authority, we hold that article 4, § 13, of our constitution, which provides that "the style of all laws of this state

shall be, 'Be it enacted by the legislature of the state of Minnesota,' " is mandatory, and that a statute without any enacting clause is void. Strict conformity with the constitution ought to be an axiom in the science of government. We are not prepared to hold that every provision of the constitution is mandatory, but we do hold that they should all be understood and accepted as mandatory unless a different intention is unmistakably manifest on the face of the provision. Rules which distinguish mandatory and directory statutes should rarely, if ever, be applied to constitutional provisions. Courts tread upon very dangerous ground when they attempt to do so. Cooley, *Const.Lim.* 93.

Unless a constitutional provision shows upon its face that it was intended to be directory, it must be accepted as the imperative mandate of the sovereign people, and not as good advice which legislators and courts may accept or reject as they please. The safety of the state, and the protection of the liberties and rights of the people, demand that this rule be strictly adhered to. But it is claimed that the provision in question shows that it was intended to be directory only, because it relates to a matter of form, and not of substance, and was intended simply to secure uniformity in the style of all laws. This is one of the objects intended to be secured by the provision, but not the only one. All written laws, in all times and in all countries, whether in the form of decrees issued by absolute monarchs, or statutes enacted by king and council, or by a representative body, have, as a rule, expressed upon their face the authority by which they were promulgated or enacted. The almost unbroken custom of centuries has been to preface laws with a statement in some form declaring the enacting authority. If such an enacting clause is a mere matter of form, a relic of antiquity, serving no useful purpose, why should the constitutions of so many of our states require that all laws must have an enacting clause, and prescribe its form. If an enacting clause is useful and important, if it is desirable that laws shall bear upon their face the authority by which they are enacted, so that the people who are to obey them need not search legislative and other records to ascertain the authority, then it is not beneath the dignity of the framers of a constitution, or unworthy of such an instrument, to prescribe a uniform style for such enacting clause. But it is otherwise if an enacting clause be a mere form, devoid of essence or substance. The concession that the object of the constitution, in prescribing the style of the enacting clause of a law, was to secure uniformity, necessarily implies that the matter of an enacting clause was so essential and important as to require uniformity in the mode of expressing it. Surely, it was not the intention to secure uniformity in the style of a useless form. It is not necessary to go to the extent of holding that, in the absence of any constitutional provision on the subject, a statute without an enacting clause would be void. But we do hold that the framers of our constitution, and the people adopting it, advised by the usages of the past, and the wisdom and legal learning of the men who had framed the constitutions for so

many other states, regarded an enacting clause in a law as useful, necessary, and proper, and that they therefore anchored in the constitution a requirement that every law should have an enacting clause, and prescribed the form thereof. The words of the constitution, the style (that is, the mode of expressing or declaring) of all laws of this state shall be, "Be it enacted by the legislature of the state of Minnesota," imply that all laws must be so expressed or declared to the end that they may express upon their face the authority by which they were enacted; and, if they do not so declare, they are not laws of this state.

It is, however, claimed by appellant that the law in question contained an enacting clause at the time it passed the legislature, and that the trial court erred in excluding evidence of such fact. The ruling was correct, for the fact itself was immaterial, for the reason that a bill, although it passes the legislature, never becomes a law, unless it be presented to the governor, pursuant to article 4, § 11, of the constitution. If the bill in question contained an enacting clause when it passed the legislature, it was never presented to the governor, but in place of it a bill was presented to and approved by him containing no enacting clause. It follows that chapter 250, Laws 1897, is void, and that a compliance with its provisions does not necessarily constitute a defense to the application for a receiver in this case. . . .

MITCHELL, J. While I concur in the result, I am not prepared to assent to the proposition that the provision of the constitution as to the style of laws is mandatory, and that the absence of an enacting clause renders a statute void. I assent to the proposition that courts should be very slow in holding constitutional provisions to be merely directory, and that they ought never to do so unless it conclusively appears that the provision relates exclusively to a mere matter of style or form, which neither affects any right nor tends to prevent any wrong. But, in my judgment, the provision relating to the style of laws is one of exactly that kind. As stated in the opinion of the court, it had been the custom almost from time immemorial to prefix an enacting clause to every statute; but, as I understand the law, the omission to do so (in the absence of any constitutional provision requiring it) would not invalidate the act. A reference to the early English and the colonial statutes will show that there was no uniformity in enacting clauses, a great variety of forms being used, according to the taste of the legislative body enacting the law. Prior to the American Revolution it had been customary to state in the enacting clause that the statute was enacted by or with the consent of the reigning sovereign of Great Britain. This style became inappropriate after the declaration of our independence. Hence it became necessary to adopt some new style; and to this end, and at the same time to obtain uniformity, the former colonies usually inserted a provision in their state constitutions providing what the style of statutes should be. This was not designed to protect any right or to prevent any wrong, but merely to provide a new and uniform style in place of the old ones, which were no longer appropriate to the changed politi-

cal conditions. This is not necessary in order to show by whom the law was passed, for that is apparent from the official publication of the laws or the engrossed bills on file in the office of the secretary of state or other proper officer, in connection with constitutional provisions as to the legislative department of the government, of which every person is presumed to be cognizant. As the decision of the majority of the court will, so far as I am personally concerned, be accepted as the settled law of this state, I do not care to say more than to thus briefly state my reasons for thinking that this provision of the constitution should be held to be merely directory. . . .

CANTY, J. I concur with MR. JUSTICE MITCHELL.

SECTION 5. DEFINITION OR INTERPRETATION CLAUSE

MCCARTHY v. STATE

Supreme Court of Wisconsin, 1920. 170 Wis. 516, 175 N.W. 785.

McCarthy was convicted of violation of the Pure Food Law, section 4601e, Stats. Wis., and brings his writ of error to reverse the judgment. The facts were undisputed, and were in brief as follows: McCarthy offered for sale and sold for use and consumption within the state a compound known as Mrs. Price's Canning Compound, composed of 95 per cent. boric acid and 5 per cent. common salt, advertised and intended to be used as a preservative in the canning of all kinds of fruits and vegetables. At the time of the sale, June 5, 1918, section 4601e, Stats. Wis., provided that—

"No person . . . shall . . . sell . . . or offer for sale any article of food within the meaning of section 4600 of the Statutes which contains . . . boric acid . . . or any other preservatives injurious to health."

Section 4600, after prohibiting the sale of any drug or article of food which is adulterated or any candy containing intoxicating liquor, further provides that—

"The term, 'food,' as used herein shall include all articles used for food or drink or condiment by man, whether simple, mixed or compound, *and all articles used or intended for use as ingredients in the composition thereof or in the preparation thereof.*"

Section 4601e was first enacted in 1905 (chapter 33, Session Laws 1905), and at that time section 4600, Statutes, did not contain the final clause quoted above in italics, but stopped with the word "compound." The clause in question was added to the section by chapter 202, Session Laws of 1909.

WINSLOW, C. J. (after stating the facts as above). The Legislature has determined that food used by our citizens ought not to contain boric acid, because it is believed to be harmful to the health. In the lawful exercise of its police power the Legislature has interdicted the sale of food containing boric acid by section 4601e of the Statutes, and:

has referred us to section 4600 of the Statutes for the definition of the word "food." Turning to the last-named section we find that the definition of food at the time of the sale in question included "all articles . . . intended for use as ingredients in the composition thereof or in the production thereof."

It is entirely competent for the Legislature to provide its own definition of a word used in a law which it enacts, and when it does so that definition must necessarily control, regardless of dictionary definitions. So the question is not whether the compound in question is really a food, or whether the definition provided by the statute is a logical one, but whether the compound was intended for use as an ingredient in the composition or preparation of food; if it was, then it was a "food" within the meaning of section 4601e, and as it contained 95 per cent. of boric acid its sale was prohibited by that section. We think the question must be answered in the affirmative.

Clearly the compound is intended to enter as a constituent part into the food which it preserves, otherwise it could hardly have effect as a preservative; thus it necessarily becomes an ingredient in the composition thereof; and just as clearly the canning of fruit or vegetables is a part of the preparation of such fruit or vegetables for use as food. The fact that the canning operation may be removed by a considerable period of time from the final acts of preparation for the table does not make it any the less a legitimate part of the general work of preparation of the raw material for use as food.

Judgment affirmed.

STATE v. STANDARD OIL CO.

Supreme Court of Oregon, 1912. 61 Or. 435, 123 P. 40, Ann Cas.1914B, 179.

This is an action brought by the state of Oregon to recover from defendant, a corporation doing business in Oregon, taxes upon the gross earnings of such defendant for the period from June 26, 1906, to December 31, 1906, and for the years of 1907 and 1908, pursuant to the provisions of an act proposed by the initiative and adopted by the people June 4, 1906, and proclaimed by the Governor June 25, 1906, being sections 3544 to 3550, inclusive, of Lord's Oregon Laws. . . .

Defendant has complied with the act of February 16, 1903, entitled "An act to provide for the licensing of domestic corporations and foreign corporations, joint stock companies and associations," etc. On November 9, 1906, the Secretary of State of the state of Oregon issued defendant a certificate of authority to do business in the state, and the latter designated an attorney upon whom process might be served under the act, entitling it to transact business in Oregon.

Section 1 of the act in question (section 3544, L. O. L.) provides: "That in addition to the taxes now provided for by law, every . . . oil company, doing business in this state, shall pay to the state of Oregon, a license of three (3) per centum upon the gross earn-

ings of such company in this state, which license shall be paid annually by such company to the treasurer of this state."

Section 4 (3547, L. O. L.) is as follows: "Any nonresident person or persons and every joint stock company or corporation not having its principal place of business within this state, or not being organized or incorporated under the laws of the state of Oregon, engaged in the business of buying and selling, or buying or selling (petroleum in its various products) within the state of Oregon, and any and all persons, companies, and corporations doing business in this state as the representative of any or either of the aforesaid persons or corporations, on commission or otherwise, and any person or persons, joint stock company, or corporation, resident within this state or organized or incorporated under the laws thereof, engaged in the business of buying and selling oil (petroleum in its various products) produced, obtained, or refined by either or any of the aforesaid nonresident persons, companies, or corporations, and whose business done annually in such special line amounts in the gross to twenty-five per centum of the total annual gross receipts of such person, company, or corporation from all lines in which he or it deals, and any person or persons, joint stock company, or corporation, wherever organized or incorporated, engaged in the business of operating cars for the transportation of such oil in this state on or over any railway line or lines in whole or in part within the state of Oregon, such line or lines not being owned or leased by such person, company, or corporation, shall be deemed an oil company, within the meaning of this act."

BEAN, J. (after stating the facts as above). . . . We find, as to the rule for the construction of interpretation clauses, that any provision in a statute which declares its meaning or purpose is authoritative. Any contemporaneous construction of the same words by the lawmakers is high evidence of the sense intended. It has been said that an interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal; not so as to disturb the meaning of such as are plain. It is often inserted for this purpose, or for abundant caution, that there may be no misapprehension, though the interpretation so directed is not different from that which the language used would otherwise receive. In such cases, this provision leads to no difficulties of construction. When, however, the clause is employed, as it often is, to make particular words mean something different or more than they would naturally and ordinarily signify, it should be construed strictly. When a concise term is used which is to include other subjects besides the actual thing designated by the words, it must also be used with due regard to the true, proper, and legitimate construction of the act. 2 Lewis, Sutherland, Statutory Construction, § 576. Such clauses often perform much the same office as a guideboard having no index to point the direction. They have been discussed with marked disfavor in England, as they embarrass, rather than assist, the courts in their decisions. "It has been very much doubted," says Lord St. Leonards, L. C., "and I concur in that doubt, whether these interpretation clauses, which are of modern

origin, have not introduced more mischief than they have avoided; for they have attempted to put a general construction on words which do not admit of such a construction in the different senses in which they are introduced in the various part of an act of Parliament." 2 Lewis, Sutherland, Statutory Construction, § 577.

Where the interpretation clause is that a particular word shall include a variety of things, not within its general meaning, it is a provision by way of extension, and not a definition by which other things are excluded. When the meaning is thus extended, the natural and ordinary sense is not taken away. *Id.* § 578, citing *Ex parte Ferguson*, L.R. 6 Q.B. 279, 291, where an act provided that the word "ship" shall include every description of vessel used in navigation not propelled by oars." On the question whether a fishing boat 24 feet long, partially decked over, and fitted with two masts and a rudder, and also with four oars, which were sometimes used, was a ship, within the meaning of the act, Mr. Justice Blackburn said: "The argument against the proposition is one which I have heard very frequently, viz., where an act says certain words shall include a certain thing, that the words must apply exclusively to that which they are to include. That is not so; the definition given of a 'ship' is in order that 'ship' may have a more extensive meaning. Whether a ship is propelled by oars or not, it is still a ship, unless the words 'not propelled by oars' exclude all vessels which are ever propelled by oars." . . .

In 26 Amer. & Eng. Enc. of Law, 680, we find, in regard to a proviso as aiding construction of enacting clauses, the following: ". . . Such clauses are often introduced from excessive caution, and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended; the rule is therefore not one of universal obligation, and must yield to the cardinal rule which requires the court to give effect to the general intent, if that can be discovered within the four corners of the act. If such general intention would be defeated by construing the act as embracing everything of the same general description as those particularly excepted therefrom, an arbitrary application of the rule is not admissible." See, also, *Dollar Savings Bank v. United States*, 19 Wall. 227, 22 L.Ed. 80.

In *The Queen v. Kershaw*, 26 Com.Law Reports (Law Jr. 1857, N. S.), at page 22, 6 E. & B. 999, 1007, it was contended for the appellants that at an election the poll was invalid, because no person ought to have been admitted to vote at the election who was not actually rated to the highway rate; and the fifth section of 5 and 6 Will. IV, c. 50, was relied upon as explaining the meaning of the sixth section that the word "inhabitant" means a person rated to the highway rate. Justice Erle said: "There is nothing in the first part of section 6 to exclude any inhabitant from voting at the election of surveyor of highways who is entitled to be present at the nomination of overseers of the poor, and no doubt every one rated to the poor would be entitled to attend and to vote, though not rated to the highway rate. Then, as to the point arising out of the interpretation clause, if section 5 had said that the word 'inhabitant' should only mean a person rated,

the construction would have been different. But the words are that 'inhabitant' shall be understood 'to include any person rated,' and other parts of the section show that the word 'include' is used in the sense of extension, and not as a definition, as when it is said that the word 'church' shall be understood to include chapel."

In the construction of a statute, where the court finds, in any particular clause, an expression not so large and extensive in its import as those used in other parts of the same statute, if, upon a review of the whole act, the real intention of the Legislature can be collected from the larger and more extensive expressions used in other parts, effect will be given to the large expressions. *State v. Jennings*, 27 Ark. 419.

It is contended by defendant's counsel that, by construing section 4 of the act and applying the maxim, "*Expressio unius est exclusio alterius*," the statute does not purport to tax residents of Oregon. This maxim does not apply to a statute, the language of which may fairly comprehend many different cases, in which some only are expressly mentioned, and not as excluding others of a similar nature. If there is some special reason for mentioning one, and none for mentioning a second, which is otherwise within the statute, the absence of any mention of the latter will not exclude it. 2 Lewis, Sutherland, *Statutory Construction*, § 495.

Whenever an act can be so construed and applied as to avoid conflict with the Constitution and give it the force of law, this will be done. Where one construction will make a statute void on account of conflict with the Constitution and another would render it valid, the latter will be adopted. Every intendment should be made in favor of the constitutionality of a statute. The lawmakers are presumed to act in view of the Constitution, and not to intend a violation of its provisions or the enactment of an invalid law. . . .

Applying the principles enunciated by the above authorities, which we think are sound and reasonable, section 1 of the act in question purports to impose a burden alike upon a resident and a nonresident oil company or person; and the interpretation clause in section 4 does not exempt residents of the state of Oregon from the operation of the act. The latter section does not say that only nonresident corporations or persons "shall be deemed an oil company within the meaning of the act." This section appears to have been inserted by the lawmakers in order that there might be no doubt as to the nonresident companies doing business in this state in a certain manner, or residents of the state buying and selling oil for nonresidents on commission. Taking the act in question as a whole, and giving it the meaning intended by the lawmakers, as indicated by its language, we think there is no discrimination between residents and nonresidents of the state of Oregon, or any denial of the "equal protection of the laws," as guaranteed by the fourteenth amendment of our federal Constitution, and that the tax provided for by the act is uniform. . . .

The judgment of the lower court is therefore affirmed.

IVEY v. RAILWAY FUEL CO.

Supreme Court of Alabama, 1928. 218 Ala. 407, 118 So. 583.

BOULDIN, J. The controlling question in this case is: Can an action be maintained under the Homicide Act for the death of a minor under 16 years of age, employed in a mine in violation of the Child Labor Law, or is the case governed by the Workmen's Compensation Law?

Section 7539 of the Code reads:

"Minors within statute.—The provisions of this chapter shall apply to employ  s who are minors and who have been employed in accordance with or contrary to laws regulating the employment of minors."

Speaking of this statute in *Chapman v. Railway Fuel Co.*, 212 Ala. 106, 101 So. 879, it was said:

"This we construe to mean only that a minor is entitled to the benefit of the act as an employee, even though the contract under which he works is contrary to law and therefore void."

This was said in course of a discussion of the constitutionality of the Workmen's Compensation Law, but is nevertheless an expression of the judicial mind; and we may say declares the obvious meaning of such provision.

But the difficulty now presented arises from the presence, in section 7596, subd. (h), defining employee or workman within the meaning of the law, of the following expression: "And also includes minors who are legally permitted to work under the laws of [this] State."

As this clause appears in subdivision (h), it is incomplete and out of its setting. Its proper place is in subdivision (g). This becomes apparent by inspection of the original statute (Acts 1919, pp. 237, 238), in connection with the substitute bill set out in the Senate Journal, vol. 1, pages 819 and 820, and in connection with the statute of Minnesota from which the provision was taken. 2 Honnold, page 1325,    34, subd. (g).

The above-quoted provisions of the same legislative act are in conflict. Which controls?

Section 7539 is an express special declaration dealing with minors alone, while the expression quoted from subdivision (h) appears in section 7596, and which said section is but a general provision defining words and phrases. Section 7539 is plain and unambiguous, and deals specially with the application of the law to minors, while subdivision (h) and the section in which it appears deals generally with many subjects, words, and phrases. It is well settled by the decisions of this and other courts that, where there is a conflict in sections or provisions in *pari materia*, one dealing specially with a subject and the other doing so generally, the special section must prevail. "Generalibus specialia derogant." . . . Moreover, the rule applicable to defining clauses is that they should be used only for the purpose of interpreting words that are ambiguous or equivocal and not so as to disturb the meaning of such that are plain. 36 Cyc. 1106.

Section 7539 appears in the original act as subsection 5a, Acts 1919, p. 207.

Section 5 (Code, § 7538) deals with death claims arising under the Homicide Act among others. It incorporates therein section 4 (Code, § 7537), which expressly denies a right of recovery thereunder in case of an employee who has elected not to accept the provisions of article 2 as against an employer who has accepted such provisions.

Thus clearly the legislative mind was directed to the application of these elective features to minors, and section 5a was incorporated accordingly.

As above mentioned, section 36 of the Alabama act (Code, § 7596) was copied from the Minnesota act. Section 34. It had been construed in *Westerlund v. Kettle River Co.*, 137 Minn. 24, 162 N.W. 680, as excluding minors employed in violation of the Child Labor Law.

Subsection 5a, Code, § 7539, did not appear in the Minnesota act. It is new to the Alabama statute. Thus appears a clear legislative purpose to depart from the parent act, and incorporate a provision expressive of such purpose. . . . This section does not strike down, nor is it in conflict with, the Child Labor Law. That law makes its violation a misdemeanor, punished accordingly. It does not deal with the civil remedies that shall accrue to such minor in case of injury, nor to his representative in case of death.

The Workmen's Compensation Law does deal with it. It confers on the minor the benefits of the Compensation Law, notwithstanding his employment was illegal, and likewise subjects him to the burdens of that law.

The Legislature was dealing comprehensively with employer and employee in view of conditions theretofore existing.

In *Humphrees v. Boxley Brothers Co.*, 146 Va. 91, 135 S.E. 890, 49 A.L.R. 1427, the Virginia court deals at length with the occasion for Workmen's Compensation Laws, their scope and policy. We cite it as a well-considered case.

We think quite clearly our Legislature has brought within the Alabama Compensation Law cases of minors employed in violation of the Child Labor Law. Whether this is a wise or just policy is for the Legislature.

Affirmed.

SUSPINE v. COMPANIA TRANSATLANTICA
CENTROAMERICANA

District Court of the United States, 1941. 37 F.Supp. 268.

Libel by Braolio Suspine and others against Compania Transatlantica Centroamericana, S. A., and another, to recover for breach of contract of employment and to recover wages for overtime services in accordance with the contract of employment, wherein the United States Attorney intervened on behalf of the government. [Under the terms of the shipping articles with the respondent company, owners of the S. S. Panamanian, signed at Newport News, Virginia, on or about May 5th, 1940, the libellants were to serve as seamen for a voyage from there to England.]

HULBERT, DISTRICT JUDGE. . . . The libelants are citizens of the Philippine Islands.

10. On August 28, 1940, the United States Collector of the Port at Baltimore, Maryland, issued the following certificate:

"Treasury Department
"United States Customs Service
"Baltimore, Md.
"August 28, 1940.

"To Whom It May Concern:

"This is to certify that on June 29, 1940, the Master of the Panamanian S/S Panamanian applied to this office for clearance of the vessel to Liverpool, England, and clearance was refused because of the presence on board of Philipino seamen, who were prohibited from making such a voyage by the Neutrality Act of 1939, and by the Regulations of the Department of Commerce.

"It is further certified that clearance was granted to the vessel on July 3, 1940, when this office was satisfied that there were no persons on board who were prohibited by the Neutrality Act of 1939 from making the voyage in question."

11. On or about July 5, 1940, the libelants were discharged by the respondents as members of the crew of the S/S Panamanian and evicted from said vessel. . . .

The Act of Congress passed November 4, 1939, Title 22 U.S.C.A. §§ 245j to 245j—19, is known as the Neutrality Act of 1939.

The respondents contend:

1. That the libelants are "citizens" within said act;
2. As such, are debarred from entering the combat area defined by the President of the United States pursuant thereto, and
3. Such contract for the employment of the libelants upon the S/S Panamanian violated the laws of the United States and hence is null and void and unenforceable.

On November 4, 1939, the President of the United States pursuant to Section 1(a) of the said Neutrality Act, by proclamation No. 2374, 4 Federal Register 4493 D.I.-B.V., proclaimed that a state of war existed between Germany and France; Poland; and the United Kingdom, India, Australia, Canada, New Zealand, and the Union of South Africa.

Section 3 of the Neutrality Act provides that whenever the President shall have issued a proclamation under the authority of the Neutrality Act, and he shall thereafter find that the protection of citizens of the United States so requires, he shall, by proclamation, define combat areas, and thereafter it shall be unlawful, except under such rules and regulations as may be prescribed, for any citizen of the United States or any American vessel to proceed into or through any such combat area.

That on November 4, 1939, the President of the United States, acting under the authority of the said Neutrality Act, issued a proclamation, No. 2376, 4 Federal Register 4495-B.V., defining combat areas, and included in the combat areas so defined were all the waters adjacent to the British Isles. . . .

Section 16, of the Neutrality Act, under the heading of "Definitions", provides:

"(a) The term 'United States', when used in a geographical sense, includes the several States and Territories, the insular possessions of the United States (including the Philippine Islands), the Canal Zone, and the District of Columbia. . . .

"(f) The term 'citizen' shall include any individual owing allegiance to the United States"

The Philippine Independence Act, Title 48 U.S.C.A. § 1231 et seq., approved March 24, 1934, authorized the Philippine Legislature to formulate and draft a constitution for the government of the commonwealth of the Philippine Islands, and Section 1232 provides that such constitution shall contain the mandatory provision, among others, that pending the final and complete withdrawal of the sovereignty of the United States over the Philippine Islands, "All citizens of the Philippine Islands shall owe allegiance to the United States." Subdivision (2) thereof reads: "Every officer of the government of the Commonwealth of the Philippine Islands shall, before entering upon the discharge of his duties, take and subscribe an oath of office, declaring, among other things, that he recognizes and accepts the supreme authority of and will maintain true faith and allegiance to the United States."

The Constitution of the Philippine Islands, adopted February 8, 1935, and approved by the President of the United States March 23, 1935, provides in an Ordinance annexed thereto, as follows:

"Section 1. Notwithstanding the provisions of the foregoing Constitution, pending the final and complete withdrawal of the sovereignty of the United States over the Philippines—

"(1) all citizens of the Philippines shall owe allegiance to the United States." 30 Philippine Pub.Laws, p. 386.

The status of the Philippine Islands and their inhabitants was reviewed at length in a very interesting opinion by Mr. Justice Sutherland (who had had an illustrious career in the U. S. Senate before his appointment to the bench) in *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 57 S.Ct. 764, 81 L.Ed. 1122. . . .

It cannot be gainsaid that Filipinos are within the statutory definition of "individuals owing allegiance to the United States." . . .

It is a fundamental principle that a statutory definition of a word or phrase will be followed by the courts regardless of what meanings may be attributed to it by other authorities, or even by common understanding. *Fox v. Standard Oil Co.*, 294 U.S. 87, 55 S.Ct. 333, 79 L.Ed. 780. . . .

Moreover, the very purpose of the law in the case at bar is to preserve the neutrality of the United States and avert the risks which brought us into the World War on April 6, 1917. . . .

My conclusion of law is:

For failure to state a cause of action, the libel must be dismissed and a decree entered in favor of the respondents.

WESTERN UNION TELEGRAPH CO. v. LENROOT

Supreme Court of the United States, 1945.
323 U.S. 490, 65 S.Ct. 335, 89 L.Ed. 414.

MR. JUSTICE JACKSON delivered the opinion of the Court.

A decree of the District Court in substance restrains the Western Union Telegraph Company from transmitting messages in interstate commerce until for thirty days it has ceased employment of messengers under the age of sixteen years and of certain others between the ages of sixteen and eighteen. This was thought to be required by the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 et seq. The Circuit Court of Appeals affirmed, and we granted certiorari. 322 U.S. 719, 64 S.Ct. 1057.

The Western Union Telegraph Company collects messages in communities of origin and dispatches them by electrical impulses to places of destination where they are distributed. Messengers are employed in both collection and distribution. A little under 12 per cent of the messenger force is under sixteen years of age, and about .0033 per cent are from sixteen to eighteen years of age, engaged in the operation of motor vehicles, scooters, and telemotors. These messengers are employed only in localities where the law of the state permits it. It is not denied that both groups are engaged in oppressive child labor as defined by the Federal Act,¹ if it applies. Whether it does so apply is the only issue here.

¹ "‘Oppressive child labor’ means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years is an occupation other than

I. It is conceded that the Act does not directly prohibit the employment of these messengers, because it contains no prohibition against employment of child labor in conducting interstate commerce.² It is conceded, too, that language appropriate directly to forbid this employment was proposed to Congress and twice rejected.

[Part of the opinion dealing with the history of the legislation is omitted. It is printed *infra* at p. 1160 Ed.]

II. The Government brought this action to reach indirectly child labor in interstate commerce by bringing it under the prohibition of Section 12(a) of the Act, which so far as material reads "no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States, in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed." Violation of this command is a crime (§§ 15 and 16) punishable by a fine and imprisonment, and threatened violations may be restrained by injunction. The Government in this case sought injunction. Its complaint charges the Western Union with a violation in that "defendant has been engaged in shipping telegraph messages in interstate commerce and in delivering telegraph messages for shipment in interstate commerce, the said goods having been produced in its said establishments in or about which the aforesaid minors were employed, suffered, and permitted to work within thirty (30) days prior to the removal of said goods therefrom."

Contention that this section is applicable to the Western Union is predicated on three steps, viz.: telegrams are "goods" within its meaning; the Company "produces" these goods within the Act because it "handles" them; and transmission is "shipment" within its terms. If it can maintain all three of these positions, the Government is entitled to an injunction; if it fails in any one, admittedly the effort to bring the employment under the Act must fail.

The Government says messages are "goods" because the Act defines "goods" as therein used to include among other things "articles or subjects of commerce of any character." § 3(i). Of course, statutory definitions of terms used therein prevail over colloquial meanings. *Fox v. Standard Oil Co.*, 294 U.S. 87, 95, 55 S.Ct. 333, 336, 79 L.Ed. 780. It was long ago settled that telegraph lines when extending through different states are instruments of commerce and mes-

manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being" 29 U.S.C. § 203(l), 29 U.S.C.A. § 203(l), June 25, 1938, c. 276, § 3(l), 52 Stat. 1061.

² The Act provides: "After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed" § 12(a), 29 U.S.C. § 212(a), 29 U.S.C.A. § 212(a).

sages passing over them are a part of commerce itself. *Western Union Telegraph Co. v. James*, 162 U.S. 650, 654, 16 S.Ct. 934, 935, 40 L.Ed. 1105. That "ideas, wishes, orders, and intelligence" are "subjects" of the interstate commerce in which telegraph companies engage has also been held. *Western Union Tel. Co. v. Pendleton*, 122 U.S. 347, 356, 7 S.Ct. 1126, 1127, 30 L.Ed. 1107; cf. *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 128, 57 S.Ct. 650, 653, 81 L.Ed. 953. It is unnecessary to decide whether electric impulses into which the words of the message are transformed are "goods" within the Act (cf. *Utah Power & Light Co. v. Pfof*, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038; *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956; *Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936, 115 A.L.R. 105), since the complaint is not based on "shipment" of impulses as "goods" but only of messages. We think telegraphic messages are clearly "subjects of commerce" and hence that they are "goods" under this Act, as alleged in the complaint.

The next inquiry is whether the Western Union Telegraph Company is a producer of these goods within the Act. Congress has laid down a definition that as used in the Act "produced" means produced, manufactured, mined, handled, or in any other manner worked on" § 3(j). The Company, says the Government, not only "handles" the message but "works on" it.

The Government contends that in defining "produced" the statute intends "handled" or "worked on" to mean not only handling or working on in relation to producing or making an article ready to enter interstate transit, but also includes the handling or working on which accomplishes the interstate transit or movement in commerce itself. If this construction is adopted, every transporter, transmitter, or mover in interstate commerce is a "producer" of any goods he carries. But the statute, while defining "produced" to mean "handled" or "worked on", has not defined "handled" or "worked on." These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context. They serve a useful purpose when read to relate to all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce. One who packages a product, or bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment might otherwise escape the Act, for in a sense he neither manufactures, produces, or mines the goods. We are clear that "handled" or "worked on" includes every kind of incidental operation preparatory to putting goods into the stream of commerce.

If we go beyond this and assume that handling for transit purposes is handling in production, we encounter results which we think Congress could not have intended. The definitions of this Act apply to the wage and hour provisions as well as to the child labor provisions. Section 15 (a) makes it unlawful to transport or ship goods in the production of which any employee was employed in violation of the wage and hour

provisions. But it makes this exception: "except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods *not produced by such common carrier*." (Italics supplied.) This recognizes a distinction between handling in transportation and producing, which is entirely put to naught by the Government's contention that by definition everyone who handles goods in carriage is thereby made a producer. The exception then is as if it read "the Act shall impose no liability on a common carrier for carrying goods that it does not carry." One would not readily impute such an absurdity to Congress; nor can we assume, contrary to the statute, that "produced" means one thing in one section and something else in another. To construe those words to mean that handling in carriage or transmission in commerce makes one a producer makes one of these results inevitable. Congress, we think, did not intend to obliterate all distinction between production and transportation. Its artificial definition, if construed to mean that "handling" and "worked on" catches up into the category of production every step in putting the subject of commerce in a state to enter commerce, is a sensible and useful one, not at odds with any other section of the Act. We think the Government has not established its contention that the Western Union is a "producer" of telegraph messages.

A third inquiry remains. Has the Company engaged in "shipping telegraph messages in interstate commerce and in delivering telegraph messages for shipment" as alleged? The learned trial court said, "More troublesome is the question whether the defendant 'shipped' goods in commerce." But he concluded on the basis of our decisions that the defendant was a "carrier of messages" to be compared to a railroad as a "carrier of goods," citing *Western Union Telegraph Co. v. State of Texas*, 105 U.S. 460, 464, 26 L.Ed. 1067; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 24 L.Ed. 708. He thought "ship" synonymous with "transport" and "convey" and hence held that the Company was "shipping" messages.

The Circuit Court of Appeals, although it sustained the injunction, took a contrary view of the nature of the enterprise. It analyzed the technology of transmitting messages. The message, it said, never leaves the originating office. It is only a text for sending electrical impulses "which are not only not the sender's message, but would be totally incomprehensible to him or to the addressee, if either could perceive them." [141 F.2d 400, 402.] It said, "From the foregoing it is at once apparent that there is not the least similarity between what the defendant does and the transportation of goods by a common carrier." Thus it cut the ground from under the Government's only allegation of violation: i. e., that the Company is engaged in "shipping" messages. It advanced this theory, apparently, to answer the Company's contention that if it was likened to a carrier, as the District Court thought, it was entitled to the benefit of the carrier's exemption in Section 15(a) (1). We do not think it is necessary for us to resolve the interesting but baffling inquiry as to precisely what, if anything,

moves across state lines in the telegraphic process. In its practical aspects, which concern the public, transmission of messages is too well known to require analysis; and in its scientific aspects, which interest the physicist, it is too little known to permit of it.

The statute applies the indirect sanctions of the Act only to those who "ship" subjects of commerce. It does not, however, define "ship." The Government says, "The verb 'ship' is an imprecise word meaning little more than to send or to transport." The term, not being artificially defined by statute, is from the ordinary speech of people. Its imprecision to linguists and scholars may be conceded. But if it is common in the courts, the marketplaces, or the schools of the country to speak of shipping a telegram or receiving a shipment of telegrams, we do not know of it, nor are examples of such usage called to our attention. Nor, if one departs from the complaint in the case and adopts the theory of the Court of Appeals, do we think either scientist or layman would ever speak of "shipping" electrical impulses. The fact is that to sustain the complaint we must supply an artificial definition of "ship," one which Congress had power to enact, but did not. We do not think "ship" in this Act applies to intangible messages, which we do not ordinarily speak of as being "shipped."

Another consideration convinces us that this Act did not contemplate its application by indirection to such a situation as we have in hand. Its indirect sanctions are well adapted to the producer, miner, manufacturer, or handler in preparation for commerce. They become clumsy and self-defeating when applied to telegraph companies, railroads, interstate news agencies, and the like, as this decree demonstrates. The Western Union is not forbidden by the decree to employ child labor, nor could it be, for it is not so forbidden by the Act. As construed by the courts below, what is prohibited is the sending of telegrams—so long as it employs child labor and for a period of thirty days after it quits. This, as the Company observes, is a sanction that the Court could not permit to become effective. A suspension of telegraphic service for any period of time would be intolerable. Of course, the Government says, the Company could escape its effect except for the thirty-day period by discharging some twelve per cent of its messengers, who are under age but whom neither the Court nor Congress has forbidden it to employ. It also suggests that the thirty-day period may be absorbed in delays. Or, it says, the District Court or Circuit Court of Appeals "may properly stay the injunction further in order to permit the transmission of messages until petitioner has a reasonable time to comply."

Of course literal compliance could be made only by ceasing to send messages, since that is all the decree does or could command. But the Company could and probably would avoid doing what the decree orders, by doing what it does not and cannot order: viz., discharging the underage part of its messenger force. This, however, would leave the thirty-day period after our mandate becomes final and goes down, during which the courts must stay the force of the injunction, either candidly or by dilatory tactics, or the Company, by continuing service

to the public, would be in contempt. Even if this were done, courts cannot stay the provisions under which the sending of messages during such period is made criminal. We may suppose the Government would not actually prosecute. But that is only because the sanctions of the Act, if applied to such a situation, are so impractical that a violation adjudged by us to be proven by stipulation of the parties as to the facts would be waived. We think if Congress contemplated application of this Act to the Western Union it would have provided sanctions more suitable than to forbid telegrams to be sent by the only Company equipped on a nation-wide scale to serve the public in sending them. Nor will we believe without more express terms than we find here that Congress intended the courts to issue an injunction which as a practical matter they would have to let become a dead letter, or enforce at such cost to the public, if a defendant proved stubborn and recalcitrant. If the indirect sanctions of this Act were literally to be applied to great agencies of transportation and communication, the recoil on the public interest would be out of all proportion to the evil sought to be remedied.

However, the indirect sanction of cutting one's goods off from the interstate market is one which can be applied to producers as we have defined them herein effectively and without injury to the public interest. If such a producer using child labor is refused facilities to transport his goods, competitors usually come in, needs are still supplied, and only the offender suffers. These indirect sanctions can practically and literally be applied to the miner and the manufacturer with no substantial recoil on the public interest, and with no gestures by the courts that they cannot follow through to punish disobedience.

Ascertainment of the intention of Congress in this situation is impossible. It is to indulge in a fiction to say that it had a specific intention on a point which never occurred to it. Had the omission of a direct prohibition of this employment been called to its attention, it might well have supplied it, for any reason we can see. Congress of course has the right to be indirect where it could be direct and to be obscure and confusing where it could be clear and simple. But had it determined to reach this employment, we do not think it would have done so by artifice in preference to plain terms. It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process. After all, this law was passed as the rule by which employers and workmen must order their daily lives. To translate this Act by a process of interpretation into an equivalent of the bills Congress rejected is, we think, beyond the fair range of interpretation. Declining that, we cannot sustain the Government's bill of complaint.

Reversed.

MR. JUSTICE MURPHY, dissenting. A word need be said about the Court's fear of enforcing Section 12(a) against Western Union. Pur-

suant to the Congressional mandate, the trial court enjoined Western Union from transmitting or delivering for transmission in commerce "telegraph or other messages or any other goods" produced by it in any establishment in or about which within 30 days prior to the transmission there shall have been employed any oppressive child labor. It is said, however, that this is a sanction that we dare not permit to become effective since the suspension of telegraphic service for 30 days would be intolerable. Such a sanction is said to be well adapted to the producer, miner, manufacturer or handler but clumsy and self-defeating when applied to telegraph companies, railroads and the like. Convinced by these considerations that the Act did not contemplate its application to this situation, the Court proceeds to carve out a judicial exception to Section 12(a) for all interstate carriers.

However much we may dislike the imposition of Congressional sanctions against a particular industry or field of endeavor, the judicial function does not allow us to disregard that which Congress has plainly and constitutionally decreed and to formulate exceptions which we think, for practical reasons, Congress might have made had it thought more about the problem. To read in exceptions based upon the nature or importance of the particular industry or corporation is dangerous precedent. If the suspension of telegraphic service for 30 days is so intolerable as to justify lifting the burden of Section 12(a) from the shoulders of Western Union, can it not be argued with equal fervor that a 30-day injunction against interstate shipments by an airplane manufacturer, a munitions plant or some other industry vital to a war or peace time economy would be likewise intolerable? What valid distinction in this respect is there between interstate carriers and manufacturers or producers? Moreover, are we to examine the competitive situation or degree of importance of a particular company to determine the amount of intolerableness which a suspension of interstate transportation might engender? These and countless other legislative problems present themselves when we embark upon a course of fashioning exceptions to a statute according to our own conceptions of appropriateness of the sanctions of an Act. Such a course is an open invitation to wholesale veto of valid and reasonable legislative provisions by means of judicial refusal to apply statutory enforcement measures. Adherence to the sound rule that inequities and hardships arising from statutory sanctions are for Congress rather than the courts to remedy by way of amendment to the statute is desirable and necessary in such a situation.

We are charged with the duty of interpreting and applying acts of Congress in accordance with the legislative intent. Courts are not so impotent that they cannot perform that duty and, at the same time, grant stays or other appropriate relief in the public interest should the occasion demand it. See *Standard Oil Co. v. United States*, 221 U.S. 1, 81, 31 S.Ct. 502, 524, 55 L.Ed. 619, 34 L.R.A., N.S., 834, Ann.Cas. 1912D, 734; *United States v. American Tobacco Co.*, 221 U.S. 106, 187, 188, 31 S.Ct. 632, 651, 55 L.Ed. 663. Thus if the injunction is granted here against Western Union, we will have vindicated to that extent

the public policy against oppressive child labor. If a 30-day suspension of telegraph messages would unduly harm the public interest, a stay of the mandate or of the injunction can be granted until at least 30 days have elapsed during which no oppressive child labor has been employed by Western Union. Thus by fashioning remedies through injunctions and stays we can aid in the elimination of oppressive child labor without undue hardship on the public. This can and should be done without abdicating our judicial function and assuming the rule of the legislature.

MR. JUSTICE BLAKE, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join in this dissent.

NOTES

1. Cf. *Regina v. Pearce*, 5 Q.B.D. 386 (1880), where Lush, J., observed: "But for the interpretation clause . . . no difficulty as to the construction . . . would have arisen. But I think an interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain."

2. See commentaries on the principal case in 8 U.Detroit L.Rev. 125 (1945), and 13 Geo.Wash.L.Rev. 383 (1945).

SECTION 6. THE PURVIEW

A. *Unity of Subject*

JOHNSON v. HARRISON

Supreme Court of Minnesota, 1891.
47 Minn. 575, 50 N.W. 923, 58 Am.St.Rep. 382.

MITCHELL, J. Chapter 46, Laws 1889, entitled "An act to establish a Probate Code," is divided into 21 subchapters, containing 326 sections. The intention of the legislature obviously was to enact, in the form of one act, a complete system of statutory law relating to or connected with those matters of which, under the constitution, probate courts have jurisdiction, to-wit, "estates of deceased persons and of persons under guardianship." It is contended that the act is repugnant to section 27, art. 4, of the constitution of the state, which provides that "no law shall embrace more than one subject, which shall be expressed in the title;" that the act embraces several distinct and separate subjects, some of which, particularly subchapter 3, relating to title to real property by descent, is not expressed in the title. The purposes of such a constitutional provision, the mischiefs which it is designed to prevent, the rules to be applied to its construction, and the tests to be applied to determine whether a law is repugnant to it, are so familiar, and have been so often passed upon by this and other courts, that they need only be referred to very briefly. Its purposes are two: *First*, to prevent what is called "log-rolling legislation" or "omnibus bills," by which a number of different and discontinued subjects are united in one bill, and then carried through by a combination of interests; *second*, to prevent surprise and fraud upon the people

and the legislature by including provisions in a bill whose title gives no intimation of the nature of the proposed legislation, or of the interests likely to be affected by its becoming a law; and, in deciding whether an act is obnoxious to this provision of the constitution, a very good test to apply is whether it is within the mischiefs intended to be remedied.

Again, while this provision is mandatory, yet it is to be given a liberal, and not a strict, construction. It is not intended, nor should it be so construed as, to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, or by multiplying their number, or by preventing the legislature from embracing in one act all matters properly connected with one general subject. The term "subject," as used in the constitution, is to be given a broad and extended meaning, so as to allow the legislature full scope to include in one act all matters having a logical or natural connection. To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other. All that is necessary is that act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject. The large number of related or cognate matters often treated of under some comprehensive title, such as "Criminal Code," "Penal Code," "Code of Civil Procedure," "Private Corporations," "Railroad Corporations," and the like, are familiar illustrations of what may be legitimately included in one act. Any construction of this provision of the constitution that would interfere with the very commendable policy of incorporating the entire body of statutory law upon one general subject in a single act, instead of dividing it into a number of separate acts, would not only be contrary to its spirit, but also seriously embarrassing to honest legislation. All that is required is that the act should not include legislation so incongruous that it could not, by any fair intendment, be considered germane to one general subject. The subject may be as comprehensive as the legislature chooses to make it, provided it constitutes, in the unconstitutional sense, a single subject, and not several. The connection or relationship of several matters, such as will render them germane to one subject and to each other, can be of various kinds, as for example, of means to ends, of different subdivisions of the same subject, or that all are designed for the same purpose, or that both are designated by the same term. Neither is it necessary that the connection or relationship should be logical; it is enough that the matters are connected with and related to a single subject, in popular signification. The generality of the title of an act is no objection, provided only it is sufficient to give notice of the general subject of the proposed legislation and of the interests likely to be affected. The title was never intended to be an index of the law. Tested by these general rules, we are of opinion that the Probate Code embraces a

single general subject, and that this subject is sufficiently expressed in its title.

In our judgment, much of the argument of counsel for respondents rests upon an entirely too limited and narrow definition of the meaning of the words "probate" and "code." They seem to construe the title of the act as if it read "An act to establish a Probate Court Code of Procedure." The word "code," as now generally used, and as obviously used in this title, means "a system of law,"—"a systematic and complete body of law." And while the word "probate" originally meant merely "relating to proof," and afterwards "relating to the proof of wills," yet in the American law it is now a general name or term used to include all matters of which probate courts have jurisdiction, which in this state are "the estates of deceased persons and of persons under guardianship." Hence the term "Probate Code" may and should be construed as meaning "the body or system of law relating to the estates of deceased persons and of persons under guardianship." In common understanding, this is as distinct and clearly defined a branch of the law as is criminal law or corporation law, and in popular signification the term "probate law" includes all matters of which probate courts generally have jurisdiction, among which is "estates of deceased persons." An examination of this act will show that all its provisions are connected with this general subject. The fact that some of them relate to matters of mere procedure, while others define and fix rights of property, is no valid objection to the law. The same objection might be urged against many acts the constitutionality of which has never been questioned. Neither is the fact important that a law contains matters that might be, and usually are, contained in separate acts, or would be more logically classified as belonging to different subjects, provided only they are germane to the general subject of the act in which they are put. The legislature is not limited to the most logical or philosophical classification. The law of wills and of title to property by descent is a part of the law relating to the estates of deceased persons, and hence is, in popular understanding, if not logically, a part of the general subject of probate law. . . .

B. Terms Incorporated by Reference

HORACE E. READ, IS REFERENTIAL LEGISLATION WORTHWHILE?

18 Can.Bar Rev. 415 (1940); 25 Minn.L.Rev. 261 (1941).

. . . A referential statute, accurately so-called, operates in either of two ways: *first*, and most commonly, the new act adopts precepts, in whole or in part, from other law; or *second*, the act provides that it shall be incorporated into all acts of a certain kind that may be passed in the future.¹⁶ Common examples of the latter are

¹⁶ E.g. the so-called consolidation acts. For an early application of this type, see *Attorney General v. Great Eastern Ry.*, (1872) L.R. 7 Ch. 475, 41 L.J.Ch. 505
READ & MACDONALD U.C.B.Leg.

the general interpretation acts.¹⁷ (Since statutes which use the former method are by far the more numerous and troublesome, all discussion hereafter will concern them unless otherwise is expressly indicated). Further, as to method, a referential act with the adoptive effect just described may either (a) apply to a new set of circumstances law originally passed for the purpose of dealing with another set of circumstances, or, less often, (b) apply to some matter a code originally passed for the purpose of being applied from time to time in a certain sphere as occasion requires.¹⁸ However, each of these modes as compared to the other has merely incidental peculiarities; and they will be adverted to later.

A person who seeks the law within the covers of the statute book must first of all discover whether the provision under his immediate perusal is self-contained, and, if it is not, in what direction and how far afield he must go to supply its deficiencies. To do this he must interpret. If, despite textual interpretation, he finds a hiatus in legislative expression, he will look for the legislative intention as to how to fill that hiatus. Before resorting to some contextual aid such as, for example, application of the *in pari materia* canon, he will investigate whether there is an incorporation of terms by reference. If he finds an express reference, his first step is easy; and for that reason a draftsman should be careful to make an intended express reference clear. A typical example of the result of a failure to do so was dealt with by Chief Justice Coleridge in *Mather v. Brown*¹⁹ where he held that a section of the Municipal Corporations Act, 1835,²⁰ was neither extended to nor incorporated with the Municipal Elections Act 1875, by the following reference:

"This Act shall, as far as consistent with the tenor thereof, be construed as one with the Act 5 & 6 Will. 4, ch. 76 (Municipal Corporations Act) and the acts amending the same. . . ."²¹

There may be an implied reference. Cases involving the question of

(Railway Clauses Consolidation Act). Wording that is characteristic of such acts appears in The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. ch. 18) which provides by sec. 1 "that this Act shall apply to every undertaking authorized by an Act which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act" For a discussion of this act see *In re Wood's Estate*, (1886) 31 Ch.D. 607, 55 L.J.Ch. 488.

¹⁷ See Canadian Uniform Interpretation Act, Part II, sec. 2.

¹⁸ See Graham-Harrison, *Criticisms of the Statute Book*, (1935) J. Soc. Pub. Teach. Law 9, 26.

¹⁹ (1876) 1 C.P.D. 596, 45 L.J.Q.B. 547.

²⁰ 5-6 Wm. IV, ch. 76.

²¹ 38-39 Vict. ch. 40, sec. 13. An example of a back-handed form of words which was construed to have effected an incorporation by reference is *Kentucky, Acts 1936*, ch. 105, p. 327: "Nothing contained herein or in chapter one hundred forty-two (142) of the Acts of one thousand nine hundred thirty-two (1932) of the General Assembly of Kentucky, shall be construed as affecting the duties of the county attorney, with reference to the giving of notice as provided in section four thousand one hundred fifty-three (4,153), Carroll's Kentucky Statutes, or as affecting his compensation as provided in said section." For a discussion thereof, see *Miller v. Kirksey*, (1936) 265 Ky. 106 110-111, 95 S.W.2d 1059.

incorporation of terms by implication or necessary intendment, although not plentiful, have usually been vexatious. One of the most interesting arose recently in Wisconsin. In *Gilson Bros. Co. v. Worden-Allen Co.*²² the question was whether the plaintiff was a beneficiary of a contractor's bond and hence could claim as a party in interest under an act of 1931²³ which required such bonds to be secured in public works contracts. The act provided that the bond should cover labor and materials, but was silent concerning the extent of the class of persons protected, and contained no words of express reference whatever. It was held that as the legislature did not attempt to give anyone a mechanic's lien on a public building, but instead devised the plan of placing a bond, to be given by the principal contractor where it would serve to save from loss persons who were so related to the work that they would have been protected by the mechanic's lien act had they been dealing with a contractor who was building for an individual, the 1931 act by necessary implication incorporated therein the classification of parties in interest contained in the mechanic's lien statute *ipsissimis verbis*. The plaintiff did not fall within that classification.²⁴

England supplies an example of a finding that an implied incorporation by reference was effected despite what appeared to be an express negation contained in the referring statute itself. The Metropolitan Board of Works, by an act passed in 1877,²⁵ was authorized to acquire specified land for street improvement, and sec. 33 thereof provided the machinery and regulated the procedure by which such land was to be acquired and sold or let. Later, by an amending act, passed in 1892,²⁶ the board was required to erect artisans' dwellings on three of the lots. Section 3 of the amending act declared:

"From and after the passing of this Act the provisions contained in section 33 of the Act of 1877 shall cease to be in force with respect to the lands shewn on the Gray's Inn Road plan, [the land on which the dwellings were to be built] and authorized to be taken by the Act of 1877, and in relation thereto the Act of 1877 shall be read as though the said section were not contained therein."

In *Wigram v. Fryer*²⁷ Mr. Justice North held that because the amending act had failed to provide the Board with the essential machinery to enable it to erect the required dwellings, the provisions of sec. 33 of the principal act of 1877 were, despite the language of sec. 3, referentially adopted *pro tanto* by necessary implication. Well might the judge remark,

²² (1936) 220 Wis. 347, 265 N.W. 217.

²³ Wisconsin, Laws 1931, Ch. 438; Wisconsin, Statutes, sec. 289.16.

²⁴ See also *Corry v. Mayor and Council of Baltimore* (1904) 196 U.S. 466, 477-478, 25 S.Ct. 297, 49 L.Ed. 556; *Turney v. Wilton*, (1865) 36 Ill. 383, 393; *Johnson v. Laffoon* (1934) 257 Ky. 156, 160-161, 77 S.W.2d 345.

²⁵ Metropolitan Street Improvements Act, (40-41 Vict. ch. 235).

²⁶ 45-46 Vict. ch. 222.

²⁷ (1887) 36 Ch.D. 87, 56 L.J.Ch. 1098.

"It is a very lamentable way of legislating, that one should be driven to get at the meaning of these Acts by removing difficulties (as far as can be done) by construction, rather than that the intention of the legislature should be clearly expressed upon the face of the Act."²⁸

Extent and Effect of a Reference

If the seeker of the law of the statute finds that there is a reference, either express or implied, he next must solve the problem of its extent in the sense simply of quantity, that is how many of the terms of the law to which reference is made does the referential act gain?

If the reference is express and specific, that is, one which refers to one or more named provisions of another act or to one or more named acts and applies it or them to the subject of the adopting statute, he will have little trouble.²⁹ But general references are pregnant with litigation. In them the very looseness of the referring language is a command invitation to the courts to partake in the legislative process—and they have responded with a rule of reason: "In the construction of general references in acts of Parliament, such reference must be made only as will stand with reason and right."³⁰

A typical general reference is illustrated and the judicial *modus operandi* in applying this standard is neatly revealed by an Alabama case.³¹ There the question was whether the clerk of the city court of Mobile had power to issue an original attachment. By statute there had been conferred upon that court "all the powers, [with one exception not here relevant], of the several circuit courts of the state."³² The clerks of those courts had been, by a previous statute, expressly empowered to issue an original attachment. The court called reason to their aid as follows:

"An original attachment is not an ordinary process, and does not issue out of a *court*, and does not pertain to the exercise of the ordinary powers and jurisdiction of a *court*. It is an extraordinary process, and can only be issued by the persons or officers upon whom the statute confers special authority to issue it. The power exercised in issuing

²⁸ *Wigram v. Fryer*, (1887) 36 Ch.D. 87, 99, 56 L.J.Ch. 1098.

²⁹ See *Kendall v. United States*, (1838) 12 Pet. (U.S.) 524, 625, 9 L.Ed. 1181; *Interstate Consol. St. Ry. v. Massachusetts*, (1907) 207 U.S. 79, 84-85, 28 S.Ct. 20, 52 L. Ed. 111; *Panama R. R. v. Johnson*, (1924) 264 U.S. 375, 391-392, 44 S.Ct. 391, 68 L.Ed. 748; *Garland v. Hickey*, (1889) 75 Wis. 178, 182-183, 43 N.W. 832. Interpretation acts sometimes assist in making specific references additionally precise, e.g. *Alberta, Rev.Stat.1922*, ch. 1, secs. 33, 34; *Manitoba, Rev.Stat.1913*, ch. 105, sec. 26.

³⁰ Lord Denman C. J. in *The Queen v. Badcock*, (1845) 6 Q.B. 787, 797, citing 2 Inst. 287. In *Jones v. Dexter*, (1859) 8 Fla. 276, 285, the same doctrine is expressed in varied language: ". . . where the provisions of a statute are adopted by *general reference* it will receive a more liberal construction than if originally passed with reference to the particular subject." See also *Panama R. R. v. Johnson*, (1924) 264 U.S. 375, 391-392, 44 S.Ct. 391, 68 L.Ed. 748; *Hutto v. Walker County*, (1913) 185 Ala. 505, 64 So. 313.

³¹ *Matthews, Finley & Co. v. Sands & Co.*, (1856) 29 Ala. 136. See also *Stevenson v. O'Hara*, (1855) 27 Ala. 362.

³² *Alabama, Acts 1851-2*, No. 66.

it is *in its nature judicial*³³ . . . and is not such as pertains to the clerk of a court merely as a clerk, and such as he exercises in the issue of process which issues out of the *court* and pertains to the exercise of the jurisdiction of the *court*."³⁴

The conclusion was that the reference clause conferred upon the clerk of the city court, a ministerial officer, the general powers of the clerks of the circuit courts, but not the power to issue an original attachment, a power special and in its nature judicial.³⁵

Perhaps it is not out of place to observe just here that tasks of this kind thrust upon the courts by using general references do not appear to be materially lightened by the clause sometimes inserted to the effect that the adopted law "shall apply save so far as expressly varied or excepted" by the referring act.³⁶ Neither are they lightened by a direction that the law referred to shall be applied "only in so far as the same are applicable," since after all that is but an express mandate to employ the rule of reason.³⁷ Employment of this direction has, indeed, been held to authorize judicial legislation to the degree necessary to save a referential act from being so uncertain as to be an insufficient expression of the legislative will.³⁸

Sometimes the identity of the provisions included within a general reference is impossible to discover. Then, the extent of the reference being wholly indeterminable, the referring act is void for uncertainty; there is a *casus omissus*. This obviously occurs and is easily established when no law of the sort named in the reference exists.³⁹ Also it happens when a statute provides that its subject shall be governed by

³³ Citing *United States v. Ferriera*, (1851) 13 How. (U.S.) 40, 14 L.Ed. 42.

³⁴ *Matthews, Finley & Co. v. Sands & Co.*, (1856) 29 Ala. 136, 138. Italics by the writer.

³⁵ For similar effect see *The King v. Justices of Surry*, (1788) 2 Durn. & E. 504. See *Du Pont v. Mills*, (Del.1937) 196 A. 168 holding that "in the same manner as other elections" referred only to procedure and not to qualifications of voters; and *Adams v. State*, (1940) 138 Neb. 613, 294 N.W. 396, holding that the general reference in: "If any bailee of any money, bank bill or note, goods or chattels shall convert the same to his or her own use with an intent to steal the same, he shall be deemed guilty of larceny in the same manner as if the original taking had been felonious; and on conviction thereof shall be punished accordingly," incorporated only the penalty provisions of the larceny statute.

³⁶ See *Minnesota, Laws, 1939, ch. 369, sec. 2.*

³⁷ See *Minnesota, Laws, 1939, ch. 12, sec. 23.*

³⁸ E.g. see *Panama R. R. v. Johnson*, (1924) 264 U.S. 375, 389, 44 S.Ct. 391, 68 L.Ed. 748, holding that rules of the Federal Employers Liability Act were incorporated into the maritime laws, 38 Stat. at L. 1185, ch. 153, sec. 20, as amended by sec. 33 of Act of June 5, 1920, 41 Stat. at L. 1007, ch. 250, which provided that " . . . all statutes of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees shall apply." See also *Attorney-General v. Great Eastern Ry.*, (1872) 7 Ch.D. 475, 41 L.J.Ch. 505; *State ex rel. Bancroft v. Frear*, (1910) 144 Wis. 79, 128 N.W. 1068; *Gillesby v. Board of County Commissioners*, (1910) 17 Idaho 586, 107 P. 71.

³⁹ See *Savage v. Wallace*, (1910) 165 Ala. 572, 51 So. 605. In *Scottish Union & National Ins. Co. v. Phoenix Title & Trust Co.*, (1925) 28 Ariz. 22, 235 P. 137 where statute of Arizona adopted by reference the "New York standard" insurance policy without further identification. It was held that since the court could take judicial notice of what that form was the reference was not void for want of certainty.

the law concerning some other subject, and that law is unidentifiable, as in the New Mexican case where the reference was to "the laws of this state as to method and manner of appropriation and use of underground waters" and different laws containing contradictory rules were applicable to underground waters according to whether or not they were artesian.⁴⁰

Extent of a reference in time, that is in respect of adoption of change in the adopted measure made subsequent to the reference, methodically should be considered here. Historically, however, the pertinent law had its beginning as a logical inference from the rule governing the primary effect of a reference upon the status of an adopted precept. It is desirable, therefore, to consider that law in its setting as a secondary result of that primary effect.

The courts are unanimous concerning the primary legal effect of a statutory reference. Whenever an act of the legislature brings into itself by reference pre-existing common law precepts or the terms of another act, the precepts and terms to which reference is made are to be considered and treated as if they were incorporated into and made a part of the referring act just as completely as though they had been explicitly written therein.⁴¹ The adopted provisions as such derive their vitality solely from the referential statute.⁴²

From this primary doctrine flow certain secondary results. The first is that a two step process is introduced to the interpretation and construction of the adopted language. It must first be read in the sense which it bore in the original act from which it was taken,⁴³

⁴⁰ *Yeo v. Tweedy*, (1929) 34 N.M. 611, 236 P. 970. See also *Rutledge v. City of Greenville*, (1930) 155 S.C. 520, 152 S.E. 700. Cf. *State ex rel. Pearson v. Probate Court of Ramsey County*, (1930) 205 Minn. 545, 556, 287 N.W. 297.

⁴¹ *The Queen v. Merlonethshire*, (1844) 6 Q.B. 343; *In re Wood's Estate*, (1886) 31 Ch.D. 607, 55 L.J.Ch. 488; *McKenzie v. Jackson*, (1898) 31 N.S.R. 70; *Kilgour v. London St. Ry.*, (1914) 30 O.L.R. 603, 19 D.L.R. 827; *Waterside Workers' Fed. of Australia v. J. W. Alexander, Ltd.*, (1918) 25 C.L.R. 434, 471; *Cathcart v. Robinson*, (1831) 5 Pet. (U.S.) 264, 279, 8 L.Ed. 120; *Engel v. Davenport*, (1929) 271 U.S. 33, 38, 46 S.Ct. 410, 70 L.Ed. 813; *Turney v. Wilton*, (1865) 36 Ill. 335; *Jones v. Chamberlain*, (1888) 108 N.Y. 100, 16 N.E. 72; *Don v. Pfister*, (1916) 172 Cal. 25, 155 P. 60; *Richardson v. Kildow*, (1928) 116 Neb. 648, 218 N.W. 429.

⁴² "The source from which the new rules are drawn contributes nothing to their force in the field to which they are translated. In that field their strength and operation come altogether from their inclusion in the [new] . . . law."—*Panama R. Co. v. Johnson*, (1923) 264 U.S. 375, 389, 44 S.Ct. 391, 68 L.Ed. 748, citing *Louisville & Nashville R. v. Western Union Tel. Co.*, (1915) 237 U.S. 300, 303, 35 S.Ct. 598, 59 L.Ed. 965. See also *Gadd v. McGuire*, (1924) 69 Cal.App. 347, 369, 231 P. 754; *Crohn v. Kansas City Home Tel. Co.*, (1908) 131 Mo.App. 313, 109 S.W. 1068.

⁴³ *Pennock v. Dialogue*, (1829) 2 Pet. (U.S.) 1, 18, 7 L.Ed. 327; *Commonwealth v. Hartnett*, (1855) 3 Gray (Mass.) 450; *Tyler v. Tyler*, (1857) 19 Ill. 151; *Giguere v. B. B. and A. C. Whiting Co.*, (1935) 107 Vt. 151, 177 A. 313; *Madow v. Riggert*, (1937) 132 Neb. 429, 272 N.W. 238; *Huffman v. Buckingham Transp. Co. of Colorado*, (C. C.A. 10th Cir. 1938) 98 F.2d 916; *Carr's Inc. v. Industrial Commission*, (1940) 234 Wis. 466, 292 N.W. 1. Cf. dictum in *United States ex rel. Demarolis v. Farrell*, (C.C.A. 8th Cir. 1937) 87 F.2d 957, 962, that "even if it [federal probation law] were copied from a state statute, it does not follow that the construction placed upon the state statute by the highest court of the state is under all circumstances binding upon the federal courts, however persuasive such decisions may be."

In *Mayor of Portsmouth v. Smith*, (1885) 10 App.Cas. 364, 371, 54 L.J.Q.B. 473,

and next in the light of its new environment, textual and otherwise.⁴⁴

The second of these secondary results has concerned the effect of modifications of the adopted law, made subsequent to the adoption, upon the referential statute, that is to say, the extent of a reference in time. Here a study of the cases in which the now established rules were evolved reveals in striking fashion the genius of the courts for compromising between the dictates of logic and practical expediency. The earlier decisions in both England and the United States hold without qualification that the repeal of the incorporated law leaves the referring one in force, unless it also is repealed expressly or by necessary implication, and that the reference does not carry with it changes afterwards made in the former. Taking as premise the primary effect of a reference, the logic of such a rule is obviously unassailable.⁴⁵ Moreover, as Mr. Justice Thompson pointed out in *Kendall v. United States*, " . . . no other rule would furnish any certainty as to what was the law, and would be adopting prospectively all changes that might be made in the law."⁴⁶ This is apparently still the unqualified *common law* rule in England,⁴⁷ Ontario,⁴⁸ and Nova Scotia.⁴⁹

Lord Blackburn said: "Where a single section of an act of parliament is introduced into another act, I think it must be read in the sense which it bore in the original act from which it was taken, and that consequently it is perfectly legitimate to refer to all the rest of that act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act." See also *Attorney-General v. Smyth & Fenton*, [1905] 2 Ir.R. 553. Judicial interpretations not made prior to adoption, and legislative interpretations made before adoption, when the reference is to the laws of another legislature, will be disregarded. *Deugau v. Kramer*, [1938] 4 D.L.R. 353, [1938] 3 W.W.R. 269.

⁴⁴ *United States ex rel. Demarais v. Farrell*, (C.C.A. 8th Cir. 1937) 87 F.2d 957, 962-963; *Gadd v. McGuire*, (1924) 69 Cal.App. 347, 369, 231 P. 754; *Penn. Bridge Co. v. City of New Orleans*, (C.C.A. 5th Cir. 1915) 222 F. 737, 741. Of where a special act incorporates and is expressly directed to be construed together with a public general act,—*West Ham Corp. v. Grant*, (1888) 40 Ch.D. 331, 58 L.J.Ch. 121.

⁴⁵ See *In the Matter of Main Street*, (1885) 98 N.Y. 454, 456-457; *Court of Insolvency v. Meldon*, (1897) 69 Vt. 510, 38 A. 167.

⁴⁶ (1888) 12 Pet. (U.S.) 524, 625, 9 L.Ed. 1181. See also *Griswold v. Atlantic Dock Co.*, (1855) 21 Barb. (N.Y.) 225, 228.

⁴⁷ (a) *The Queen v. Stock*, (1838) 8 Ad. & El. 405; *The Queen v. Smith*, (1873) L.R. 8 Q.B. 146, 42 L.J.M.C. 46; *Aerated Bread Co. v. Gregg*, (1873) L.R. 8 Q.B. 355, 42 L.J.M.C. 117; *Jenkins v. Great Central Ry.*, [1912] 1 K.B. 1, 81 L.J.K.B. 24. In *Secretary of State for India v. Hindustan Cooperative Ins. Soc.*, (1931) 58 I.A. 259, 267, Sir George Lowndes, speaking for the Judicial Committee of the Privy Council, said, after stating the rule as to repeal of an adopted statute: "It seems to be no less logical to hold that where certain provisions from an existing act have been incorporated into a subsequent act, no addition to the former act, which is not expressly made applicable to the subsequent act, can be deemed to be incorporated in it, at all events if it is possible for the subsequent act to function effectually without the addition."

(b) The common law rule stated in the text *supra* was modified in England by the Interpretation Act, 1889, 52-53 Vict. ch. 63 sec. 38(1), which reads: "Where this act or any act passed after the commencement of this act repeals and re-enacts, with or without modification, any provisions of a former act, references in any other act to the provisions so repealed, shall, unless the contrary intention appears, be construed as reference to the provisions so re-enacted." See 31 Halsbury, *Laws of England* (2d ed. 1938) 565, n. (q), for cases applying this provision. See also interpretation acts, Canada, *Rev.Stat.1927* ch. 1, sec. 20(b); *Alberta, Rev.Stat.1922*, ch.

But, despite their initial declaration of firm loyalty to a rule coined of logic and dedicated to certainty, it was not long before the "American" courts, while in the throes of construction, resorted to the "Intention of the Legislature," that Aladdin's lamp which has so often enabled Anglo-American courts to conjure much from little or nothing. The result was a distinction between two types of reference: Where one statute adopts the whole or a part of another *statute*⁵⁰ by a particular or descriptive⁵¹ reference to the statute or provisions adopted, such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions, modifications, or repeals of the statute so taken unless it does so expressly or by necessary implication.⁵² But where the reference is, not to any particular statute or part of a statute, but to *the law generally* which governs a specified subject, the reference will be regarded as including, not only the law on that subject in force at the date of the referential act, but also that law as it exists from time to time thereafter.⁵³

2, sec. 15; British Columbia, Rev.Stat.1936, ch. 1, sec. 17; Manitoba, Rev.Stat.1913, ch. 105, sec. 34; New Brunswick, Rev.Stat.1927, ch. 1, sec. 27; Nova Scotia, Rev. Stat.1923, ch. 1, sec. 9; Ontario, Rev.Stat.1937, ch. 1, sec. 16(b); Saskatchewan, Rev.Stat.1930, ch. 1, sec. 41; Australia, Commonwealth Acts 1901-1935, Acts of Interpretation Act 1901-1932, sec. 10.

In 1916 Australia added: "Where in any act reference is made to any other act, and that other act is subsequently amended, then unless the contrary intention appears the reference shall, from the date of the amendment, be deemed to be to that Act as so amended." Now Acts of Interpretation Act 1901-1935, sec. 10A.

⁴⁸ Kilgour v. London St. Ry., (1914) 30 O.L.R. 603, 19 D.L.R. 827. (See this case also for effect given to a statutory reversal of a common law rule.)

⁴⁹ McKenzie v. Jackson, (1898) 31 N.S.R. 70.

⁵⁰ Referential provisions where the reference is made to another part of the same act stand on a different footing and involve peculiar problems. See Thring, Practical Legislation (1902) 48-52; Report of the Committee on Legislative Drafting (1919) Conference of Commission on Uniform Laws 5. Consult interpretation acts, e. g. Alberta, Rev.Stat.1922, ch. 1, secs. 32, 33; British Columbia, Rev.Stat. 1936, ch. 1, secs. 52, 53. See Crohn v. Kansas City Home Tel. Co., (1908) 181 Mo. App. 313, 109 S.W. 1068.

⁵¹ A "descriptive" reference is sometimes difficult to distinguish from a "general" one, as will be shown in discussion in the text infra. Typical descriptive references are: "Company within the meaning of the Companies Acts," "Any alien . . . convicted of an offence under . . . this act, shall . . . be kept in custody and deported in accordance with the provisions of the Immigration Act relating to enquiry, detention and deportation." (Opium and Narcotic Drugs Act, Canada, Rev.Stat.1927, ch. 144, sec. 24.) See the reference considered in *Damron v. Rankin*, (Tex.Civ.App.1931) 34 S.W.2d 360. In *Hutto v. Walker County*, (1913) 185 Ala. 505, 508, 64 So. 313, the reference was as follows: "All provisions of the election law pertaining to the contest of an election of constable shall be observed as to the contest hereunder. . . ." On p. 509 the court said that incorporation by reference "does not require the specific adoption of the existing statutes *suis nominibus*," and held that this was a descriptive reference which, like a specific or particular one, adopted the described law as it existed at the time of adoption only, and thus did not include a later amendment.

⁵² *Culver v. People*, (1896) 161 Ill. 89, 43 N.E. 812; *Nampa & Meridian Irrigation Dist. v. Barker*, (1924) 38 Idaho 529, 223 P. 529; *People v. Whipple*, (1874) 47 Cal. 592; *Ventura County v. Clay*, (1896) 112 Cal. 65, 44 P. 488; *State v. Caseday*, (1911) 58 Or. 429, 115 P. 287; *Gilson Brothers Co. v. Worden-Allen Co.*, (1936) 220 Wis. 347, 265 N.W. 217; *Devery v. Webb*, (1937) 58 Idaho 118, 70 P.2d 377; *Noble v. Noble*, (1940) 164 Or. 347, 103 P.2d 293, 298.

⁵³ I.e. at the time each exigency arises to which the law is required to be applied. See rules stated in *Knapp v. City of Brooklyn*, (1884) 97 N.Y. 520; *Culver v. People*,

The distinction just stated appears to have been drawn first in a Florida case, *Jones v. Dexter*, in 1859.⁵⁴ An act of 1828 adopted in general terms as the rule for the distribution of personalty on intestacy — "the provisions of the law regulating descents." At that time descents of realty were covered by an act of 1822, but in 1829 it was superseded. The 1829 act was substantially borrowed from Kentucky, which in turn had derived it from Virginia. Both states had enacted it after a referential act had applied the law of descents to personalty, and in both the reference had been held not to extend to it. On perusing the Virginia and Kentucky decisions,⁵⁵ the Florida court found a distinction between the wording of the reference clauses pronounced upon therein and that of the one before it. Said the court:

"In the construction of our statute of 1828, we are wholly relieved from the pressure which bore upon the Virginia and Kentucky courts, growing out of the particular phraseology of their adopting acts. Our statute makes no reference to any particular act, *by its title or otherwise*, but uses the broader and more comprehensive term '*law*' — '*the law governing descents.*' The term '*law*' is more general than the term '*act*', and is of much more extensive signification, and especially so in its application when the latter is limited and qualified by the designation of its title. . . . It would be monstrous indeed to hold, that because the provisions of a statute, especially enacted with reference to a particular subject, had been, by *mere adoption in general terms*, applied to a subject of an essentially different nature, those provisions still continued in force in relation to that other subject, notwithstanding the original act should have been expressly repealed. The bare announcement of the proposition furnishes its own condemnation. It is illogical and wholly incompatible with any idea of sound reason. We are not unaware that there are instances where a repeal of the original act operates no further than to affect the original subject . . . ; but this is not of that class of cases."⁵⁶

It followed that the act of 1829 furnished the rule of descent for personalty.

By such logic was a distinction born, a logic sound enough on its immediate premises but hardly compatible with the primary legal effect of a reference. Certainly it is well worth quoting at length, for two reasons: first, because many courts outside of Florida were quick to crystallize this distinction, (expedient though it was merely

(1896) 161 Ill. 89, 43 N.E. 812; *Hutto v. Walker County*, (1913) 185 Ala. 505, 64 So. 813; *Johnson v. Laffoon*, (1934) 257 Ky. 156, 77 S.W.2d 345; *Postal Tel. Cable Co. v. Southern Ry.*, (N.D. N.C.1898) 89 F. 190. There is no distinction between references to substantive and procedural precepts in this respect. See *Guenthoer's Estate*, (1912) 235 Pa.St. 67, 74, 83 A. 617.

⁵⁴ (1859) 8 Fla. 276.

⁵⁵ *Tomlinson v. Dilliard*, (1801) 3 Call (Va.) 105; *Dilliard v. Tomlinson*, (1810) 1 Munf. (Va.) 183; *Pinkard v. Smith*, (1821) Litt.Sel.Oas. (Ky.) 331. The reference in each of the acts considered in these cases was to the adopted act by its exact title.

⁵⁶ *Jones v. Dexter*, (1859) 8 Fla. 276, 282-283. Italics by the court.

to construing a relatively obscure statute of that state), into a dogmatic rule; and second, because reasoned judicial applications of the distinction have been rarer than radium. Indeed, practically every judge who has since made use of it "seems to have shrunk from the discussion thereof, and reposed himself upon the sanctity of former decisions." ⁵⁷

In stating the rule which originated in *Jones v. Dexter* the present writer in the text just before stating the case has used the language and its arrangement most common to judicial opinions and text books. From that language the essential distinction involved might well appear to be between whether or not the adopted precept was statutory or common law. But the distinction plainly does not lie there; it actually operates only when the precept to which reference is made happens to be in legislative form. When the precept is a part of the unwritten law, a reference to it for adoptive purposes is always general. But when it is statutory, the reference may be either specific or general, depending upon the form of words used as construed in the light of the precept to which the reference is made.

Especially difficult to construe in this regard in advance of litigation are descriptive references. How determine in a given case between description and generality? Thus in *Chelan County v. Navarre*⁵⁸ the reference in question was contained in a general statute relating to condemnation proceedings. It provided that

"In case a jury is waived, *as in civil cases in courts of record, in the manner prescribed by law*, the compensation to be paid for the property sought to be appropriated shall be ascertained and determined by the court or the judge thereof, and the proceedings shall be the same as in trials of an issue of fact by the court."

When this reference was made in 1891 waiver of juries in ordinary civil actions was governed by a single general statute which allowed no constructive waiver, but it was amended in 1903 to provide for that species of waiver. In holding that the 1903 act enabled a constructive waiver to be found in condemnation proceedings begun in 1904, the court said:

"Here the adopting statute does not refer to any particular act, but to the general statute on the subject of waiving a jury trial, hence the existing law governs the subject, and not the law in force at the time the condemnation statute was enacted." ⁵⁹

⁵⁷ A likely explanation is that the doubtful origin of the rule has been outweighed by its convenience as a device for reaching desired results. In *La Oite de Montreal v. Poulin*, (1904) 25 Q.L.R. (S.C.) 364, this rule was advanced by counsel in argument, citing United States authority, but the court held that it had been displaced by a declaratory statute applicable to the case before the court, which statute had expressly said that amendments to the specifically adopted act made after its adoption were to be included in the referring one.

⁵⁸ (1905) 38 Wash. 684, 80 P. 845, construing *Washington, Codes and Stats.*, Ballinger 1897, sec. 5620. See also *Corkery v. Hinkle*, (1923) 125 Wash. 671, 217 P. 47; *Greene v. Town of Lakeport*, (1925) 74 Cal.App. 1, 239 P. 702.

⁵⁹ (1905) 38 Wash. 684, 688, 80 P. 845.

The character of this reference appears to be plain. But compare *People v. Crossley*,⁶⁰ where it was held that the following reference in an act to authorize the organization of high school districts was to a specific statute, and not to the law generally on the particular subject, schools:

"For the purpose of supporting a high school, the township or territory for the benefit of which a high school is established under the provisions of this act, shall be regarded as a school district, *and the board of education thereof shall, in all respects, have the powers and discharge the duties of boards of education elected under the general school law.*"

Here, just as in *Chelan County v. Navarre*, when the reference was made the law adopted was contained in a general statute, but it happened here that the title of that general statute was "General School Law," a phrase that coincided exactly with the wording of the reference. If the draftsman of that reference thought about the matter, the odds should probably be even that he intended it to be general rather than specific, and would likely have been surprised to learn that he had opened the way for the court to decide the question to accord with a restrictive rather than an expansive mood. Somewhat difficult to reconcile with this would be a case holding that a reference to an act by its popular name is general.⁶¹

⁶⁰ (1913) 261 Ill. 78, 84, 103 N.E. 537, applying Illinois, Laws 1911, p. 505, sec. 5 as quoted in text. Italics by the writer.

⁶¹ Brabner-Smith, *Incorporation by Reference and Delegation of Power—Validity of "Reference" Legislation*, (1937) 5 Geo.Wash.L.Rev. 198, 204, implies that a court might so hold.

The Interpretation Act, Manitoba, Rev.Stat.1913, ch. 105, sec. 25, which is designed to assist in making descriptive references specific, reads: "Where, in any act, reference is made to an act by any name or designation other than that of the chapter and year of enactment, it shall be understood that the reference is intended to be to the act which by its terms, or the terms of some other act, is to be or may be cited by that name or designation, or if there be none, to the act bearing such name or designation at the head or beginning thereof, and, where there is more than one such act, then to that one thereof in the Revised Statutes, 1913, unless the reference be in an act later than the Revised Statutes 1913, and there be a later act than the corresponding one in the Revised Statutes 1913, which, it is provided as aforesaid, may be cited by, or which bears a name or designation the same as, that so mentioned, in which case or in case there is no such Act in the Revised Statutes 1913, the reference shall be deemed to the latest act of the Legislature of Manitoba which it is provided, as aforesaid, may be so cited, or which bears as aforesaid such name or designation, or if there be no such act of such legislature, then to the latest act of the Parliament of Canada which it is so provided, as aforesaid, may be so cited, or which so bears, as aforesaid, such name or designation." (Obviously a good idea, this provision should have been re-drafted with clarity of expression in mind. But in 1939 the Manitoba Interpretation Act was revised, following substantially the draft bill prepared by the Canadian Conf. of Comms. on Uniformity of Leg., Manitoba, Statutes 1939, ch. 34, now Manitoba Rev.Stat.1940, ch. 108; and for the old sec. 25 was substituted sec. 21(1) of the new act: "In any act, regulation or document, an act of the province or of Canada may be cited by reference to its title or its short title, if any, either with or without reference to the chapter of the Revised Statutes or of the statutes for the year of Our Lord or of the regnal year in which the act was passed." In a recent letter to the author the legislative counsel of Manitoba says: "Section 25 has been partially reproduced in section 21. . . . In view of your comments on old section 25 I am not entirely satisfied that our present act is quite complete.")

Similarly it is somewhat difficult to find guidance by which to draw the line between a general and specific reference in the frequently cited, but apparently rarely read, Michigan case, *Dramstaetter v. Moloney*.⁶³ There the following reference was held to adopt "under general words of reference a specific regulation in a separate general law" and hence not to include a later amendment to the law so adopted:

"The assessor and aldermen . . . of the respective wards of the city of Detroit, shall be and are hereby vested with the powers and duties of supervisors, as provided by *the laws of this state*. . . ." ⁶³

How can this be justified without stressing unduly the word "laws" as compared with "law," an emphasis nowhere expressly indicated in the court's opinion? ⁶⁴

Perhaps the apparent contradictions between the cases which purport to apply the so-called rule of *Jones v. Dexter* are reconcilable on the basis of a silent application of an all pervading doctrine of statutory construction: that a court may transmute any so-called rule of construction into a mere canon to be discarded in the face of the court's notion of what was or should have been the instant "legislative intent." The *Jones v. Dexter* rule has been expressly eliminated in that fashion on several occasions.⁶⁵

Obviously the wise draftsman will avoid the rule of *Jones v. Dexter* by explicitly stating whether or not a reference is confined to the then existing precept or is to include any future change or substitution. Thus in a general reference an Illinois act provides that park taxes shall be collected "in such manner as is now or may hereafter be provided by law for the collection of state and county taxes." To a specific reference may be added "as the same may be amended from time to time." ⁶⁶

⁶³ (1881) 45 Mich. 621, Cf. *Guenthoer's Estate*, (1912) 235 Pa.St. 67, 83 A. 617.

⁶⁴ Michigan, Acts 1857, No. 55, ch. 9, sec. 3. Italics by the writer.

⁶⁵ For another example of such construction, see *Hutto v. Walker County*, (1913) 185 Ala. 505, 64 So. 313. Such construction would make specific, for example, the following reference in 2 Mason's Minn.Stat.1927, sec. 3463: "Any association may also invest its funds . . . in any securities permitted by the laws of this state for the investment of the assets of life insurance companies."

For an ingenious use of a descriptive reference by the court to fix the time at which a referring act became law, see *Ross v. Chambers*, (1938) 214 Ind. 223, 14 N.E.2d 1012.

⁶⁶ E.g., In the Matter of Estate of Frathelm, (1923) 156 Minn. 366, 369, 194 N.W. 766.

⁶⁷ The Illinois law is the act of May 2, 1873 for improvement of parks and boulevards (Illinois, Rev.Stat.1874, p. 744) sec. 2. Cf. construction in *Culver v. People*, (1896) 161 Ill. 89, 43 N.E. 812. See also Oklahoma, Stat. 1921 sec. 6123, as applied in *Dabney v. Hooker*, (1926) 121 Okla. 193, 249 Pac. 380. The care that should be taken in drafting these provisions is illustrated by a decision that references adopting expressly "existing general law" and the "general law now in force" on a subject meant the law in force when the referring act was later applied and not the law in force at the time that act was passed. As the rule that a statute is to be taken as always speaking rendered the above quoted phrases ambiguous, the court resorted to contextual interpretation. *Newman v. City of North Yakima*, (1893) 7 Wash. 220, 34 P. 921. See also *Guenthoer's Estate*, (1912) 235 Pa.St. 67, 83 A. 617.

Evils and a Virtue. Herein of State Prohibitions

The apparent simplicity and labor saving value of this method of legislating led naturally to its widespread adoption, and in the days before legislation became the growing point of the law its use gave rise to little difficulty. But as statutes became more numerous and complex and the tempo of the legislative process accelerated, evils soon developed. The description of the *first* of them fifty years ago by Mr. Justice Mathew in *Knill v. Towse* has with passage of time gained in point:

"Sometimes whole Acts of Parliament, sometimes groups of clauses of Acts of Parliament, entirely or partially, sometimes portions of clauses are incorporated into later Acts, so that the interpreter has to keep under his eye, or, if he can, bear in his mind, large masses of bygone and not always consistent legislation in order to gather the meaning of recent legislation. There is very often the further provision that these earlier statutes are incorporated only so far as they are not inconsistent with the statute into which they are incorporated; so that you have first to ascertain the meaning of a statute by reference to other statutes, and then to ascertain whether the earlier Acts qualify only or absolutely contradict the later ones, a task sometimes of great difficulty, always of great labour—a difficulty and labour generally speaking wholly unnecessary."⁶⁷

The *second* evil was the unfair advantage which use of the device enabled unscrupulous legislators to take of their fellows and the public.

"This practice afforded a means of imposing upon unwary members of the legislative bodies, and of procuring the passage of amendments which would never have been passed had their effect been fully understood."⁶⁸

Third, apart altogether from the opportunity for fraud, the unfortunate result was inevitably to multiply the instances in which legislation was enacted improvidently, "without that intelligent consideration and understanding of the matter involved which is so essential to the procurement of wise and wholesome legislation."⁶⁹

But cf. *Schlaudecker v. Marshall*, (1872) 72 Pa.St. 200, where "power . . . now has" was held to mean at the time the referring act was passed. Examples of provisions ambiguous in this respect are: (a) Minnesota, Laws 1939, ch. 99, sec. 11, "The superintendent of schools shall receive . . . such fees as are now prescribed by law;" and Minnesota, Laws 1939, ch. 114, sec. 4 ". . . shall be taxed in accordance with existing laws." Do not neglect Interpretation Act—see *supra* note 47b.

⁶⁷ (1889) 24 Q.B.D. 186, 195-196. To same effect see *State v. Beddo*, (1900) 22 Utah 432, 434-435, 63 Pac. 96. For a recent criticism on similar ground, see *Legislation by Reference*, (1932) Scots L.T. 1.

⁶⁸ *Gaines C. J., Quinlan v. Houston & Tex. Cent. Ry.*, (1896) 89 Tex. 356, 34 S.W. 738, 740.

⁶⁹ *Stewart J., Manchester Township Supervisors v. Wayne County Commissioners*, (1917) 257 Pa.St. 442, 448, 101 A. 736. See also *Bay Shell-Road Co. v. O'Donnell*, (1888) 87 Ala. 376, 6 So. 119.

In an attempt to curb these evils⁷⁰ thirty-three of the United States have adopted prohibitory constitutional provisions. They are of three types. The *first* type, in force in twenty-one states,⁷¹ says that "no act shall be revised, revived or amended, by reference to its title only." Probably by a very liberal construction, in the light of all three evils which they were intended to cure, these constitutional provisions could have been held to prohibit referential legislation altogether. But the courts realized that to construe them so broadly would be both impractical and unreasonable, for, they said, if you will turn through a copy of the session laws for any session, you will find much original legislation which is complete in itself but refers to other statutes to define the scope of its application; and to hold this legislation unconstitutional would result in chaos.

"To require legislation to be so complete that no reference would be necessary to any other legislation to determine the meaning of the particular legislation would . . . hamper legislation almost to the extent of prohibiting it."⁷²

As a consequence, by placing emphasis upon correction of the two evils of referential legislation referred to last above, as being the purpose of the constitutional prohibitions, and by also construing in the light of relative results, most courts have held them to forbid enacting only statutes which are either incomplete in themselves or which by reference *expressly* revise, amend, extend, or revive prior acts, and not to forbid incorporation in an independent new act the terms of an old one.⁷³

The position is not difficult to defend, since, although they too are susceptible to being used for evil purposes and to cloak a draftsman's

⁷⁰ Cooley J., *Mok v. Detroit Bldg. and Sav. Ass'n*, (1875) 30 Mich. 511, 515-516.

⁷¹ They vary in form, but all are to same effect. They include: Arizona, constitution, art. IV, sec. 14; California, constitution, art. IV, sec. 24; Florida, constitution, art. III, sec. 16; Georgia, constitution, art. III, sec. 7(17); Idaho, constitution, art. III, sec. 18; Illinois, constitution, art. III, sec. 13; Indiana, constitution, art. IV, sec. 21; Kansas, constitution, art. III, sec. 16; Louisiana, constitution, art. 32; Maryland, constitution, art. 3, sec. 29; Michigan, constitution, art. V, sec. 21; Mississippi, constitution, art. IV, sec. 61; Missouri, constitution, art. IV, sec. 33; Nebraska, constitution, art. III, sec. 11; Nevada, constitution, art. IV, sec. 17; Ohio, constitution, art. II, sec. 16; Oregon, constitution, art. IV, sec. 22; Texas, constitution, art. III, sec. 36; Virginia, constitution, art. III, sec. 52; Washington, constitution, art. II, sec. 37; West Virginia, constitution, art. VI, sec. 30. (Not included is Tennessee, constitution, art. II, sec. 17, which merely requires recital of "the title or substance of the law" referred to.

⁷² See dissenting opinion, *Farris v. Wright*, (1923) 158 Ark. 519, 524-525, 250 S.W. 889. This case is a good illustration of the line of demarcation between an amendment by reference, which offends the *first* and *second* types of constitutional provision, and an inclusion of terms by reference, which does not. The following enactment was upheld because it did not merely confer a new remedy or method of procedure for enforcing a pre-existing substantive right, i.e. was not amendatory, but itself created a new substantive right, i.e. was original and referential: "The estate of curtesy is hereby abolished, and hereafter, upon the death of a married woman, her surviving husband shall have in her estate the same interest that the wife has in the estate of the husband upon his death under the laws of this state."

⁷³ These provisions do not apply to implied amendments, *People v. Mahaney*, (1865) 13 Mich. 481; or to independent acts which in effect but not expressly amend by addition, *Timm v. Harrison*, (1884) 100 Ill. 593.

laziness or ignorance or both, incorporating references have certain compensating virtues to be later mentioned which may justify their use; virtues which in case of amendments and repeals by reference have less redemptive value.

Ten states have provisions of a *second* type as follows: "No law shall be revised or amended, *or the provisions thereof extended* by reference to its title only."⁷⁴ By guessing that the language forbidding extension was inserted because the provisions of the first type " . . . as construed by the courts were not deemed sufficient to carry out the broad purpose of such restriction, and to prevent the mischief existing and anticipated . . ."⁷⁵ from referential legislation, some courts have held that they prevent altogether incorporation of substantive terms but not of provisions that set out mere methods of procedure.⁷⁶ Although *prima facie* the construction as regards substantive terms appears to be close to literal, when the primary effect of an incorporation by reference is remembered it is seen to be a very liberal interpretation indeed. In truth it is a distortion, when as in the actual cases the new act incorporates a former one by reference because it then does not extend the incorporated act as such. The cases that hold that the effect of the *second* type in the usual case, that of adoption of "terms" by reference in no way differs from that of the *first* seem to be logically and verbally correct; that is, that they do prohibit extending already existing statutes by reference, but do not prevent extending in that manner the referring statute itself.⁷⁷ For what is extension of already existing statutes but amendment of them?

In addition to the states which have constitutional prohibitions of the sorts just discussed, there are two in which the provisions comprise a *third* type by providing that in enacting a new statute, if all or any part of an existing statute is adopted, it shall be inserted in full in the new act.⁷⁸ Plainly these prohibitions are aimed at the practice

⁷⁴ Alabama, constitution, art. IV, sec. 45; Arkansas, constitution, art. V, sec. 23; Colorado, constitution, art. V, sec. 24; Kentucky, constitution, sec. 51; Montana, constitution, art. V, sec. 25; New Mexico, constitution, art. IV, sec. 18; North Dakota, constitution, art. II, sec. 64; Oklahoma, constitution, art. V, sec. 57; Pennsylvania, constitution, art. III, sec. 6; Wyoming, constitution, art. III, sec. 26.

⁷⁵ *State v. Armstrong*, (1925) 31 N.M. 220, 258-259, 243 P. 333.

⁷⁶ *St. Louis and San Francisco R. v. Southwestern Tel. & Tel. Co.*, (C.C.A. 8th Cir., 1903) 121 F. 270; *Denver Circle R. R. v. Nestor*, (1837) 10 Colo. 403, 15 P. 714; *White v. Loughborough*, (1916) 125 Ark. 57, 188 S.W. 10; *Carroll v. Hartford Fire Ins. Co.*, (1916) 28 Idaho 406, 154 P. 985.

⁷⁷ See *Savage v. Wallace*, (1910) 165 Ala. 572, 51 So. 605; *Lyman v. Ramey*, (1922) 195 Ky. 223, 242 S.W. 21, emphasizing that the first and second types of provisions were intended "to prevent the same type of abuse." In *Quinlan v. Houston & Tex. Cent. Ry.*, (1896) 89 Tex. 356, 34 S.W. 738, where the referring act in terms "extended" the old act, the court treated it as being incorporated into the referring one to avoid violation of a constitutional provision of the first type.

⁷⁸ New York constitution, art. III, sec. 17; New Jersey, constitution, art. IV, sec. 7(4). (North Dakota, constitution, art. II, sec. 64 has been said to be of this type in *State v. Armstrong*, (1925) 31 N.M. 220, 249, 243 Pac. 333, but is ambiguous and apparently has not been construed by the North Dakota court. It follows: "No bill shall be passed which shall be revised or amended, nor the provisions

of inserting by mere reference the provisions of other laws into even an original law as it is being enacted. But in both states the courts, on the ground of practical expediency⁷⁹ have refused to give them literal effect. Instead, while they have held that a referential incorporation of substantive provisions is forbidden, they have decided that a new act, if substantively complete in itself, may adopt rules of construction or modes of procedure for carrying out its objects or applying its standards by reference to other statutes,⁸⁰ if the reference is certain⁸¹ and the content and effect of the material adopted is within the assumable knowledge of the legislature at the time the new law is enacted.⁸²

Although salutary enough, all of this has been done in the name of the legitimated offspring of legislative intent, a judicially fabricated constitutional purpose or policy.⁸³ Perusal of the record of judicial experience in applying these constitutional prohibitions of legislation by reference leads one to concur with a judge's declaration in a New York case that

"A provision of the fundamental law which attempts to regulate the form in which the legislative will is to be expressed in the enactment of laws is difficult of a just and reasonable application in all cases, and is at best of very doubtful utility. . . ."⁸⁴

It will have been apparent that the courts have never given these state constitutional restrictions upon referential legislation rigid effect because they believe that to do so would work great if not intoler-

thereof extended or incorporated in any other bill by reference to its title only, but so much thereof as is revised, amended or extended or so incorporated shall be re-enacted and published at length.")

⁷⁹ See *People ex rel. Everson v. Lorillard*, (1892) 135 N.Y. 285, 291, 31 N.E. 1011.

⁸⁰ *People ex rel. Commrs. v. Banks*, (1876) 67 N.Y. 568; *Curtin v. Barton*, (1893) 139 N.Y. 505, 34 N.E. 1093. To say, as the court did in the *Banks* Case at p. 575, that "by such a reference the general [procedural] statute is not incorporated into or made a part of the [referring] special statute," is so much subterfuge. See also *Campbell v. Board of Pharmacy*, (1883) 45 N.J.L. 241, 244-245, *aff'd* (1885) 47 N.J.L. 347, and *cf.* *State v. McNeal*, (1886) 48 N.J.L. 407, 5 A. 803.

⁸¹ In *Matter of Becker v. Eisner*, (1938) 277 N.Y. 143, 18 N.E.2d 747, a general reference appeared in the following form: "All laws applicable or which may be applicable." On p. 150 the court said: "This reference to 'all laws' . . . is entirely too vague, and to permit it to pass as proper legislation would in effect nullify the constitution. . . . For this case the petitioner seeks only reference to article 33-A of the Education Law, but the act is not so limited—all laws—what laws? Nobody knows and nobody can tell with any certainty, although we may guess that none will turn up except article 33-A as applicable to the Board of Education. 'There is the provision 'all laws applicable'—too vague to be good."

⁸² *De Agostina v. Parkshire Ridge Amusements*, (1935) 155 Misc. 518, 523-524, 278 N.Y.S. 622.

⁸³ In *Taylor v. Taylor*, (1865) 10 Minn. 107, 121 (Gil. 81, 93) *Wilson O. J.*, said: "The rules applicable in the construction of constitutions are not different in this respect from those that govern in the construction of statutes. . . . In seeking the intention of the legislature, there are certain rules that have been accumulated by experience. . . ." See also *People ex rel. Commrs. v. Banks*, (1876) 67 N.Y. 568, 575-576; *People ex rel. N. Y. Elec. Lines Co. v. Squire*, (1888) 107 N.Y. 593, 602, 14 N.E. 820, for this approach to the particular sort of constitutional provision here being considered.

⁸⁴ In *People ex rel. Everson v. Lorillard*, (1892) 135 N.Y. 285, 288, 31 N.E. 1011.

able inconvenience for the legislatures and would render the statutes unnecessarily voluminous. A single virtue of incorporation by reference, that it tends to avoid encumbering the statute book with "useless repetition and unnecessary verbiage,"⁸⁵ has to them justified its preservation as a legislative device.

Federal Constitutional Restraints

In federally united countries such as the United States, Canada and Australia, referential legislation raises additional problems. Both practical and theoretical characteristics of federalism contribute to them, comprising *first* the mutual tendency of the associated local governments to adopt laws from each other and that of the local and central governments to do likewise, especially in the field of economic and social legislation, and *second* the phenomena of separate sovereignty of the federated units and division of governmental power between them on the one hand and the central government on the other.

Where not restrained by some constitutional limitation there is nothing to prevent any legislature, federal or local, from adopting precepts from the laws of any associated legislature by reference. In the United States the difficulties arise from certain provisions in state constitutions⁸⁶ and from a generally accepted theory of the nature of

⁸⁵ See *Binghampton Bridge*, (1865) 3 Wall. (U.S.) 51, 18 L.Ed. 137.

⁸⁶ They have been just discussed in the text of this article. It is obvious that the *first* type as generally construed cannot prevent adoption of precepts from the laws of other states or of Congress. Such provisions refer only to revision or amendment of some law already passed by the referring legislature itself: In re *Burke*, (1923) 190 Cal. 326, 212 P. 193 (stating that the constitutional provision "refers only to the revision or amendment of some law already enacted by our state legislature"); *People v. Frankovich*, (1923) 64 Cal.App. 184, 221 P. 671. Contra, *Commonwealth v. Dougherty*, (1909) 39 Pa.Super. 338, purportedly distinguished but in effect overruled by *Commonwealth v. Alderman*, (1923) 275 Pa.St. 483, 119 A. 551. As observed *supra* in the text, the courts are thus far divided on whether the *second* type has any different effect than the first concerning referential adoption of a state's own prior laws. In the case of previous acts of Congress and of other states, there is even stronger ground logically for concluding that adoption by reference is not thereby forbidden; to wit, the fact that the legislatures concerned are respectively in different sovereignties. The legislature of Minnesota cannot incorporate its statute into, so as to extend, an act of Congress or of another state. The supreme court of New Mexico has, however, by single-eyed devotion to the so-called "mischief" rule (the rule in *Heydon's Case*, (1584) 3 Co. 7a), absurdly concluded that an adoption into a statute of that state of certain provisions of the National Prohibition Act by a specific reference was a violation of the state's constitutional proscription against extension by reference. *State v. Armstrong*, (1925) 31 N.M. 220, 243 P. 333 (on re-hearing). See also *Commonwealth v. Dougherty*, (1909) 39 Pa.Super. 338. The *third* type has been held by the courts of both New York (*Darweger v. Staats*, (1935) 267 N.Y. 290, 196 N.E. 61) and New Jersey to forbid adoption of precepts from federal and other extra-state law by reference. "The adoption," exclaimed the vice-chancellor of New Jersey, "... of the laws of another state or of the nation as a part of our own act was improper; it cannot be introduced into our legislation by reference. We may adopt the spirit, but we can't make the law by injecting into our statutes a reference to the United States Code or Minnesota law and calling it our law." *Wilentz v. Sears, Roebuck & Co.*, (1934) 12 N.J.Misc. 531, 533-534, 172 A. 903. In both the New York and New Jersey cases just cited the references were also held to involve wrongful delegation of legislative power, but there was no confusion of the two problems as has sometimes occurred, e.g. *State v. Larson*, (1932) 10 N.J.Misc. 384, 160 A. 556. This angle

legislative power. The chief difficulty of a peculiarly federal nature relates to delegability of legislative power. Whatever its true doctrinal foundation, one of the most firmly established principles of United States constitutional law is that, subject to certain limited exceptions,⁸⁷ legislative power cannot be delegated.⁸⁸ Although no express constitutional provisions forbid such delegation, the courts have developed the proscription as a corollary of the doctrine of separation of powers.⁸⁹ Obviously this question can arise concerning referential legislation only when the referring legislature adopts precepts from a body of law not of its own making.

Just when does a reference confront the delegation problem and how do the courts approach a solution? Legislative power is exercised by enactment of laws, and "The enactment of a law involves both the determination of what the rule shall be and that such rule shall have the force of law."⁹⁰ When, therefore, a legislature adopts a precept merely in the existing form in which another law-making body has already passed it there is clearly no delegation at all. This was decided in *Santee Mills v. Query*,⁹¹ where the South Carolina legislature adoptively referred to the provisions of the United States Income Tax Act of 1921 and Acts amendatory thereto ". . . which have been passed and approved prior to the time of approval of this Act."⁹² On the other hand, if future laws, rules or regulations are included in the adoption there is with equal clarity a delegation.⁹³ An extreme example of an express reference of that kind was the Nebraska statute which provided that

"Assent is hereby given to the provisions of an Act of Congress . . . now pending . . ." and ". . . 'the good faith

of *Darweger v. Staats* and *Wilentz v. Sears, Roebuck & Co.* was apparently overlooked in *Brabner-Smith, Incorporation by Reference and Delegation of Power—Validity of "Reference" Legislation*, (1936) 5 *Geo.Wash.L.Rev.* 193, 222, where it is stated that every state constitutional provision fails to "prevent reference to a law of another jurisdiction."

⁸⁷ E.g. delegations to municipalities by state legislatures and to federal territories by Congress. See *McBain, Delegation of Legislative Power to Cities*, (1917) 32 *Pol.Sc.Q.* 276; *Springfield v. Thomas*, (1896) 166 U.S. 707, 17 S.Ct. 717, 41 L.Ed. 1172.

⁸⁸ See *Duff and Whiteside, Delegata Potestas Non Potest Delegari; A Maxim of American Constitutional Law*, (1920) 14 *Corn.L.Q.* 168; *Sternberg, Delegation of Legislative Authority*, (1936) 11 *Notre Dame Lawyer* 109. *Cooley, Constitutional Limitations*, (8th ed. 1927) 224, states that: "One of the settled maxims of constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority."

⁸⁹ *Rottschaefer, Constitutional Law* (1939) 72.

⁹⁰ *Rottschaefer, Constitutional Law* (1939) 73.

⁹¹ (1922) 122 S.C. 158, 115 S.E. 202. Accord, see *Gibbons v. Ogden*, (1824) 9 *Wheat.* (U.S.) 1, 6 L.Ed. 23; *Florida v. Mellon*, (1926) 273 U.S. 12, 47 S.Ct. 265, 71 L.Ed. 511; *Matter of Kinney*, (1921) 53 *Cal.App.* 792, 200 P. 966.

⁹² *Santee Mills v. Query*, (1922) 122 S.C. 158, 168, 115 S.E. 202.

⁹³ See *inter alia Clark & Murnell v. Port of Mobile*, (1880) 67 *Ala.* 217; *State v. Holland*, (1918) 117 *Me.* 288, 104 *A.* 159; *Scottish Union & Nat'l Ins. Co. v. Phoenix Title & Trust Co.*, (1925) 28 *Ariz.* 22, 235 P. 137. The few cases that are contra give no clear reasons for so holding. See *People ex rel. Pratt v. Goldfogle*, (1926) 242 *N.Y.* 277, 151 *N.E.* 432; *Commonwealth v. Alderman*, (1923) 275 *Pa.St.* 483, 119 *A.* 551. For a general discussion, see (1935) 33 *Mich.L.Rev.* 597.

of the state of Nebraska is hereby pledged to provide funds sufficient to carry out the provisions of said Act of Congress as hereinafter provided.'⁹⁴

Less extreme, but equally delegations, are the references that expressly include the adopted measure and its future amendments. So also are those that simply include the adopted measure "and amendments thereto" when at the time of the reference no such amendments yet exist; but not necessarily if amendments have previously been made, since in the latter case the court is free by construction to avoid unconstitutionality by saying that only the ones previously made were intended to be included.⁹⁵

When a referring act fails to state expressly in any manner the scope of the adoption in regard to futurity, resort must be had to interpretation and thus to the so-called rule in *Jones v. Dexter*. It will be recalled that under that rule the particularity or generality of the reference determines whether the reference is intended to include the adopted precept only as it exists at the time of the reference or also as it may be amended from time to time thereafter.⁹⁶ Remembered also will be the fact that this rule, like any other "rule" of statutory construction, is susceptible to being dubbed a "mere canon of construction" and jettisoned in the name of legislative intent.

There have been several cases in which the references were to future legislation of Congress or another state, where the line between delegation and non-delegation was not as easily discernible as in the Nebraska statute described above. Decisions in these cases turn upon the same criteria that determine the question of delegation of legislative power generally.⁹⁷ Professor Rottschaefer states:

"The general rule . . . , is that it [a state legislature] may not confer on the authorities of another state, or of the United States, the power to determine what shall be the rule in force in the state, or condition changes in its rule on changes in rules enacted by other states or the United States."⁹⁸ But it is not a delegation when the

⁹⁴ This statute was held to be an unconstitutional delegation of legislative power in *Smithberger v. Bannin*, (1935) 129 Neb. 651, 660-661, 262 N.W. 92. There is, of course, no delegation when a reference is made to other laws that may be enacted by the same legislature. See *Robertson v. Langford*, (1928) 95 Cal.App. 414, 273 P. 150.

⁹⁵ E.g., *In re Burke*, (1923) 190 Cal. 326, 212 P. 193; *State v. Webber*, (1926) 125 Me. 319, 133 A. 738.

⁹⁶ In applying that rule if the result would be an invalid delegation there should be a presumption that no adoption of future amendments was intended. *State v. Webber*, (1926) 125 Me. 319, 133 A. 738; *Santee Mills v. Query*, (1922) 122 S.C. 158, 115 S.E. 202.

⁹⁷ For discussion of them see Jacoby, *Delegation of Powers and Judicial Review*, A Study in Comparative Law, (1936) 36 Col.L.Rev. 871; Brabner-Smith, *Incorporation by Reference and Delegation of Power—Validity of "Reference" Legislation*, (1937) 5 Geo.Wash.L.Rev. 193, 204.

⁹⁸ Rottschaefer, *Constitutional Law* (1939) 79, citing *Opinion of the Justices*, (1921) 239 Mass. 606, 133 N.E. 453; *State v. Gauthier*, (1922) 121 Me. 522, 118 A. 330; *Darweger v. Staats*, (1935) 267 N.Y. 290, 196 N.E. 61. The courts fail to make any distinction between attempted adoption of future federal legislation and ad-

legislature merely conditions the operation and duration of a statute on the action of the legislature of another state or of Congress.

The line drawn in the cases, taken as a whole, making this distinction between wrongful delegation and a proper conditional enactment is up to now shadowy and non-definitive. In all of them, however, emphasis is placed on whether the reference to the external standard is or is not merely to an extrinsic fact which in no way substitutes the legislative discretion of the other legislature as to what is to be the law for that of the one making the reference. If it is there is no delegation. For example, a Minnesota act which provided that it should remain in effect only so long as a federal statute remained in effect was on this basis definitely sustainable.⁹⁹ But it is difficult to follow the court which on the same ground upheld an act of New York which measured fees payable by a foreign insurance company doing business there by corresponding fees which might be charged New York companies from time to time under the law of the state of its origin.¹⁰⁰

In recent years there has been a type of statute before Canadian provincial courts in which several of the problems already herein discussed have been intrinsic. . . .

Conclusion

In conclusion, in view of this survey how should the question "is referential legislation worth while" be answered? Some critics have vehemently replied, "never," and have described the device as the deadly sin in draftsmanship.¹⁴¹ Halsbury's advice on drafting¹⁴² takes a slightly more moderate position:

ministrative rulings. See Note (1934) 11 N. Y. U. L. Q. Rev. 601, 607. On the question of delegation of legislative power to a body of the legislature's own creation, see (1936) 15 Oregon L.Rev. 260.

⁹⁹ State v. Andrew Brothers, (1919) 144 Minn. 337, 175 N.W. 685. Plainly this sort of a reference does not incorporate the foreign statute into the state act: State ex rel. Tex. Co. v. Dickinson, (1910) 79 N.J.L. 292, 75 A. 803. On power to legislate conditionally see Cargo of Brig Aurora v. United States, (1813) 7 Cranch (U.S.) 382, 3 L.Ed. 378; Field v. Clark, (1892) 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294; J. W. Hampton Jr. & Co. v. United States, (1928) 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624; People v. Klinek Packing Co., (1915) 214 N.Y. 121, 138-140, 108 N.E. 278; Powell, Separation of Powers, (1912) 27 Pol.Sc.Quart. 125, 138-140. The Oklahoma Unemployment Compensation Act, which provides that it shall cease to be operative in the event that title IX of the Federal Social Security Act is declared invalid, has recently been held not a delegation of legislative function to the Supreme Court of the United States, but "simply a legislative determination of future applicability of the act dependent upon a contingency." Gibson Prod. Co. v. Murphy, (1940) 186 Okla. 714, 110 P.2d 453, 8 U.S.Law Week 477.

¹⁰⁰ People v. Fire Association of Philadelphia, (1888) 92 N.Y. 311, aff'd sub nom. Philadelphia Fire Ass'n v. New York, (1886) 119 U.S. 110, 7 S.Ct. 108, 30 L.Ed. 342.

¹⁴¹ W. M. Graham-Harrison has observed that this extreme attitude flows from a mistaken idea that any statute can be self-contained: Criticisms of the Statute Book, (1935) J.Soc.Pub.Teach.Law 25-27. Cf. Minnesota Revisor of Statutes' Manual, Report of Revisor to Senate and House of Representatives, 1941, 62, rule (2): "Referential legislation should be avoided. Legislators should not have to look beyond the four corners of a bill in order to comprehend its meaning."

¹⁴² 31 Halsbury, Laws of England (2d ed. 1938) sec. 787. Accord, see Thring, Practical Legislation (1902) 53-57.

"Referential legislation, while improper where those whose duty it is to approve it and those who are bound by it must look beyond the four corners of a statute in order to comprehend it¹⁴³ . . . , is proper when the object of reference is to incorporate certain general acts, or parts of general acts, made for and adapted to incorporation."¹⁴⁴

Many now approve of the references which Halsbury calls "proper."¹⁴⁵ But those which are characterized unqualifiedly "improper" would seem in the light of the various factors examined in this article, to have received rather cavalier treatment by the author of that commentary. Here as elsewhere careful examination reveals the need of discrimination, and correct statement is relative: that the admitted disadvantages of having to derive terms of a statute from outside may sometimes be outweighed by other considerations and even largely obviated when safeguards are used.

Now to summarize the factors this study has divulged to be necessarily taken into account by the framer of a statute when making up his mind whether to use a reference in his given case and to indicate desirable limits and safeguards for use.¹⁴⁶

Greatest advantage gained by incorporating terms by reference is that the new bill may be shortened with two practical benefits, reduction in volume of the statute books, and application of established precepts of proven worth to a new situation with a minimum of legislative tinkering.¹⁴⁷ Balanced against these benefits, mere incon-

¹⁴³ Citing *Knill v. Towse*, (1889) 24 Q.B.D. 186, 195, 59 L.J.Q.B. 136. (Quoted in text *supra*).

¹⁴⁴ Adding in note, "Thus, when powers of acquiring land are to be taken the machinery of the Lands Clauses Acts (as defined in the Interpretation Act, 1880 (52-53 Vict. ch. 63), sec. 23) is usefully embodied with them."

¹⁴⁵ See with some qualifications, Report of Select Committee of the House of Commons 1875, Cmd. 208; Ilbert, *Legislative Methods and Forms* (1901) 255; Thring, *Practical Legislation* (1902) 53-54; Report of Special Committee on Drafting of Legislation, (1914) 39 A.B.A.Rep. 629, 657-658; Final Report of Special Committee on Legislative Drafting, (1921) 46 A.B.A.Rep. 410, 458.

Minnesota Revisor of Statutes' Manual, Report of Revisor to Senate and House of Representatives, 1941, 62, rule (3) is as follows: "Reference should not be made to wholly separate acts unless the acts referred to are general acts, made for and adapted to incorporation by reference. The incorporated general act should not be deviated from or modified. The referential legislation to be avoided consists in referring, in one act, to provisions of another act, which do not readily lend themselves to incorporation, and require to be referentially modified before they can be made to harmonize with the incorporating act." This was plainly taken from unrealistic and inadequate text book treatments of the problem.

¹⁴⁶ Recall that "referential legislation," strictly and as discussed in this article, does not include amendment and repeal of existing acts merely by reference to them in a new act. Such blind amendments and repeals breed almost nothing but evil, and, as has been seen, have been effectively prohibited in thirty-three of the United States. See unanimous condemnation of such "Chinese puzzle" method of amendment and repeal in evidence before Select Committee of the House of Commons 1875, Cmd. 208, and discussion by W. M. Graham-Harrison, (1935) J.Soc.Pub. Teach.L. 29. See safeguard in this respect in Rule 4b, Rules of Minnesota House of Representatives, 1941.

¹⁴⁷ When giving evidence before the Select Committee, 1875 Cmd. 208, Sir George Jessel said: "If you bring in a Bill with an enormous number of clauses it is difficult to get the bill through committee, and the draftsman is compelled therefore,

venience of looking "beyond the four corners" of the new bill and act should mean little, and as a screen for fraud the device can as a practical matter largely be discounted. However, since any incorporation of terms by reference inevitably renders them indeterminate as to the referring act, great care should be taken to insure that they are readily and surely determinable.¹⁴⁸ Hence, very serious consideration should be given to the degree to which a proposed referential adoption will render the terms of the new measure difficult to discover, unworkable, or unintelligible.

A competent draftsman will first of all if the proposed reference is to adopt an act or portion of an act examine the whole of that act, its textual environment, construction, history and administrative application, to make sure that the adoption will neither heap up a series of statutes, be unsuitable, nor achieve unintended results. Having satisfied himself that serious dangers of that sort are avoidable, he will employ at least the following safeguards: (a) Make the reference express and clear.¹⁴⁹ (b) Use only specific reference when adopting statutory precepts with exact citation, never mere description. There is a saying that the strength of a statute lies in its general phrases. But Ernst Freund showed that to be a half truth, that in some statutes general phrases constitute weakness.¹⁵⁰ The foregoing analysis has demonstrated that in most statutes general references usually do so. (c) Be explicit concerning the extent of the reference in quantity,¹⁵¹ and never affirmatively provide that the statutory provision referred to shall apply "so far as applicable" or "so far as practicable."¹⁵² (d) When necessary to adapt the adopted precepts to the subject matter of the referential act, do so expressly in the new bill; do not leave the task to the courts and administrative officials. In case of administrative provisions special care in this respect should be taken with both rules and standards.¹⁵³ (e) As to extent of the reference in time, displace application of the English rule or of the rule in *Jones v. Dexter* or, if desirable, of that in a general interpretation act by expressly stating in so many words

with a view to passing the Bill to make it a short Bill. Making it a short Bill involves simply as much reference as possible to former enactments. Members [take] the opportunity of endeavoring to improve the existing law. . . ." See also Chalmers, *An Experiment in Codification*, (1886) 2 *Law Q.Rev.* 125, 133; *Crales, Statute Law* (4th ed. 1936) 26.

¹⁴⁸ See typical complaint of practicing lawyer in this respect in *Legislation by Reference*, [1932] *Scots L.T.* 1. Special care should be taken in this regard with administrative provisions since the effectiveness of legislation depends so largely upon them.

¹⁴⁹ The problem of implied references can be avoided by taking care to avoid any *casus omissus* in the new act.

¹⁵⁰ Freund, *Indefinite Terms in Statutes*, (1921) 30 *Yale L.J.* 437, *Legislative Regulation* (1932) ch. VIII.

¹⁵¹ Cf. *Crales, Statute Law*, (4th ed. 1936) 202.

¹⁵² Cf. *Report of Special Committee on Drafting Legislation*, (1914) 39 *A.B.A.Rep.* 628, 656-657.

¹⁵³ To same effect see Carr, *Legislation by Reference and the Technique of Amendment*, (1940) 22 *J.Comp.Leg.* (3d ser.) 12, 16-18.

whether changes made in the incorporated law after the date of the adoption are or are not to be included in the reference.¹⁵⁴ (f) In countries with written or partly written constitutions if the reference is to precepts from a body of law not of the legislature's own making, try to avoid constitutional difficulties by expressly declaring that an adoption by reference, not a delegation, is being made and that the reference includes only the precepts "which have been passed prior to the passage of this act."¹⁵⁵

Although in any case its use means careful and time-consuming search by someone, most properly by the draftsman, whether referential legislation is worth while cannot be determined in the abstract. After all, in each particular case it is a question of good judgment and skill on the part of the draftsman.¹⁵⁶

NOTE

The following reference clause appeared in a recent bill for an English Finance Act:

"Sub-sections (2) and (3) of section 20 of the Finance Act 1922 shall have effect as if references to paragraph (c) of sub-section (1) of that section included references to the foregoing provisions of this section, as if references to a disposition included references to a settlement, and as if the reference to the making of a disposition included a reference to the making of or entering into a settlement, and sub-section (4) of that section shall have effect as if the reference to that section included a reference to the said provisions of this section."

¹⁵⁴ See *supra* notes 66 and 47.

¹⁵⁵ Cf. in this respect the references in the following Manitoba acts: (a) Pensions for the Blind Act, Manitoba, Statutes 1935, ch. 33, sec. 2(a), "The Lieutenant-Governor-in-Council may authorize the payment of pensions to blind persons under the conditions specified in any act of the Dominion relating thereto or regulations made thereunder." (b) Industrial Disputes Investigation Act of 1907, chapter 20 of the Statutes of the Parliament of Canada 1907, and all amendments thereto up to and including the said chapter 14 of 1925, shall apply to every individual dispute of the nature defined which is within or subject to the exclusive legislative jurisdiction of this province."

¹⁵⁶ When making the above suggestions the author had in mind that Chalmers, who drafted the English Bills of Exchange and Partnership Act, once remarked that lawyers usually regard projects for improving drafting of statutes "with the same pious shrinking as that with which an orthodox doctor would regard a medical prescription written in English instead of in dog Latin." Since publication of this article in the Canadian Bar Review a lawyer correspondent has commented to the author: "I have no faith that draftsmen will adopt your sensible advice. It seems to me that, short of an earthquake, nothing will induce a lawyer to use the English language in preference to 'legal English,' or to use his common sense,—otherwise we should long ago have got rid of artificial and meaningless monstrosities like the ordinary mortgage deed and the ordinary deed of trust in a bond issue, and draftsmen would come to see the necessity of making special provision in every statute for such inevitable problems as retrospective effect, contracting out, extent of protection conferred on administrative officers, etc., etc." However, the author's experience seems to justify less pessimism concerning his fellow disciples of Saint Ives. See review by Sir Cecil Carr in (1940) 22 J.Comp.Leg. (3d ser.) 191, of this article as published in the Canadian Bar Review for interesting commentary based on his experience as a parliamentary draftsman.

SECTION 7. EXCEPTIONS, PROVISOS AND SAVINGS CLAUSES

NOTE

Exceptions and provisos made their first appearance in the early real property law. The distinction between them in their use in conveyances was that an exception operated to save something out of the original conveyance so that the thing saved or excepted had to be in existence at the time of the conveyance. On the other hand, a proviso was a thing newly created or reserved out of the property conveyed, and operated by way of re-grant back to the grantor. See Coke upon Littleton, 47 (a); 1 Saunders Rep. 234 note c. This theoretical distinction was preserved when the use of exceptions and provisos became common in statutes.

ROWELL v. JANVRIN

Court of Appeals of New York, 1896. 151 N.Y. 60, 45 N.E. 308.

O'BRIEN, J. This was an action against a stockholder of a corporation organized under the manufacturing act of 1848, to enforce a debt of the corporation, upon the ground that no certificate that the capital stock had been paid in was ever made or filed as required by the tenth and eleventh sections of the act. The complaint was dismissed at the trial on the ground that it did not state facts sufficient to constitute a cause of action, and this ruling, and the exception taken by the plaintiff, raise the only question that need now be considered. The complaint alleges that the certificate required by the sections of the act above referred to was not filed or recorded, but it was held that this allegation was not sufficient to charge the defendant. . . .

The more substantial ground upon which the defendant succeeded in the courts below was that the complaint failed to state whether the stock was issued for cash or for property. It is said that, if the stock was issued for property, there was no duty or obligation to file any certificate whatever, while, if issued for money, then the statute applied, but the plaintiff was bound to state a case in his pleading which brought the defendant within the statute. This contention calls for a construction of the statute upon which the action is based. The tenth section of the act of 1848 provides that the stockholders of such company shall be severally liable to the creditors, to an amount equal to the stock held by them, for all debts and contracts of the company, until the whole amount of capital stock fixed and limited by the company shall have been paid in, and a certificate thereof made and recorded as provided in the following section, and the capital stock shall all be paid in, one-half within one year, and the other half within two years from the incorporation, or the company shall be dissolved. The next section prescribes the form of the certificate, and the officers who are to make and file the same. The fourteenth section declares that nothing but money shall be considered as payment of any part of the capital stock. It will be seen, from these provisions of the statute as originally enacted, that

the complaint in this case states sufficient facts to create the liability then imposed upon the stockholders. But by chapter 333 of the Laws of 1853 the act of 1848 was amended generally, without naming any particular section. It is upon this amendment that the learned counsel for the defendant has constructed an argument that has met with signal success in the courts below. That statute reads as follows: "Sec. 2. The trustees of such company may purchase mines, manufactories, and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full stock, and not liable to any further calls; neither shall the holders thereof be liable for any further payments under the provisions of the tenth section of the said act; but in all statements and reports of the company, to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact."

But it does not follow that because stock issued by a manufacturing corporation for property is not within the tenth section of the act of 1848, requiring the certificate to be filed, the complaint in this action is defective. The act of 1853 has modified the general provisions of the act of 1848, and has relieved stockholders, under certain circumstances, from personal liability. The question here is one of pleading, and the complaint is good unless the plaintiff was bound to negative the provisions of the amendment of 1853. In stating a cause of action arising upon a statute, it is an ancient rule that, where an exception is incorporated in the body of the clause of a statute, he who pleads the clause ought to plead the exception. But where there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he may plead the clause, and leave it to his adversary to show the proviso. *Jones v. Axen*, 1 *Ld. Raym.* 120. This rule of pleading has been followed and applied in a great variety of cases arising upon statutes and contracts, to this day. *Harris v. White*, 81 *N.Y.* 532; *U. S. v. Cooke*, 17 *Wall.* 168; *Com. v. Hart*, 11 *Cush.* 130; *Sheldon v. Clark*, 1 *Johns.* 513; *Bennet v. Hurd*, 3 *Johns.* 438; *Teel v. Fonda*, 4 *Johns.* 303; *Hart v. Cleis*, 8 *Johns.* 41; *Fleming v. People*, 27 *N.Y.* 329; *People v. Kibler*, 106 *N.Y.* 321, 12 *N.E.* 795; *People v. Briggs*, 114 *N.Y.* 56, 20 *N.E.* 820. The whole controversy presented by the appeal really turns, therefore, upon the question whether the amendment of 1853 is to be treated as an exception or a proviso. If the latter, the plaintiff was not bound to anticipate it by negative allegations in his complaint, but might leave it to his adversary, as matter of defense. The reason upon which this rule of pleading rests seems to be that when a party counts upon the enacting clause of a statute containing an exception, as the foundation of his action, he cannot logically state his case unless he negative the exception. But if the modifying words are no part of the enacting clause, but are to be found in some other part of the statute, or in some subsequent statute, it is otherwise; and he may then state his case in the words of the enacting clause,

and it will be *prima facie* sufficient. When we bear in mind the reason of the rule, and the necessity for pleading the negative, it is not very important to deal with the somewhat vague and shadowy distinctions which are to be found in the books between an exception and a proviso. But the distinction, however difficult to state, has always been recognized. An exception exempts something absolutely from the operation of a statute, by express words in the enacting clause. A proviso defeats its operation conditionally. An exception takes out of the statute something that otherwise would be part of the subject-matter of it. A proviso avoids them by way of defeasance or excuse. Black, Law Dict. 960; 2 Bouv. Law Dict. 483, "Proviso"; *Minis v. U. S.*, 15 Pet. 421. The plaintiff has stated a case under the tenth section of the original act. When that was passed, it contained no exception, and remained in that condition for five years, till the passage of the amendment of 1853. An exception is generally part of the enactment itself, absolutely excluding from its operation some subject or thing that otherwise would fall within its scope. But when the enactment is modified by ingrafting upon it a new provision, by way of amendment, providing conditionally for a new case, it is in the nature of a proviso. The statute of 1853 has all these characteristics. It was passed five years after the enactment which it modified. It was not an absolute permission to issue the stock for property generally, but only such property as was necessary in the corporate business; and the amount of stock to be thus issued could not lawfully exceed the fair value at which it should, honestly and in good faith, be estimated by the directors. The amendment took out of the original act a special case, and provided specially for such a case. It ingrafted a limitation upon the broad and general language which the legislature had originally employed in constructing the tenth section, and that, as we understand, is the main office of a proviso. In *re Webb*, 24 How. Prac. 247; *Potter*, Dwar. 118. It had the same effect as if it was attached to the original section, and was preceded by the usual words, "Provided, however," etc. If this view is correct, it follows that the plaintiff was not bound, by the strict rules of pleading, to negative the proviso. He could state a case within the terms of the original enactment, and leave the defendant to take the case out of it by pleading the facts constituting the special case provided for by the amendment.

We have seen that an exception in a statute is something embodied in, and forming a part of, the enacting clause itself; and nothing of that kind is found in the tenth section, upon which the complaint was framed. If words follow the enacting clause, or are subsequently attached to it or ingrafted upon it by way of amendment, which modify or change its scope and application, or take a particular case out of it, then such new matter or modifying words constitute what is technically known in the construction of statutes as a "proviso," which the plaintiff was not bound to negative by pleading. *Spieres v. Parker*, 1 Term R. 141; *Rex v. Bryan*, 2 Strange, 1101; *Steel v. Smith*, 1 Barn. & Ald. 94. And it was therefore for the defendant

to aver and prove that the case was one falling within the terms of the amendment of 1853. It appears from the record that this was the view which the defendant's counsel took of the case, since he has pleaded in his answer that the stock was issued for property; thus availing himself of the terms of the amendment or proviso, and in that way avoiding the statutory liability for failing to file the certificate which the original law required, but which the amendment did not, according to the construction which the courts have given to it. But, before the complaint was dismissed, some proof should have been given of the facts so pleaded. When the allegations of the answer were sustained by proof of the fact that the stock was issued, not for cash, but for property, then the defense would be complete, unless the plaintiff gave proof tending to show either that the property was not such as pertained to the business, or that it was deliberately overvalued for the fraudulent purpose of evading the statute. It would not be enough to show that there was an honest error of judgment on the part of the trustees in fixing the value, but it must be shown that they acted in bad faith. We conclude, therefore, that in this respect the complaint was sufficient.

. . . For these reasons, the judgment dismissing the complaint without requiring the defendant to give any proof should be reversed, and a new trial granted; costs to abide the event. All concur. Judgment reversed.

NOTE

"Provisos" and "exceptions" are striking examples of art having degenerated through misuse into legal jargon. Retention meanwhile of the historical technical distinction between them has created many needless problems for the courts. One of the most perplexing of these has to do with the pleading of such statutes. The question there is whether the one relying on a statute must negative in the complaint or indictment the exceptions and provisos, or whether he may leave them to be introduced, if at all, by the other party. Further importance is attached to this problem by the fact that the rules as to burden of proof and the burden of going forward with the evidence usually follow the rules of pleading. "He who pleads must prove." Legislative practice being as it is, many statutes fairly abound in exceptions and provisos. (See, for example, the statutes construed in the following cases: *Orinoco Supply Co. v. Masonic & Eastern Star Home*, 163 N.C. 513, 79 S.E. 964 (1913); *People v. Martin*, 314 Ill. 110, 145 N.E. 395 (1924); *Richman v. Commonwealth*, 195 Ky. 715, 243 S.W. 929 (1922); *Campbell v. Jackman Bros.*, 140 Iowa 475, 118 N.W. 755 (1908).) A pleader may find that he has a vast amount of proof to set up if he wishes to rely on a certain statute, unless he is prepared to show that it was the duty of the other party to plead the exceptions and provisos.

While the distinction drawn in the principal case is retained in civil pleading, in criminal cases, where the problem most frequently arises, this distinction has been largely abandoned. The main theme as to pleading of exceptions and provisos is whether or not they are considered elements of the offense. The judicial application of this criterion is, however, so uncertain that it is imperative when drafting criminal statutes to state specifically what are to be considered essential elements of the offense and what are to be matters merely of defense. Thus, for example: "The following are matters of defence, to be pleaded, if at all, by the defendant", or "The following are the essential elements of this offense".

The case of *People v. Bowes*, 314 Ill. 140, 145 N.E. 391 (1924), furnishes a word of warning. The statute there involved provided: "It shall not be necessary in any affidavit, information or indictment, to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful." In spite of this provision, the majority of the court held that the exceptions in the state liquor act had to be negatived, and said: ". . . where the statute creating a new offense does not describe the act or acts which compose it, the pleader is required to state them specifically." The minority opinion went on the ground that the intent of the legislature as to what should constitute this crime had been clearly set out.

PIERSON v. CADY

Supreme Court of New Jersey, 1913. 84 N.J.L. 54, 86 A. 167.

SWAYZE, J. The relators claim title to the office of chosen freeholders of Union county, under the act of 1902 (P.L. p. 65), amended in 1908 (P.L. p. 269; C.S. p. 509, pl. 131), and revised in 1912 (P.L. p. 619). The defendants claim title to the same office under the legislation existing prior to the act of 1902. The act of 1902 was to take effect only when adopted by vote of the legal voters of the county. An attempt to adopt it had been made in Union county in 1911.

The county of Union is a county of the second class, that is, a county with a population of not less than 50,000 nor more than 300,000 inhabitants. P.L. 1911, p. 19. By the amendment of 1908, a proviso was inserted in section 1 of the act of 1902, in the following language, "Provided, however, this act shall not apply to counties of the second class." Obviously, if this proviso is to control and the statute with the proviso was within the power of the Legislature to enact, the adoption of the act of 1902 in 1911 was without warrant of law. The relators advanced two claims by way of attack upon the proviso. They say: First, that the proviso is repugnant to the rest of the section and must be rejected; and, second, that if the proviso is sustained the act then becomes unconstitutional.

We think the first contention is untenable. The proviso is indeed repugnant to the rest of the section, but the question is whether the proviso or the other language is to prevail. A distinction is made in the cases between a saving clause repugnant to the purview of the act, and a repugnant proviso. *Townsend v. Brown*, 24 N.J.L. 80; *Clark Thread Co. v. Kearny Township*, 55 N.J.L. 50, 25 A. 327. In the first-cited case Chief Justice Green said: "The rule has long been established that if a proviso in a statute be directly contrary to the purview of the statute the proviso is good, and not the purview, because it speaks the later intention of the Legislature." The rule was recognized by Mr. Justice Van Syckel, in the last-cited case, although he quoted from Sedgwick and Chancellor Kent as to its arbitrary character. If we take only the words of the act, the clause forbidding its application to second-class counties is undoubtedly a proviso; it is so denominated by the Legislature itself, and upon the rule of law above stated this clause would nullify the preceding por-

tion of the section. It would, however, be too narrow a view to make the case turn on the mere fact that the Legislature had used the word "provided," instead of the words "saving and excepting." As Justice Van Syckel said in *Clark Thread Co. v. Kearny Township*, we ought to ascertain, if possible, which part of the section expresses the latest intent of the Legislature. Ordinarily the clause coming last in the act represents the last intention of the lawmaker. In the present case we have a section which, as amended in 1908, carefully provides for the selection of freeholders in all counties whatever their population. In counties having between 100,000 and 200,000, seven were to be elected. In counties having between 50,000 and 100,000, five were to be elected. These counties included all counties of the second class, as the classification then was. It would be attributing absurd conduct to the draftsman of this act to suppose that the original intent was to exclude second-class counties from the operation of the law, and that this intent was altered by afterwards providing especially for counties of the requisite population. It is much more probable that the act as originally drafted and introduced contained distinct provisions for counties having from 50,000 to 100,000 population, and counties having from 100,000 to 200,000, and that it was amended in its passage through the Legislature by adding the proviso excluding second-class counties from its operation. This is all the more probable for the reason that Monmouth, a county of the second class, had in 1905 adopted the act of 1902. *Patterson v. Close*, 82 N.J.L. 160, 83 A. 233. But for the proviso in the act of 1908, the county of Monmouth would have been subject thereto, and it seems probable that the representatives of that county induced the Legislature to refuse to change its government within three years after it had begun the trial of the act of 1902, and while litigation growing out of the change was still pending. Tacking the proviso to the act as originally drawn was a ready way of accomplishing this end, and it was not unnatural in the haste of legislation to overlook the repugnancy thus created. We cannot resort in aid of this construction to the history of the legislation in the process of passage through the Senate and House of Assembly. *Standard Underground Cable Co. v. Attorney General*, 46 N.J.Eq. 270, 19 A. 733, 19 Am.St.Rep. 394. It is, however, reassuring to know that in fact the proviso was adopted as a Senate amendment to a bill originating in the House of Assembly. . . . The act of 1902 was not law in 1911; it had been essentially modified in 1908, was no longer applicable to second-class counties, and the amendments of that year were never voted on. Even if the referendum of 1911 were validated, however, it would be of no avail, since it could do no more than make effective the act as it then was, and that act was repealed in 1912. When the relators were elected, the only act under which they could be elected was chapter 355 of the Laws of 1912, and that act at best was ineffective without a referendum thereon, which has not been had in Union county.

As to those of the defendants whose terms would otherwise have expired, they hold over because no successors have been chosen and

qualified. C.S. 3489, pl. 130; *Wright v. Campbell*, 74 N.J.L. 609, 67 A. 186. The other defendants hold to the ends of their terms. The defendants are entitled to judgment.

COMMONWEALTH v. DESMOND

Supreme Judicial Court of Massachusetts, 1877. 123 Mass. 407.

GRAY, C. J. By the St. of 1869, c. 410, entitled "an act to establish certain rules for the construction of repealing statutes," it is enacted that "in the construction of all statutes hereafter enacted the following rules shall be observed, unless such construction would be repugnant to the express terms of the same statute." The general rules so established are to be deemed part of every repealing statute since passed, as much as if expressly inserted therein, unless the later statute clearly manifests a different intention. One of these rules is that the repeal of an act shall not affect any prosecution pending at the time of the repeal for an offence committed under the act repealed. The St. of 1876, c. 172, § 4, which simply enacts that the St. of 1874, c. 356, "is hereby repealed," does not therefore affect this prosecution, which was pending under the St. of 1874 when the St. of 1876 was passed.

Exceptions overruled.

NOTES

1. Communication of the Law Revision Commission to the Legislature Relating to Section 93 of the General Construction Law, N.Y.Leg.Doc. (1939) No. 65 (M), 3-4. (1939) Rep.Rec.& St.Law Rev.Comm. 741-742. "By each act of repeal the Legislature expresses or implies prospective intention, as to what the law is to be, and a retrospective intention, as to what effect the repeal is to have on the application of the repealed law to past acts. To aid in the determination of such intention certain presumptions were developed, such as the one that the repeal of a statute not only prevents the accrual under it in the future of rights and liabilities, but that it also prevents the enforcement under it of accrued rights and liabilities. To prevent the application of this presumption it became common to introduce into repealing statutes clauses saving for certain purposes the effectiveness of the laws repealed.

"In order to deal more effectively with repeals, most states, including New York, have passed statutes of general construction relating to legislative intent. These have radically changed certain of the presumptions developed by the common law. The New York statute contained in the General Construction Law provides in section 90 that the repeal of a statute which repealed a prior statute does not revive the prior statute; in section 93 that the repeal of a statute shall not affect or impair any act done, right acquired, or liability incurred prior to the time when the repeal takes effect; and in section 94 that all actions or proceedings, civil or criminal, commenced under or by virtue of a provision which is repealed may be prosecuted and defended in the same manner as if such provisions had not been repealed. These sections state rules of construction to be applied in reading each enactment of the Legislature, unless it is made clear that a contrary rule of construction is intended.

"In spite of the existence of the provisions in section 93, doubt has been expressed as to the propriety of repealing statutes without attaching to the repealer a specific

saving clause. Objection has been made to several bills recommended by the Commission, on the ground that they did not contain specific saving clauses, apprehension being expressed that such repealers might be construed to impair existing rights.

"If section 93 of the General Construction Law is sufficient in its language to accomplish its purpose, and is valid as applicable to acts of future legislature, such objections are groundless. The Commission has made a study of these questions. As a result of its study, the Commission is convinced of the validity of section 93 of the General Construction Law, and its adequacy.

"It has been repeatedly declared by the Court of Appeals that section 93 of the General Construction Law is not an invalid attempt by one Legislature to bind later Legislatures, but is a valid rule of interpretation to be applied to subsequent legislation, in the absence of evidence of a contrary legislative intent. In substantive matters, the adequacy of section 93 of the General Construction Law has been tested and upheld not only in actions involving the rights, both vested and inchoate, of individuals, but also in proceedings relating to the rights of the state, in tax matters and criminal prosecutions, and proceedings involving the rights and liabilities of municipal corporations. Section 93 does not apply to enactments which regulate *merely* the details and incidents of judicial procedure, but it does apply to save every substantive right and liability from automatic extinction by a statute, procedural or otherwise.

"The Commission concludes that section 93 of the General Construction Law is valid and adequate to take the place of specific clauses in repealing statutes intended to save substantive rights and obligations. It desires to call this conclusion to the attention of the Legislature. It supports those bills previously recommended by the Commission which did not contain specific saving clauses."

[See *supra* Chapter 3, Section 4c concerning repeals.]

2. The Minnesota Interpretation Act, 1945 Minn.Stat. § 045.35 reads: "The repeal of any law shall not affect any right accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the law repealed. Any civil suit, action, or proceeding pending to enforce any right under the authority of the law repealed shall and may be proceeded with and concluded under the laws in existence when the suit, action, or proceeding was instituted, notwithstanding the repeal of such laws; or the same may be proceeded with and concluded under the provisions of the new law, if any, enacted."

This savings clause is silently incorporated by reference into all acts unless expressly rejected.

3. "The saving clause simply limits the scope of the repeal. A title for an unqualified repeal comprehends a qualified one as the greater includes the less. . . . A title which recites that the act contains a repeal need not refer to a germane saving clause. Likewise, provisos and exceptions appearing in the body without previous mention in the title have been sustained." *O. Thomas Stores Sales System v. Spaeth*, 209 Minn. 504, 297 N.W. 9 (1941). See commentary in 26 Minn.L. Rev. 135 (1941).

4. A typical saving clause in an original as distinguished from an amending or repealing act is Section 76a of the Uniform Sales Act: "None of the provisions of this act shall apply to any sale, or to any contract to sell, made prior to the taking effect of this act." *Mason's Minn.Stat.*, 1927, § 8451. This clause was expressly applied in *Wylie China Co. v. Vinton*, 97 Or. 350, 192 P. 400 (1920). See also Section 76b. Cf. *Walsh v. Alaska Steamship Co.*, 101 Wash. 295, 172 P. 269 (1918), concerning effect of a saving clause not in a repealing act.

SECTION 8. SEVERABILITY CLAUSE

WILLIAMS v. STANDARD OIL CO.

Supreme Court of the United States, 1929.
278 U.S. 235, 49 S.Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases were considered together by the court below and are submitted together here. In both the validity of a statute of Tennessee is assailed as contravening the federal Constitution. Appellee in No. 64 is a corporation organized under the laws of Louisiana, and appellee in No. 65 is a corporation organized under the laws of Delaware. From a time long prior to the passage of the statute, both have been engaged and are now engaged in the business of selling gasoline in the state of Tennessee.

The statute was adopted in 1927. Its purpose and effect are to fix prices at which gasoline may be sold within the state. A division of motors and motor fuels is created in the department of finance and taxation and authorized to collect and record data concerning the manufacture and sale of gasoline, freight rates, differentials in price to wholesalers and retailers, the cost and expense of production and sale, etc. The information thus collected is made available for use by the commissioner of finance and taxation in the regulation of prices at which gasoline may be sold in the state. Permits for such sale are to be issued subject to the approval of the commissioner but only at the prices fixed and determined. Prices of gasoline are to be fixed with a proper differential between the wholesale and retail price. Rebates, price concessions, and price discrimination between persons or localities are forbidden. The prices first are to be stated by the applicant for a permit, and, if not approved by the superintendent of the division, are to be determined by that official, with a right of review by the commissioner and finally by the courts. Chapter 22, p. 53, Public Acts Tennessee 1927. By a general statute (Shannon's Tennessee Code, § 6437) a violation of the act is a misdemeanor and is punishable by fine and imprisonment. *Pressly v. State*, 114 Tenn. 534, 538, 86 S.W. 378, 69 L.R.A. 291, 108 Am.St.Rep. 921.

Appellees brought separate suits in the court below to enjoin the state officers named as appellants from carrying out their intention to enforce the act and institute criminal proceedings for violations of it against appellees, respectively, and to have the act declared unconstitutional and void. Under the facts alleged, the suits were properly brought. *Terrace v. Thompson*, 263 U.S. 197, 214, 44 S.Ct. 15, 68 L. Ed. 255; *Tyson & Brother v. Banton*, 273 U.S. 418, 428, 47 S.Ct. 426, 71 L.Ed. 718.

The principal ground of attack, and the only one we need to consider here, is that the Legislature is without power to authorize agencies of the state to fix prices at which gasoline may be sold in the state, because the effect will be to deprive the vendors of such gasoline of

their property without due process of law in violation of the Fourteenth Amendment. Appellees applied for a temporary injunction against appellants, upon which there was a hearing, and the court below, consisting of three judges (section 266, Judicial Code; 28 U.S.C.A. § 380), granted the injunction as prayed. . . .

In support of the act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the state of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the state. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase "affected with a public interest." Those decisions control the present case. . . .

Finally, it is said that even if the price-fixing provisions be held invalid other provisions of the act should be upheld as separate and distinct. This contention is emphasized by a reference to section 12 of the act, which declares: "That if any section or provision of this act shall be held to be invalid this shall not affect the validity of other sections or provisions hereof."

In *Hill v. Wallace*, 259 U.S. 44, 71, 42 S.Ct. 453, 459 (66 L.Ed. 822), it is said that such a legislative declaration serves to assure the courts that separate sections or provisions of a partly invalid act may be properly sustained "without hesitation or doubt as to whether they would have been adopted, even if the Legislature had been advised of the invalidity of part." But the general rule is that the unobjectionable part of a statute cannot be held separable unless it appears that, "standing alone, legal effect can be given to it and that the Legislature intended the provision to stand, in case others included in the act and held bad should fall." The question is one of interpretation and of legislative intent, and the legislative declaration "provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command." *Dorchy v. Kansas*, 264 U.S. 286, 290, 44 S.Ct. 323, 325 (68 L.Ed. 686).

In the absence of such a legislative declaration, the presumption is that the Legislature intends an act to be effective as an entirety. This is well stated in *Riccio v. Hoboken*, 69 N.J.L. 649, 662, 55 A. 1109, 1113 (63 L.R.A. 485) where the New Jersey Court of Errors and Appeals, in an opinion delivered by Judge Pitney (afterward a Justice of this Court), after setting forth the rule as above, said:

"In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will

leave the constitutional features and purposes of the act substantially unaffected by the process." . . .

The effect of the statutory declaration is to create in the place of the presumption just stated the opposite one of separability; that is to say, we begin, in the light of the declaration, with the presumption that the Legislature intended the act to be divisible, and this presumption must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that the invalid part being eliminated the Legislature would not have been satisfied with what remains.

In the present case, it requires no extended argument to overcome the presumption and to demonstrate the indivisible character of the act under consideration. The particular parts of the act sought to be saved are found in sections 1, 2, 3, 4 and 10. Section 1, after a preamble in respect of the importance of controlling the sale of gasoline and a declaration that such sale is impressed with a public use, creates the division of motors and motor fuels as already stated. Section 2 requires the superintendent of the division and other employees to make investigations, collect and record data concerning the manufacture and sale of gasoline, the cost of refining, freight rates, differentials in wholesale and retail prices, costs and expenses incident to the sale, methods employed in the distribution of gasoline, and other data and information as may be material in ascertaining and determining fair and reasonable prices to be paid for gasoline. This information is declared to be available for use in the regulation of prices and for the inspection and information of the public. The superintendent is directed to issue permits for the sale of gasoline at prices fixed and determined as provided in other parts of the statute. Section 3 makes it unlawful for anyone to engage in the sale of gasoline without first having obtained a permit signed by the superintendent and approved by the commissioner of finance and taxation, for which permit application must be made in accordance with and in compliance with all the requirements of the act. Section 4 requires that the application shall set forth whether the applicant proposes to do a wholesale or retail business, or both, the number and location of the different places where he is to operate and other like information. He must also set forth the price or prices at which he is at the time selling gasoline, the cost price thereof, including various items which enter into the price, and the price at which he proposes to sell. Section 10 imposes a special permit tax of \$10 per annum for each place of sale at wholesale, and \$1 per annum for each retail service station or curb pump. The tax thus imposed is constituted a special maintenance fund to aid in defraying the expenses of the division of motors and motor fuels.

The bare recital of these details shows conclusively that they are mere adjuncts of the price-fixing provisions of the law or mere aids to their effective execution. The function of the division created by section 1 is to carry these provisions into effect, and if they be stricken down as invalid the existence of the division becomes without object. The purpose of collecting the data set forth in section 2 is to furnish

information to aid in the fixing of proper prices. The requirements in section 3 that a permit must be obtained before any person can engage in the business of selling gasoline and those in section 4 that the application therefor must state the character of the business, the number and location of the places where business is to be carried on, the price or prices at which the applicant is then selling gasoline, the cost price thereof, and the price at which he proposes to sell, obviously constitute data for intelligently putting into effect the price-fixing provisions of the law or means to that end. The taxes imposed by section 10 are solely for the purpose of defraying the expenses of the division of motors and motor fuels, and since the functions of that division practically come to an end with the failure of the price-fixing features of the law, it is unreasonable to suppose that the Legislature would be willing to authorize the collection of a fund for a use which no longer exists.

Appellants also insist that certain provisions in respect of rebating and discrimination contained in section 8 of the act are separable. Those provisions are that it shall be unlawful to grant any rebate, concession, or gratuity to any purchaser for the purpose of inducing the purchaser to purchase, use, or handle the gasoline of the particular dealer, and that it shall likewise be unlawful to discriminate for or against any purchaser by selling at different prices to purchasers in the same locality or in different localities. It seems clear that these provisions are mere appendants in aid of the main purpose; but, if treated as separable, they are unconstitutional restrictions upon the right of the private dealer to fix his own prices and fall within the principle of the decisions already cited. See especially *Fairmont Creamery Co. v. Minnesota*, supra.

This interpretation of the various provisions of the act is fortified by a requirement of the Tennessee Constitution (article 2, § 17) that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title." It is fair to conclude, and there is nothing to suggest the contrary, that in the passage of the present act the Legislature intended to observe this requirement and confine the provisions of the act to the one subject of price-fixing.

Accordingly, we must hold that the object of the statute under review was to accomplish the single general purpose which we have stated, and that purpose failing for want of constitutional power to effect it, the remaining portions of the act, serving merely to facilitate or contribute to the consummation of the purpose, must likewise fall.

Decrees affirmed.

MR. JUSTICE HOLMES dissents.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concur in the result.

NOTES

1. In *State v. Montgomery* (1912) 177 Ala. 212, at pp. 241-2, 59 So. 294, 303, McClellan, J., said: "It is of course not within legislative competency to bind the

courts by any declaration or pronouncement in their unfettered functions of determining the constitutional validity of enactments. Yet we do not doubt that it is within legislative competency to remove, by express assertion in the act, any uncertainty, in the judicial mind, as to what the Legislature would have done in respect to the adoption of the act, with the invalid parts thereof stricken, before passage, therefrom. Whether, after accepting such legislative assertion that it would have passed the act with the invalid stricken, that remaining is valid, surviving the operation of the cutting off of the invalid, we think would still be a question of separability, of vigor, and effectiveness to stand without the aid of that so stricken, etc., within the rule and limitations before stated *in those particulars*. In short, such an expression in an enactment serves only to render certain the legislative intent with respect to *passage* of the valid parts, notwithstanding the invalid, and does not avail to clothe the valid with immunity from the invalidating effect the law gives the inseparable blending of the bad with the good. If the expression were given other or greater effect, the result would be to sanction legislative restraint of the judicial power in the performance of the unimpaired duty of interpreting and of enforcing, when properly invoked to do so, the mandates and requirements of the Constitution."

2. Handbook of the National Conference of Commissioners on Uniform State Laws, 1928, pp. 59-61. "Mr. Freund, (Chairman of Committee on Legislative Drafting): I think it is quite clear that when the legislature makes a statement or purports to pass a statement in the act that it would have passed any section irrespective of the validity or invalidity of any other section, the legislature says something that it does not really mean. I think that is very clear. We had an example of that last year in the Uniform Business Corporation Act.

"There was a clause specifically repealing all other acts, and then it said that the legislature would have passed any section irrespective of the fact of any other section. Now if the whole act had been declared unconstitutional, I mean all the provisions, the repealing clause would have stood and repealed all other acts, and you would have no corporation law at all. No one meant that. That is quite clear, but you stated it. It seems to me very undesirable and a futile kind of decision, which no court would pay any attention to.

"There is a separability clause which is found in the more recent acts of Congress, which covers a point that is not covered by any of the acts that have been before this Conference, and that is the application provision—that is to say, that the act shall be applied so far as it is valid where a part of the application is declared unconstitutional. I think that originated with the Employers' Liability Act. The first Employers' Liability Act spoke of any carrier engaged in interstate commerce, and the Supreme Court held that meant not only the carrier while engaged in interstate commerce but any carrier engaged in interstate commerce whether the employe was injured in intrastate or interstate. And then they declared the act unconstitutional, whereupon the act was amended and so altered to read 'while engaged in interstate commerce.' That of course was a very narrow and perhaps unfortunate construction of the first act, and against the dissent, and I think it was owing to this construction that in Congress this clause is now usually inserted.

"That is not a usual construction, however. It is a construction that occurs in acts of Congress, and even so I believe it is a rather dangerous clause to put in, because it is quite obvious that the Congress would not intend in every case to give an act which is unconstitutional, say for instance as to all persons and matters, application to only a few.

"For instance, you can do a great many things with reference to corporations, relating to the future, but if you have a general regulation act which is unconstitutional, to say that that shall then apply to all corporations to be created in the future might create a diversity between future and present corporations, which it was never the intention of Congress to enact.

"All these separability clauses have a certain danger and, on the whole, it seems to me the matter might just as well be left to the courts. They are reasonably liberal in making a separation, and where the thing hangs together in such a way that they do not feel the act should be sustained, so far as I can gather from the decisions, the court will not be bound by any legislative declaration, which is apparently disregarded as an encroachment upon the judicial prerogative of construction, particularly with reference to constitutional matters."

3. The point raised by Mr. Freund in the second paragraph of his remarks *supra* was dealt with in *Mazurek v. Farmers Fire Ins. Co.*, 320 Pa. 33, 181 A. 570 (1935), as follows:

"Where a subsequent statute which would, if valid, act as a repeal of a prior statute only by implication, i. e., because its terms are contradictory of the provisions of the earlier enactment, is itself unconstitutional, it must be obvious that the earlier act remains in full force and effect. This follows inevitably from the fact that in the eyes of the law it never came into existence. Never having come into existence, it could have no effect.

"Nor is this conclusion forestalled by a section on 'constitutional construction' . . . wherein it is declared that the 'provisions of (the) act shall be severable, and, if any of its provisions shall be held to be unconstitutional, the decision of the court shall not affect the validity of the remaining provisions of (the) act.' Such a clause is to be given a reasonable interpretation, and since the repealing clauses are inseparably connected with (the invalid) section 344 they must stand or fall with it. The severability clause cannot save the appropriate repealing sections if it is clearly apparent that they would not have been inserted had the Legislature known that section 344 was invalid, even though there is an apparent legislative expression to the contrary."

4. See for a case in which the "presumption" raised by a severability clause was expressly given full effect, *N. R. Bagley Co. v. Cameron*, 282 Pa. 48, 127 A. 311 (1925), (citing similar cases from several states).

STATE v. NEVEAU

Supreme Court of Wisconsin, 1940. 237 Wis. 85, 294 N.W. 796.

This action was begun on March 26, 1940, by the state of Wisconsin, plaintiff, against Edgar Neveau, defendant, to enjoin the defendant from continuing to operate his barber shop until the license fees were paid. The case was tried to the court. The court made and filed findings of fact and conclusions of law, holding the act under which the application was made unconstitutional and void. From the judgment dismissing the plaintiff's complaint, the plaintiff appeals.

The complaint alleges that the trade practice standards for the barber trade have been issued under sec. 100.205 of the statutes and are in effect; that the defendant is operating a barber shop within the city of Milwaukee without a license; that the trade practice standards for the barber trade provide that barbering shall not be done for less than the following reasonable costs: hair cut, 50 cents, plain shampoo, 40 cents, hair tonic application, 25 cents; that the trade practice standards for the barber trade provide: "Also each of the following is an unfair trade practice and an unfair method of competition, and is forbidden: (1) To offer, contract, undertake, or advertise to do or sell, or to do or sell, barbering for less than the foregoing schedule of

reasonable cost, directly or indirectly, by: . . . (g) any method or device."

Upon information and belief it is alleged that the defendant is selling and threatens to sell hair cuts for 35 cents, and is advertising to sell and selling, and threatens to advertise and sell, shampoos for 25 cents and hair tonic applications for 15 cents. The plaintiff asks that the defendant be enjoined pending the action from operating his barber shop without the license required by sec. 100.205 of the statutes and from violating the trade practice standards.

The defendant appeared and answered. The answer is long and argumentative but admits the issuance of the trade practice standards; alleges that sec. 100.205 of the statutes of 1939 and the trade practice standards promulgated pursuant thereto are void and unconstitutional on nearly all the grounds on which any regulatory law has been declared to be unconstitutional, and by way of counterclaim asks judgment declaring sec. 100.205 unconstitutional and that the plaintiff be restrained from enforcing its provisions. Upon motion the counterclaim was stricken.

The parts of sec. 100.205 material on this appeal are set out in the margin.¹

1 "100.205(1) (a) The department shall appoint a trade practice examiner not subject to chapter 16, who shall, after investigation and public hearing, issue by order such standards, with written reasons therefor, as are necessary or convenient to eliminate unfair methods of competition or unfair trade practices in the cleaning and dyeing, barber, cosmetician and shoe rebuilding trades and amend or revoke by order any standards previously issued by him.

"(b) [Department is authorized to modify or set aside any action of the examiner, review the examiner's action and to adopt, modify or change the examiner's written reasons etc.]

"(c) [Relates to judicial review of orders, not involved in this case.]

"(2) (a) [Provides for the appointment of an advisory committee etc.]

"(b) [Relates to the power of the department to appoint a deputy and his duties.]

"(3) (a) Unreasonably low wages, unreasonably long or inappropriate work or shop hours, other unreasonably burdensome or hazardous labor conditions, and selling below reasonable cost, are severally expressly declared to be, among others, unfair methods and practices.

"(b) [Provides for cooperation with the industrial commission.]

"(c) For pertinent reasons, and within the limitation of this section, standards may classify persons, places and other things, and delimit areas of natural competition in the trade, and the examiner, by like procedure and subject to like review, may make specific exemptions.

"(d) No standards shall be issued or continued in any area where it is impracticable of enforcement.

"(e) No standard tending to promote monopoly, oppress or discriminate against small enterprises, or unreasonably burden consumers, shall be issued or continued.

"(f) [Not involved in this action.]

"(4) (a) [Relates to date when standards become effective.]

"(b) Any court having any equity jurisdiction may enjoin violation of the provisions of this section or the violation of any standard issued thereunder.

"(c) [Right of jury trial.]

"(d) Violation of any provision of this section or any standard promulgated or issued thereunder, shall be punishable by a fine of not less than five nor more than one hundred dollars, or by imprisonment in the county jail for not less than five nor more than ninety days, or both.

"(5) (a) [Duty of examiner.]

"(b) [Not involved.]

"(c) [Relates to assessments and fees, not involved here.]

ROSENBERY, CHIEF JUSTICE. A perfect swarm of constitutional questions is raised by a consideration of the facts and conclusions in this case. To deal exhaustively with all of the questions raised and suggested would require us to write a treatise on constitutional law. In the first place, it is to be observed that sec. 100.205 presents a peculiar method of law making. There are included in the statute many provisions as to the constitutionality of which the legislature must have had substantial doubts. This is indicated by the fact that the legislature went to extreme lengths in the insertion of severability clauses in the act. Subsec. (7) is general and by its terms the provisions and limitations of sec. 100.205 wherever contained in the act, and whether express or implied, are all severable from each other and as to different persons, things and circumstances. This of course applies to subsec. (6) (a) but in order to make assurance doubly sure subsec. (6) (a) provides: "Each provision of this paragraph is expressly declared to be severable".

It was apparently the legislative purpose to enact a law as to the constitutionality of which there was substantial doubt and then by the insertion of an all inclusive severability clause, authorize the court to whittle down the law so as to bring it within the constitutional field. This is a method of law making not contemplated by the constitution. The constitutional mandates apply to the legislature as well as the courts. It is as much the responsibility of the legislature to enact valid laws as it is the duty of the courts to pass upon their validity after they are enacted. . . .

Judgment affirmed.

"(d) [Not involved.]

"(8) (a) The provisions of this section shall not apply to any county having a population of thirty thousand or less by the last federal census, or to any town, city or village having a population of five thousand two hundred or less by such census. Such territory shall be known as noncode area. Provided that if the provisions of this paragraph as to counties is invalid, the provision shall be that standards are prima facie not necessary or convenient in any county of not more than thirty thousand population by the last federal census unless by reason of proximity to a county of greater population unfair competition would result, and that if the provision of this paragraph as to towns, cities and villages is invalid the provision shall be that standards are prima facie not necessary in any town, city or village of not more than five thousand two hundred population by such census unless by reason of proximity to a municipality of greater population unfair competition would result; provided that in any event no standards shall be effective in any such county or in any such town, city or village other than those in a county having a population of five hundred thousand or more unless such standards are approved by a majority of the electors voting thereon in such county or town, city or village. Provided further that in judicial review of orders or denials of orders under this paragraph, the court shall have the same powers as the department under paragraph (b) of subsection (1). Each provision of this paragraph is expressly declared to be severable.

"(b) [Not involved here.]

"(7) Provisions and limitations of this section, whether or not in the same subsection or sentence, or express or implied, all are severable from each other and as to different persons, things and circumstances."

NOTES

1. See Stern, "Separability and Separability Clauses and the Supreme Court", 51 Harv.L.Rev. 76, esp. 114 et seq. (1937), where the author concludes that up to the time of writing ". . . In important cases judicial decisions on separability often reflect the attitude of the judges towards the merits of the particular statute—their general constitutional philosophy—rather than an objective effort to apply the principles which are always said to determine separability." After ten years that conclusion remains without need for qualification.

2. 1945 Minn.Stat., § 645.20, provides: "Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent."

Inclusion of a specific severability clause in bills drawn for introduction in the Minnesota Legislature, in addition to its doubtful utility, is thus pointless.

3. Mich.Pub.Acts 1945, No. 119, § 5, reads: "In the construction of statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:

"If any portion of an act or application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable."

See discussion of this statute in 46 Colum.L.Rev. 623 (1946).

SECTION 9. CLAUSE AS TO TAKING EFFECT

TURNIPSEED v. JONES

Supreme Court of Alabama, 1893. 101 Ala. 593, 14 So. 377.

STONE, C. J. This was and is a contest by Turnipseed, the appellant, of the election of Jones, appellee, to the office of treasurer of Montgomery county. The proceeding was instituted before the judge of probate under the statutory provisions found in the Code of 1886, commencing with section 396 of that Code. It is not shown in the record before us what disposition the judge of probate made of the case, nor in what manner it found its way into the circuit court. It comes to us by appeal from the judgment of the circuit court, pronounced on demurrer to contestant's amended complaint, which sets forth his grounds of contest. The ruling by the judge of probate becomes wholly immaterial, for, under the statute as it existed when this proceeding was commenced, (Code 1886, § 432,) "in contested election cases tried by the judge of probate, an appeal lies to the circuit court, to be tried *de novo*." So, no erroneous rulings made by the judge of probate, if such were made, not carried into the rulings of the circuit

court, can be inquired into in this court. The circuit court sustained the demurrer to the amended complaint or information, and the present appeal questions the correctness of that ruling.

The judgment of the circuit court sustaining the demurrer was pronounced February 10, 1893. On that identical day the governor approved the act "to provide for and regulate contests of elections to offices, state and county, herein named." Sess.Acts 468. That statute embraces the office of county treasurer, and provides for its contest. It also expressly repeals by numbers all the sections of the Code under which the present contest was instituted. The questions arise: Does that statute exert any influence in the decision of this case? If so, what influence does it exert? It will not be denied that the right to contest an election is purely statutory, and, when that mode of redress is invoked, statutory requirements must be substantially conformed to. At what time must the statute of February 10, 1893, be understood as going into operation? The authorities bearing on this question are far from uniform. It was long the rule in England—the source of our common law—that sessions of parliament were treated as one continuous day, and every statute enacted during any given session was binding and given effect to as if enacted on the first day of the session. Under that absurd interpretation, fines and mulcts were assessed for acts which, when done, violated no law then in existence. This was subsequently changed by statute. But still the rule on this question in the several states is far from uniform. "In this country an act takes effect generally, and where no other time is fixed by constitution, general law, or the particular statute itself, from the time of its passage." End.Interp.St. § 498, note 119. Neither does the law, in the absence of express provision, regard a fraction of a day. "In the legal computation of time there are no fractions of a day, and a day on which an act is done must be entirely excluded or included." 5 Amer. & Eng.Enc.Law, 89. "The legislature has full power to take away, by statute, rights not vested, which have been conferred by statutes. If the repealing statute is general and unconditional, without a saving of pending proceedings and prosecutions, these fall with the statute which may have authorized them." *Luke v. Calhoun Co.*, 56 Ala. 415. The question we are considering has been settled in this state. *Wood v. Fort*, 42 Ala. 641. In that case it was said: "The right of the appellee to an affirmance depends upon the question whether the act is to be deemed to have been of force during the entire day of its approval. Upon authority and principles of policy and convenience, carefully limiting ourselves by the necessities of this case, we decide that a public statute, remedial in its character, and not prescribing punishments or penalties, is of force during the entire day of its approval, and that the law in reference thereto does not recognize any fraction of a day; yet we concede that the decisions are not entirely harmonious." That doctrine was reaffirmed in *Young v. Pollak*, 85 Ala. 439, 5 So. 279. So, we must treat this case as falling within the influence of the act approved February 10, 1893.

. . . We hold that, before this case was brought to a conclusion in the circuit court, the statute under which it was instituted was repealed, and that that repeal put an end to the suit. The judgment of the circuit court is affirmed.

PARKINSON v. BRANDENBURGH

Supreme Court of Minnesota, 1886. 35 Minn. 294, 28 N.W. 919.

MITCHELL, J. The question here is whether the levy made on February 27th, under writs of attachment issued out of justice's court, was dissolved by the assignment under the insolvent law, executed March 2d, by the defendants in the writs, Johnson & Dahl. This involves the question whether chapter 70, Gen.Laws 1885, took effect on the twenty-seventh or on the twenty-eighth of February. The act was passed February 27th, and was, by its terms, "to take effect, and be in force, *from and after its passage.*" In *Duncan v. Cobb*, 32 Minn. 460, S.C. 21 N.W. 714, this court, in considering a statute which was to take effect "one year from and after its passage," held that in computing this period of one year the day of the passage of the act should be excluded. This would seem to be decisive of the present case. But as the point was decided without much consideration, and was not necessarily involved in the determination of the case, we would not feel compelled to adhere to the rule, if, on fuller consideration, we were convinced that it was wrong.

Undoubtedly the great weight of authority is to the effect that a statute which is to take effect "from and after its passage" takes effect upon the day of its passage. *Arnold v. U. S.*, 9 Cranch, 104; *Matthews v. Zane*, 7 Wheat. 211; *Mallory v. Hiles*, 4 Metc. (Ky.) 53; *People v. Clark*, 1 Cal. 406. The reason usually assigned for this is that it is in accordance with the general rule that when a computation of time is to be made from an act done, the day on which the act is done is to be included. *Arnold v. U. S.*, supra; *Mallory v. Hiles*, supra. And yet the general and now prevailing rule is that where the computation of time, as prescribed in statutes, is to be made from an act done, the first day—that on which the act is done—is to be excluded. *Sedg. Const. St.* 356; *Smith, Comm.* § 616; *Bigelow v. Willson*, 1 Pick. 485.

How this rule is to be reconciled with that suggested in *Arnold v. U. S.* and *Mallory v. Hiles*, supra, we have never been able clearly to understand. It may well be doubted whether any inflexible rule can be laid down as of universal application to all classes of causes. The word "from" may, in vulgar use, and even in strict propriety of language, mean either "inclusive" or "exclusive." It must always depend upon the context and subject-matter whether it shall be inclusive or exclusive of the *terminus a quo*. *Pugh v. Duke of Leeds*, 2 Cowp. 719. It seems to us that the words "from and after," as used by the legislature in this connection, are words of exclusion. And if a day is to be deemed an indivisible point of time, and, in accordance with the general rule, fractions of day disregarded, it logically follows that the day of the passage

of the act should be excluded. The expressions "from its passage" and "from the *day* of its passage," like the expressions "from the date" and "from the *day* of the date," are synonymous, (*Bigelow v. Willson*, supra; *Pugh v. Duke of Leeds*, supra;) and if a day is an individual point of time, there can be no distinction between a computation from an act done and a computation from the day on which the act was done.

It therefore seems to us that when a legislature declare that an act shall take effect "from and after its passage," or "from and after the day of its passage," it may be fairly presumed that they use these terms as exclusive of the day of the passage of the act. This furnishes a certain and convenient rule, which avoids serious practical difficulties resulting from holding that the day of the passage of the act is to be included. Some of the authorities which hold that such a statute takes effect on the day of its passage take the position that it is to be deemed in force from the earliest moment of that day, and that any inquiry as to the exact hour of its passage is inadmissible. In *re Welman*, 20 Vt. 64; *Mallory v. Hiles*, supra. But it would seem wrong in principle that laws designed as rules of conduct should be, by a mere legal fiction, made retroactive, even for a fraction of a day. To avoid this result, the tendency now is to hold that the statute takes effect only from the exact moment of its approval, and that, when necessary to determine conflicting rights, courts of justice will inquire as to the exact hour of its passage. In *re Richardson*, 2 Story, 571; *People v. Clark*, supra; *Louisville v. Savings Bank*, 104 U.S. 469.

The objection to this is that, while all right in theory, it is difficult of application in practice. There is usually no satisfactory means of ascertaining the exact hour at which the executive approved any given statute. The question must generally be decided on mere conjecture, or by indulging in presumptions, as in *Kennedy v. Palmer*, 6 Gray, 316. It certainly does not seem fit or proper that the time of the commencement of a law, whenever the question arises, should be left to depend upon the uncertainty of parol proof, or upon anything extrinsic to the law itself and the authenticated recorded proceedings in passing it. By excluding the day of the passage of the act, and holding that it takes effect at the beginning of the following day, all these practical difficulties are avoided, and a rule established which is not only certain and convenient, but, as we think, entirely in accord with recognized canons of construction. It is also in harmony with the usual method of computing time in other cases. We therefore see no good reason for receding from the rule laid down in *Duncan v. Cobb*, supra.

It is not necessary to consider whether the legislature could, by making this statute retroactive, have affected attachment liens acquired prior to its passage. It is sufficient here to say that statutes are not to be construed as retroactive unless by their language it clearly appears that they were so intended to be. No such intent appears from the language of this act. Order reversed.

NOTES

1. In *Mushel v. Board of County Commissioners for Benton County*, 152 Minn. 266 at p. 269, 188 N.W. 555 at page 556, (1922), Hallam, J., said:

"If the question were an open one, we should have serious doubts as to the correctness of the rule adopted in the *Parkinson* case. It is contrary to the weight of authority and to the decisions of the Supreme Court of the United States as the decision itself plainly shows. The rule that in such cases the law will not take into account fractions of a day was repudiated in *Syndicate Printing Co. v. Cashman*, 115 Minn. 446, 132 N.W. 915, where it was held that where two inconsistent statutes are approved on the same day the court will ascertain which was passed last and will hold that the one passed last repeals the other, and in arriving at its conclusion will presume that they were passed in their numerical order. On the other hand, since this decision was rendered, the legislature has met more than 20 times. At any session the legislature might have changed the rule, but it has not done so. On the contrary, when it adopted the code of 1905 it provided that every act of the legislature which does not expressly declare when it shall take effect shall be in force 'from and after' its approval by the Governor. R.L.1905, sec. 5510; G.S.1913, sec. 9408. The words 'from and after' were doubtless used with knowledge of the judicial construction that had been placed upon them in the cases cited and the same construction was doubtless contemplated in the new use. A majority of the court are of the opinion that the *Parkinson* case should not be overruled."

1945 Minn.Stat. § 645.02, reads: "Each act, except one making appropriations, enacted finally at any session of the legislature takes effect at the beginning of the day next following its final enactment, unless a different date is specified in the act."

"An appropriation act or an act having appropriation items enacted finally at any session of the legislature takes effect at the beginning of the first day of July next following its final enactment, unless a different date is specified in the act."

"Each act takes effect at 12:01 a.m. on the day it becomes effective, unless a different time is specified in the act."

2. Concerning statutes conditioned to take effect on the action of another state or of Congress, see *supra*, Section 7 at p. 754.

ROBERTSON v. BRADBURY

Supreme Court of United States, 1889.
132 U.S. 491, 10 S.Ct. 158, 33 L.Ed. 405.

BRADLEY, J. This is a suit to recover alleged excess of duties exacted on certain cargoes of asphaltum in cakes, imported by Bradbury, the plaintiff below, from Antwerp, in May, 1883. Two questions are presented in the case for our determination: *First*, whether the seventh section of the act of March 3, 1883, entitled "An act to reduce internal revenue taxation, and for other purposes," went into effect at the time of the passage of the act, or not until the 4th of July following; *secondly*, if it did go into effect at the time of the passage of the act, whether, under the circumstances of this case, the plaintiff below was entitled to the benefit of that section. Prior to the passage of the act referred to, under the 2907th and the 2908th sections of the Revised Statutes (which were taken from the ninth section of the act of July 28, 1866, 14 St. 330) the collector, in determining the "dutiable value" of merchandise, was required to add to the cost, or actual wholesale

price or general market value, at the time of exportation, in the principal markets of the country whence the goods were imported, the cost of transportation, shipment, and transshipment, with all the expenses included, from the place of growth, production, or manufacture, to the vessel in which shipment was made to the United States; also the value of the sack, box, or covering, and commissions and brokerage; which additions were to be regarded as part of the actual value, and a penalty was imposed for not including them. These sections were repealed by the seventh section of the act of March 3, 1883. They are repealed by words in the present tense, thus: "That sections 2907 and 2908 . . . be, and the same are hereby, repealed, and hereafter none of the charges imposed by said sections, or any other provisions of existing law, shall be estimated in ascertaining the value of goods to be imported." We do not see how there can be any doubt that this repealing section went into immediate effect. The law itself went into immediate effect, although, it is true, various provisions of it, contained in other sections, were postponed to take effect, some on the 1st of July, and some on the 1st of May. But where such postponement was intended it was expressed, and only referred to the parts that were so postponed. It did not affect the section in question; and such was the understanding of the treasury department itself at the time. In a treasury circular of March 12, 1883, addressed to the collectors of customs, the secretary, referring to the act in question, then just passed, said: "Various sections recite the date when each shall go into effect, and, so far as concerns these sections, those dates control. Section 7, however, names specifically no date when it is to go into operation, and the department holds that it takes effect from and after the date of the passage of the act." This contemporaneous construction is entitled to some weight in favor of importers. *U. S. v. Johnston*, 124 U.S. 236, 253, 8 S.Ct. 446. At all events, it was undoubtedly the correct construction. . . .

PAYNE v. GRAHAM

Supreme Judicial Court of Maine, 1919.
118 Me. 251, 107 A. 709, 7 A.L.R. 516.

DEASY, J. In May, 1919, Vera Payne was indicted and convicted in the superior court, Cumberland county, for violation of chapter 112 of the Public Laws of 1919, which act, approved March 7, 1919, makes more stringent the provisions of statute for the prevention and punishment of sexual crimes.

She presents her petition for writ of habeas corpus, upon the ground that at the time of her indictment and conviction chapter 112 had not become effective as law.

Section 7 of the act is as follows:

"In view of the emergency cited in the preamble this act shall take effect when approved."

But the petitioner says that chapter 112, notwithstanding this legislative pronouncement, is not an emergency act, and that it did not take effect until 90 days after the recess of the Legislature, which period expired after her conviction.

The amended Constitution of Maine, article 4, part third, section 16, is as follows:

"No act or joint resolution of the Legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the Legislature, of either branch, or of any committee or officer thereof, or appropriate money therefor or for the payment of salaries fixed by law, shall take effect until ninety days after the recess of the Legislature passing it, unless in case of emergency (which with the facts constituting the emergency shall be expressed in the preamble of the act), the Legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct. An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety; and shall not include (1) an infringement of the right of home rule for municipalities, (2) a franchise or a license to a corporation or an individual to extend longer than one year, or (3) provision for the sale or purchase or renting for more than five years of real estate."

The petitioner contends that the act in question is not immediately necessary for the preservation of the public peace, health, or safety, and that the court should so declare.

But the state maintains that the question presented is one for final legislative determination.

The leading case touching this matter is *Kadderly v. City of Portland*, 44 Or. 120, 74 P. 721, 75 P. 222. The opinion in this case sustains the state's contention. See, also, to same effect *Hanson v. Hodges*, 109 Ark. 479, 160 S.W. 392; *Oklahoma City v. Shields*, 22 Okl. 265, 100 P. 559; *In re Menefee*, 22 Okl. 365, 97 P. 1014; *In re Senate Resolutions*, 54 Colo. 269, 130 P. 336; *Bennett Trust Co. v. Sengstacken*, 58 Or. 333, 113 P. 863.

But in the case of *State v. Meath*, 84 Wash. 302, 147 P. 11, the doctrine of the Oregon court is by a majority opinion denied, and its conclusions rejected. Other cases also hold that the question is one for court review. *State v. Whisman*, 36 S.D. 260, 154 N.W. 711, L.R.A. 1917B, 1; *Miami County v. City of Dayton*, 92 Ohio St. 215, 110 N.E. 728; *Attorney General v. Lindsay*, 178 Mich. 542, 145 N.W. 98.

Obviously the test is the extent to which legislative power is limited by the Constitution. Constitutional limitations are subjects of judicial interpretation and effectuation. Questions of public policy, such as the justice, expediency, necessity, or urgency (immediate necessity) of laws are for final legislative determination. But the control by the Legislature of even these questions may be qualified by express constitutional limitation.

The only Maine case touching the subject is *Lemaire v. Crockett*, 116 Me. 267, 101 A. 302. This case is not directly in point, because

it involves one of the express limitations of the Constitution. Though it may deem an act which is an "infringement of the right of home rule for municipalities" to be immediately necessary, the Legislature is forbidden by the positive mandate of the Constitution to give it immediate effect. Whether a given act is such an infringement is a judicial question. The case of *Lemaire v. Crockett* does not reach the question concerning which courts differ so radically; i. e., whether the words, "An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety," or other similar language, creates a limitation upon legislative power which the courts have jurisdiction to interpret and give effect to.

We are mindful of the long-established rule that questions of constitutional law should not be passed upon, unless strictly necessary to a decision of the cause under consideration. We therefore defer expressing a final opinion upon the question concerning which, as appears above, courts are at variance, because, for another reason not touched upon in any of the above-cited cases, we hold that chapter 112 did not take immediate effect as an emergency act.

Of the states that have provided for giving emergency acts immediate effect, generally in connection with the initiative and referendum, the Constitutions of nearly all provide in effect that emergency legislation shall include only such measures as are immediately necessary for the preservation of the public health, peace, or safety. But our Constitution goes further and requires that the emergency "with the facts constituting the emergency shall be expressed in the preamble of the act." The only state Constitutions containing similar language are those of California, article 4, § 1; Ohio, article 2, § 1d; North Dakota, article 2, § 67; Mississippi, amendment of 1914 (see Laws 1941, c. 520); Massachusetts, amendment of 1918. In neither of these is the language precisely like that of the Maine Constitution, but all require that the facts constituting, or reasons for, an emergency be expressed or set forth in the preamble or some part of the act. Our investigation does not disclose that in either of these states such constitutional provisions have been judicially interpreted. The case of *City of Roanoke v. Elliott* (Va.) 96 S.E. 821, construes that clause of the Virginia Constitution reading: "The emergency shall be expressed in the body of the bill" (Const. § 53). The Virginia Constitution does not require the facts or reasons to be expressed, and it is held that in the absence of an explicit constitutional mandate the facts need not be set forth.

We think it clear that the above-quoted language of the Maine Constitution creates a limitation upon legislative power, and that without conforming to it no act be made an emergency act, and as such be given immediate effect.

The preamble of chapter 112, under consideration, is as follows:
"Whereas, owing to the necessity of preserving the public health in general, the enactment of more stringent laws prohibiting pros-

titution, lewdness and assignation and providing punishment therefor, is an emergency measure immediately necessary for the preservation of the public peace, health or safety."

This preamble contains an assumption that there is "a necessity of preserving the public health in general," and a conclusion that "the enactment of more stringent laws . . . is an emergency measure." It contains no statement of facts, as required by the Constitution, and no facts that are even suggestive of an emergency.

In argument, indeed, facts are presented which give the act an emergent character. In argument it is said that a great World War had been raging; that, while an armistice had been declared, large bodies of troops were still assembled; that for preventing the spread among these troops of sexual disorders, destructive of military efficiency, existing laws were inadequate; and that the federal authorities had requested the co-operation of the state in meeting these conditions.

But these facts are not, as the Constitution requires, expressed in the preamble. The facts constituting the emergency are expressed in the briefs of counsel, instead of in the preamble of the act. Chapter 112 is therefore not an emergency act as defined by the Constitution. It did not take effect until after the petitioner's indictment and conviction. Her detention is therefore not warranted, and the entry must be:

Exceptions sustained.

Writ of habeas corpus to issue.

Chapter 6

LEGISLATIVE LANGUAGE, ITS ARRANGEMENT, AND THE MECHANICS OF DRAFTING

SECTION 1. INTRODUCTORY

CARMAN F. RANDOLPH, DELIBERATE LEGISLATION

25 Rep.N.Y.S.B. 168, 172 (1902).

The poison of bad law circulates through every vein of the body politic, and often they who suffer most are least cognizant of the cause. Naturally the most intelligent resentment comes from lawyers, for they best appreciate the connection between the cause and the effect; and our profession should prescribe the cure. Here is not merely the opportunity of the American Bar. Here is a duty imposed by the reproach cast upon us by the existing conditions. Few laws are drafted by laymen. Our ignorance, our carelessness, our obeisance to noxious influences are immediately responsible for most of the statutory texts condemned by our wisdom, our skill and our public spirit.

NOTE

See also "Report of Special Committee on Drafting of Statutes", 39 Rep.A.B.A. 637-641, 648-649 (1914).

JAMES BRYCE, THE CONDITIONS AND METHODS OF LEGISLATION

31 Rep.N.Y.S.B.A. 153, 162-163 (1908).

. . . . The quality of statute law may be considered in respect: First, of its Form; secondly, of its Substance.

As respects Form, you, as lawyers, know that a statute ought to be clear, concise, consistent. Its meaning should be evident, should be expressed in the fewest possible words, should contain nothing in which one clause contradicts another or which is repugnant to any other provision of the statute law, except such provisions as it is expressly intended to repeal.

To secure these merits two things are needed, viz.: That a bill as introduced should be skillfully drafted, and that pains should be taken to see that all amendments made are also properly drafted, and that the wording is carefully revised at the last stage and before the bill is enacted. Of these objects the former is in England pretty well secured by the modern practice of having all government bills—these being the most important and the large majority of those that pass—prepared by the official draftsman, called the Parliamentary

Counsel to the Treasury. Nearly all our important bills, nearly all the controverted bills that pass are bills brought in by the government of the day. A private member has now hardly any chance of passing legislation. Therefore, you may take it that all important legislation is prepared, pushed through and passed by the government. The government has an official permanent drafting staff, consisting of two or three able and highly trained lawyers, whose business it is to put its bills in the best shape. If they are not always in the best shape, that is not the fault of the draftsman, because the best scientific shape is not necessarily the shape in which it is most easy to pass a bill through Parliament. A bill may be so prepared in point of form as to excite more or less opposition and sometimes it is just as well to take a little pains so to arrange the clauses as to give the least open front to hostile criticism, and also, to afford the fewest opportunities for taking divisions in committees. It is one of our rules of Parliament that every clause has to be separately put to vote in committee, therefore, the more clauses, the more divisions. Hence if you put a great deal into one clause subdividing it into subsections, and parts of subsections by numbers and letters, instead of letting each matter enacted have a clause to itself, you have fewer debates on each clause and fewer divisions. That explains what you might otherwise think scientifically objectionable in the structure of recent acts. It is not possible in legislation, passed by a popular assembly, to attain that high standard of scientific perfection which could be obtained by an absolute potentate like a Roman Emperor.

This question of Parliamentary drafting is really an important one. . . .

THOMAS I. PARKINSON, LEGISLATIVE CONTRIBUTION TO PROGRESS

12 A.B.A.Jour. 95 (1926).

. . . The translation of a legislative idea into an effective statute is not, to use the words of a Bar Association President, "a pastime for a summer afternoon." John Stuart Mill, a legislator as well as an economist, says "there is hardly any kind of intellectual work which so much needs to be done . . . by minds trained to the task through long and laborious study as the business of making laws," and yet we, in this country, acting upon the premise that the legislator's duty includes not only determination of questions of general policy but also the phraseology of the statute necessary to give effect to an approved policy, have been leaving the preparation of our statutes to men who, though representative of their communities, know nothing of the science of legislation. The resulting difficulty with much of our legislation is expressed by an English Court's criticism of the British workmen's compensation act "that the draftsman has apparently not worked out on paper in legislative language the scheme which he had in his head."

American legislators have been slow to recognize their need of competent draftsmen. When Senator Root proposed a legislative draftsman for Congress he was told by leading Senators on the floor of the Senate that they did not propose to turn over to a "schoolmaster" the responsibility for law-making which their constituents had vested in them. It is to the credit of Claude Kitchin, Democratic leader of the House during the Wilson Administration, that he recognized the need and persuaded Congress to provide official draftsmen who are contributing so much of improvement in the form and phraseology of the Federal statutes. The leaders in Congress of both parties now recognize the distinction between the policy-determining function of the representative and the legislative drafting function in the exercise of which the representative is entitled to have competent technical assistance. What Mr. Kitchin then established exists today in the hands of men who, in my opinion, are the most competent draftsmen employed by any parliamentary body in an English-speaking country. I think it is little known, even among the lawyers of the country, that the draftsmen now serving the House and the Senate in Washington are doing as splendid, as accurate and as fine drafting service as anywhere in the world is being given to a legislative body.

The legislative draftsman constantly finds his path beset with tantalizing difficulties some of which are inherent in the English language. One legislature, determining to deal vigorously with accidents at railroad grade crossings, provided that when two trains approach a grade crossing from different directions they should both come to a full stop and that neither should start up again until the other had fully crossed. That makes up in effectiveness what it lacks in practicability.

Governor Hodges cites a Kansas hotel act which requires that "all carpets and equipment used in offices and sleep-rooms including walls and ceilings must be well plastered."

There is still on the Federal statute books a provision "that no sponges . . . shall be landed at any port in the United States of a smaller size than four inches in diameter." How many of our ports could qualify for the reception of imported sponges?

"A legislative commission engaged in drafting a workmen's compensation act after providing compensation for the widow of a killed workman defined the term widow as "only those who are living with the decedent at the time of his death." In order to avoid the possibility of a plurality of claims the commission in a later draft presented the following definition: "The term 'widow' shall include only a widow living with the decedent at the time of his death." What the commission was evidently trying to say was "the decedent's wife living with him at the time of his death."

In emphasizing the defects of our legislative enactments we must not be unmindful of the fact that similar and equally serious flaws are frequently present in other legal documents which are not prepared by our legislatures. The best of our lawyers have not been able to overcome the difficulties of form and phraseology which account for

so many of the failures of our legislators. The Marine insurance contract was not drawn by legislators and while it has the merit of brevity it would hardly be selected as a model of concise and definite legal phraseology. The standard fire insurance contract can boast of no superiority in form and phraseology when compared with the average workmen's compensation act. . . .

The defects of our statutes merit the criticism and derision which are daily heaped upon them. I am not attempting to divert this criticism to contracts and other legal documents formulated by counsel for private interests, but I am endeavoring to emphasize the importance of detail and precision in all legal documents including statutes. Wise and effective legislation is dependent upon attention to detail. It requires power in the legislator to analyze the problems which confront him; wisdom in selecting from available alternatives, and skill in the use of language. . . .

FELIX FRANKFURTER, SOME REFLECTIONS ON THE READING OF STATUTES

47 Colum.L.Rev. 527, 545-546 (1947).

The quality of legislative organization and procedure is inevitably reflected in the quality of legislative draftsmanship. Representative Monroney told the House last July that "ninety-five percent of all the legislation that becomes law passes the Congress in the shape that it came from our committees. Therefore if our committee work is sloppy, if it is bad, if it is inadequate, our legislation in ninety-five percent of the cases will be bad and inadequate as well."⁴⁴ And Representative Lane added that ". . . in the second session of the 78th Congress 953 bills and resolutions were passed, of which only 86 were subject to any real discussion."⁴⁵ But what courts do with legislation may in turn deeply affect what Congress will do in the future. Emerson says somewhere that mankind is as lazy as it dares to be. Loose judicial reading makes for loose legislative writing. It encourages the practise illustrated in a recent cartoon in which a senator tells his colleagues "I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means." A modern Pascal might be tempted at times to say of legislation what Pascal said of students of theology when he charged them with "a looseness of thought and language that would pass nowhere else in making what are professedly very fine distinctions." And it is conceivable that he might go on and speak, as did Pascal, of the "insincerity with which terms are carefully chosen to cover opposite meanings."⁴⁶

But there are more fundamental objections to loose judicial reading. In a democracy the legislative impulse and its expression should come

⁴⁴ 92 Cong.Rec. 10040 (1946).

⁴⁵ 92 Cong.Rec. 10054 (1946).

⁴⁶ Pater, *Essay on Pascal* in *Miscellaneous Studies* 48, 51 (1895).

from those popularly chosen to legislate, and equipped to devise policy, as courts are not. The pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed. Above all, they must not be encouraged in irresponsible or undisciplined use of language. In the keeping of legislatures perhaps more than any other group is the well-being of their fellow-men. Their responsibility is discharged ultimately by words. They are under a special duty therefore to observe that "Exactness in the use of words is the basis of all serious thinking. You will get nowhere without it. Words are clumsy tools, and it is very easy to cut one's fingers with them, and they need the closest attention in handling; but they are the only tools we have, and imagination itself cannot work without them. You must master the use of them, or you will wander forever guessing at the mercy of mere impulse and unrecognized assumptions and arbitrary associations, carried away with every wind of doctrine."⁴⁷

Perfection of draftsmanship is as unattainable as demonstrable correctness of judicial reading of legislation. Fit legislation and fair adjudication are attainable. . . .

SIR W. D. EVANS, INTRODUCTION TO COLLECTION OF STATUTES

3rd ed., London: 1829, p. xxx.

Another evil may be noticed, that is rather formidable in the distance, than influencing, at present, to any great extent; namely, the notion of introducing a technical Nomenclature throughout the whole extent of our Judicial system. Not to mention, that in spite of the multiplicity of set forms of expression, applying to particular cases, that might be promulgated, yet upon account of the still greater variety of possible circumstances, it would constantly occur, among all those forms there would not be found one exactly parallel to the case under consideration, and that, therefore, it is a vain attempt to introduce accuracy into a subject that does not admit of it: The only cases in which a Nomenclature can, with any safety, be fixed, are those proceedings, (pleadings for example) in which lawyers are unavoidably employed, and where time is not essentially an object. Here without any impropriety, and frequently with great advantage, there are a number of phrases, to which the Courts annex an artificial meaning, and which they will interpret in that sense only. No inconvenience arises from this, since these matters are conducted by men trained up in the science of which these forms are a part. But to introduce a technical Nomenclature throughout the whole extent of the Judicial system, would not merely throw the most ordinary affairs of life into the hands of lawyers; it would introduce endless misery, by taking from those who either had not the means, or the opportunity

⁴⁷ Allen, *Essay on Jeremy Bentham in The Social and Political Ideas of the Revolutionary Era* 181, 199 (Hearnshaw ed. 1931).

of employing professional men, the power of acting. The notion, indeed, has been partially carried into effect. In some instances, set forms of expression have certain ideas, in exclusion of all others, annexed to them, as in the Law of Devises; a practice that has been deplored by Judges as enlightened as those who introduced it. In its origin, perhaps, it sprung from that rage for simplicity, which, by making every thing bend to a single principle, and that alone govern a system, has introduced so much confusion into science.

FRANCIS M. BURDICK, CAN A STATUTE BE WELL
WRITTEN IN ENGLISH

6 Rep.N.Y.S.B.A. 130, 133-134 (1882).

Is not the true reason why our statutes are so badly written found in the defective education of our Bar, in legal and legislative expression? There can be no doubt that our statutes are, in the main, "framed by lawyers, are, in the long run, the fruit of whatever capacity for orderly disposition and whatever power of comprehensive expression are to be found among the Bar." Until recently, the genius of English and American lawyers has been almost wholly directed to the development of case law. In this field they are unrivaled. But they have done little in the cultivation of an accurate and comprehensive terminology for legal and legislative use. Indeed, in some instances, those who have attempted to codify our laws have increased their uncertainty by insisting upon using words in their popular sense. If law is a science, however, it must have its scientific phraseology. Words must be used by the lawyer and legislator with scientific precision and definiteness, if the prolixity and liability to misapprehension which now characterize our statutes and forensic discussions are to be avoided.

Such has not been the habit of the English-speaking lawyer or lawgiver; hence the poverty of our legal vocabulary. To demand of legislators well-written statutes, while the proper materials for their construction are wanting, is to impose a more difficult task than was put on ancient Israel—of making bricks without straw.

If the cause of the defectiveness of our statutes has been correctly pointed out, it follows that the only efficient remedy is found in making legal terminology a distinct department of legal education. In support of this position, we have the high authority of Sir Henry Maine. He says: "The difficulty of drafting statutes, and the confusion caused by amending them, are infinitely greater than they need be, and infinitely greater than they would be, if English practitioners were subjected to any system of legal education, in which proper attention was paid to the dialect of legislation and law. This branch of study may be described, though the comparison cannot, from the nature of the case, be taken strictly, as having for its object to bring all language, for legal purposes, to the condition of algebraic symbols, and therefore to produce uniformity of method in its employment and identity

of inference in its interpretation. In practice, of course, nothing more than an approximation to these results could be obtained; but it is likely that a general educational machinery would add materially to the extent and importance of that portion of legislative phraseology which is common stock."

OGDEN AND RICHARDS, THE MEANING OF MEANING

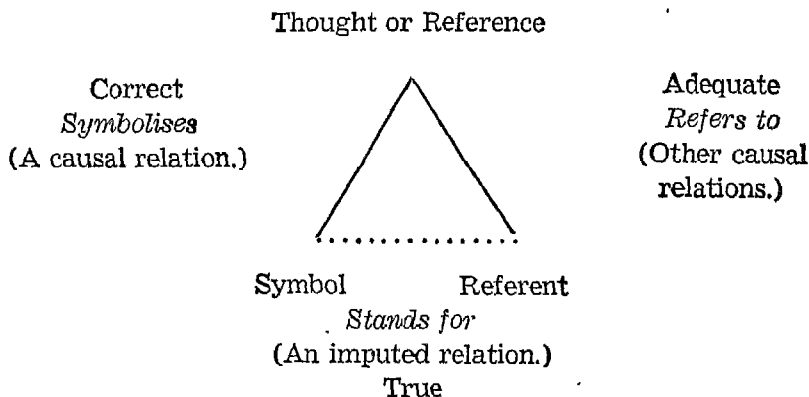
(1936) Harcourt, Brace & Co., 11.

b. Symbols

There is no doubt an Art in saying something when there is nothing to be said, but it is equally certain that there is an Art no less important of saying clearly what one wishes to say when there is an abundance of material; and conversation will seldom attain even the level of an intellectual pastime if adequate methods of Interpretation are not also available. Some knowledge of symbols, of words and their ways, is therefore a direct advantage both in general discussion and in scientific enquiry.

Symbolism is the study of the part played in human affairs by language and symbols of all kinds, and especially of their influence on Thought. It singles out for special inquiry the ways in which symbols help us and hinder us in reflecting on things. Symbols direct and organise, record and communicate. In stating what they direct and organise, record and communicate we have to distinguish as always between Thoughts and Things. . . .

This may be simply illustrated by a diagram, in which the three factors involved whenever any statement is made, or understood, are placed at the corners of the triangle, the relations which hold between them being represented by the sides.



The point just made can be restated by saying that in this respect the base of the triangle is quite different in composition from either of the other sides. Between a thought and a symbol causal relations hold.

When we speak, the symbolism we employ is caused partly by the reference we are making and partly by social and psychological factors—the purpose for which we are making the reference, the proposed effect of our symbols on other persons, and our own attitude. When we hear what is said, the symbols both cause us to perform an act of reference and to assume an attitude which will, according to circumstances, be more or less similar to the act and the attitude of the speaker. . . . Between the symbol and the referent there is no relation other than the indirect one, which consists in its being used by someone to stand for a referent. Symbol and Referent, that is to say, are not connected directly (and when, for grammatical reasons, we imply such a relation, it will merely be an imputed, as opposed to a real, relation) but only indirectly round the two sides of the triangle.

ZECHARIAH CHAFEE, JR., THE DISORDERLY CONDUCT OF WORDS

41 Colum.L.Rev. 381, 382-394 (1941).*

Words are the principal tools of lawyers and judges, whether we like it or not. They are to us what the scalpel and insulin are to the doctor, or a theodolite and sliderule to the civil engineer. So we need to know more about their imperfections. Several books have appeared recently about a new science of language called Semantics. Best known in the United States are *The Meaning of Meaning* (fourth edition, 1936), a technical and difficult work by C. K. Ogden and I. A. Richards, and *The Tyranny of Words* (1938), a popular discussion by Stuart Chase. I have gone to these for help, to see whether they supplement the efforts of judges and lawbooks to solve problems of legal interpretation.

I

The first lesson I have learned is, that language is not used solely for the communication of thought. That purpose is uppermost in our minds when we write opinions or briefs or law review articles, and hence we lawyers easily forget that words are frequently employed with quite a different object—to make somebody do something. Ogden and Richards stress this emotive function of language as distinguished from its communicative function; and illustrate this by printing Malinowski's observations on the speech of children and savages. They do not employ language, he says, as a condensed piece of reflection and a record of fact or thought, as does the author of a book or inscription. With them, language functions as a link in concerted human activity, as a piece of human behavior. It is a mode of action and not an instrument of reflection. For example, among primitive people:

"A word, signifying an important utensil, is used in action, not to comment on its nature or reflect on its properties, but to make (the

* [Footnotes are omitted. Ed.]

utensil) appear, be handed over to the speaker, or to direct another man to its proper use."

It takes only a little thought for us to realize that among civilized adults language is largely employed for the same emotive purpose. One instance will suffice—the young wife who complained, "When I ask Charles if he loves me, he acts as if I were asking for information."

. . .

However, our major concern as lawyers is with the communicative function of language, to which my remaining observations will be devoted. My next main point is that *The Meaning of Meaning* gives us much help in understanding the true relation between a word and the object for which the word stands. (I use "object" loosely to embrace persons and abstract ideas as well as tangible things; the semanticists use instead the technical word "referent").

To start with, the word is not the same as what it points to. Obvious as this statement may seem, the contrary belief is constantly cropping up; that words have existence and power, that they are equivalent to the things and persons they denote, or nearly so. It is something like the relation assumed by primitive or superstitious minds between the god and the image. A Harvard professor fell into conversation with a peasant in the Campagna, who asserted defiantly that there was no God. "I suppose you don't believe in the Devil either." Quick as a flash the peasant crossed himself and looked behind him with terror.

Although this identification of the word with the object is avoided by more sophisticated minds, they often slip just one peg down into the deeply-rooted notion that the word inevitably and unalterably belongs to a particular thing or person. A name is like a label chained around the object by God's order, which nobody must presume to detach. "And whatsoever Adam called every living creature, that was the name thereof." . . .

Lawyers and judges are highly susceptible to this notion of an indissoluble link between the word and the thing. A sense of the inherent potency of words is natural with us. Words are the effective force in the legal world. In statutes, they result in heavy fines, long imprisonment or even death. In contracts, deeds, or wills, they transfer large amounts of property. Hence the persistent feeling in our profession that the right words must be used. You must in the old days say "A and his heirs" to give a fee, not "A and his descendants" or "A and his successors." . . .

The need for analysis of this word "meaning" is obvious. Ogden and Richards constantly insist that words are only symbols of objects. These symbols do not arise from the nature of the objects, but are created by human beings for purposes of convenience, just like buoys and traffic-signals. So far there is nothing new. Wigmore, for example, has an admirable presentation of the symbolic quality of words. But now comes a big contribution from Ogden and Richards. The relation of the word to the object is only indirect. Between these

two factors, a third factor always intervenes, the thought of some person. Thus the object causes a thought in the mind of a speaker or writer, and he uses a word to express his thought. In listening or reading, the process is reversed. The word brings about a thought which refers to the object. The authors diagram their theory by a triangle. The word and the object are at the two base angles; the thought is at the apex. We never go directly across the base of the triangle, from word to object or *vice versa*, but always travel the long way around through somebody's thought at the top of the triangle. Of course, we telescope this process in popular parlance by saying that the word stands for the object, but in careful analysis we must always remember the whole series: object to thought to word, or word to thought to object.

The value of this analysis to law can be realized only after a full consideration of Ogden and Richard's book. I shall speak of only one application, to the problems of Mistake. Since the relation between the word and the object involves two steps, two different kinds of mistakes may occur. First, the thought may not adequately represent the object, as when parties buy and sell a racehorse which is in fact dead. This type of mistake I call Error. Second, the word may not correctly express the thought. For example, a deed describes the "east" half of Blackacre when the parties intended the west half to be conveyed. This I call a Mistake of Expression. This distinction is important, because the usual remedy for Error is to call the bargain off (rescission), and for Mistake of Expression is to remould the writing to the actual intention (reformation).

Another big contribution of Ogden and Richards is their demonstration that this word "meaning," which we lawyers and judges use so blithely as if it were a clear path out of our tangles, is really a network of paths in which we are likely to get worse lost than ever. The authors list sixteen different main definitions of "meaning" and nine sub-variations, all derived from reputable sources. I mention only a few of these, as apt to occur in law: the other words annexed to a word in the dictionary; what the user of the word intends to be understood from it by the listener or reader (intention of the testator, etc.); that to which the user of the word actually refers; that to which the user of the word ought to be referring (this is common usage, the view held by Mr. Justice Holmes, who insists on "the ordinary meaning of the language in the mouth of a normal speaker situated as the party using the language was situated"); that to which the interpreter of a word refers; that to which the interpreter believes himself to be referring; that to which the interpreter of a word believes the user to be referring.

When a lawyer or judge speaks of "the meaning of the word used," he needs to know clearly which of these numerous definitions is applicable. Sometimes a case on the interpretation of a will or contract or statute shows the judge employing "meaning" in three or four different senses and sliding unconsciously from one sense to another in a single sentence of his opinion.

I have spoken of two lessons for law to be gained from the writers on Semantics—first, the varied functions of language; second, the analysis of the relation between the word and the object. We now come to a third lesson, that words are very imperfect means of communication. A word doesn't stay put. It wabbles and slides around. This is illustrated by the migrations of "meaning," just discussed. Hundreds of examples arise in daily life. We pay dues to a golf-club and use a golf-club to hit a ball. Then we invite our fair partner to a ball at the clubhouse.

When the objects for which a single word stands are thus widely separated, no harm results except an occasional excruciating pun, from which even the law is not free. A Massachusetts doctor charged with procuring an abortion argued to the Supreme Judicial Court of Massachusetts that he was protected by the Statute of Frauds—no one should be held for the debt, default or "miscarriage of another" unless evidenced by some memorandum in writing.

However, when the same word signifies two ideas which are close to each other or overlap, confusion and obscurity are probable. The writer may fall into the terrible crime called the *utraquistic subterfuge*, of using the word in both its senses during the same discussion. This is said to be a frequent crime among philosophers. For example, "knowledge" may be used for both the content of what is known and the process of knowing. Such an error occasionally creeps into judicial opinions. For example, a case involves a serious misstatement of fact, but it is not clear that the speaker knew of the falsehood or intended to deceive. The judge begins by calling innocent misrepresentation "constructive fraud." After a while "constructive" drops out. Later on he cites a number of cases of intentional misrepresentations which stress the wickedness of "fraud." "Fraud" is an emotive as well as a communicative word, and the judge begins to warm up. Before long the speaker's knowledge of the falsehood is treated as irrelevant, and the judge concludes that an innocent misstatement should be heavily penalized because "fraud" is a vicious quality.

If words were perfect instruments of communication, such difficulties could be avoided. Ogden and Richards lay down as the first requirement of a satisfactory system of symbols, "One symbol stands for one and only one referent." ("Referent," as already stated, is their word for my "object,"—what one's thought refers to.) Unfortunately, this requirement can only rarely be fulfilled. In mathematics, we have a specially devised system of symbols of such a character; *pi* always means the same thing. The natural sciences approximate this ideal. Our colonial ancestors used "robin" for an English relative of the sparrow and an American relative of the thrush, but an ornithologist calls each bird by a different Latin name. But it would be impossible to impose such precision on ordinary language, for it would go to pieces in the wear and tear of everyday intercourse. "Thus it constantly happens that one word has to serve functions for which a hundred would not be too many." Some attempts to introduce a specially devised symbolism into law have

not been successful, as we shall see later. For the most part we must be content to let the words remain imperfect symbols.

It is some consolation to realize that other kinds of symbols often possess the same difficulty. Stuart Chase would have us go back to gestures as far more accurate than words, but has he never been perplexed by the ambiguity of the arm motions of a traffic policeman? A red light symbolizes the rear of an automobile, a pile of dirt, a railway crossing, a fire alarm box, the port side of a steamer, and (on a lighthouse) the presence of rocks and shoals. Probably nobody has ever confused the port light of a boat with a moving automobile, but a lowered railway gate has been mistaken for such an automobile with disastrous consequences. Ordinarily we are able to attach the proper significance to the red light because of the environment, just as a word which is in itself ambiguous can often be understood in the light of the context and surrounding circumstances. But this is not always possible.

We find abundant examples in law of the trouble caused by a word which is capable of standing for two or more different objects, like "remarries" in the divorce settlement. Are canary birds subject to a tariff on "live animals"? A life insurance policy makes the company not liable for death while "participating in aeronautics"; does the phrase apply when the insured is killed while a passenger in a commercial plane which crashes? This quality of words was described by Mr. Justice Holmes in the first Stock Dividend case, where he made it plain that "income" in a revenue act did not necessarily mean exactly the same as "income" in the Sixteenth Amendment:

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. . . ."

A fourth and final lesson is taken from a Polish exile, Korzybski. This I call the hierarchical nature of words. All words are symbols, but some of them are much nearer than others to the five senses. Thus, at the bottom level we have "John Marshall," "Ford sedan No. 1,207,643" and "26 Broadway." On a higher level come generalized words for persons and things, like "judge," "automobile," "office-building." Above these are "men," "chattels," "real estate." Still higher come abstractions like "mankind" and "property." Some writers, especially Stuart Chase, stress the dangers that we run as we get up on the heights. The more abstract the word, the greater the risk that any proposition in which it is used will not be true of all the persons and things within the class denoted by the word, and the more liable we are to forget that at bottom we are talking about persons and things. An ardent advocate of female rights will assert that "Women are oppressed by men" regardless of several hen-pecked husbands she knows. With this inexactness of abstractions goes another danger, their emotional quality. Men are stirred to frenzy by words like "democracy," "un-American," "New Deal" without taking the trouble to specify to themselves the individual persons and practices which they purport to admire or hate.

Similar dangers exist in the legal use of abstractions. "Property" is a striking example. It includes a great range of things from my home to my interest in a free access to prospective customers and employees. Suppose that an official, acting under a statute, is compelling me to bargain with a union or alter my management of a holding company in which I have majority control. Because he is restricting my "property," I begin to feel and talk as indignantly as if I were turned out of my home or forbidden to cruise in my own sloop. Mr. Justice Holmes, who has given as much thought to the meaning of words as any American judge, recognized this danger in *Truax v. Corrigan*.

"Delusive exactness is a source of fallacy throughout the law. By calling a business 'property' you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed." . . .

However, it is one thing to say that abstractions must be used cautiously, and quite another to urge, that, unless they can be verified by the methods of the natural sciences, they must not be used at all. The higher ranges of the hierarchy of words are indeed dangerous, but so are high buildings and high voltages. Modern life would be hampered without these; and every department of intellectual activity including law would be slowed down almost to a standstill if we did not employ shorthand expressions to denote great masses of related facts.

SECTION 2. SOME PROBLEMS OF LANGUAGE AS JUDICIALLY DETERMINED

INTRODUCTORY NOTE

Professor Conard is undoubtedly correct in what he says about the undesirability of writing laws primarily for the eye of the literal-minded judge (*infra*, p. 914). Anyone who relies confidently upon so-called judicial canons of interpretation as a guide to effective draftsmanship deludes himself. However there are valuable lessons about the expression and arrangement of language and the necessity for careful legal research to be learned from the methods of literal contextual interpretation, and further, since canons are always available as "aids in discovering the intention of the legislature", the draftsman should know and take account of those most commonly invoked. The material in this section should be examined with this in mind. In Chapter 7, Section 2, *infra*, it will be reviewed in its setting within the interpretive processes (*infra*, pp. 1072-1078).

A state supreme court has recently reaffirmed that "All relevant rules for the interpretation of statutes are brought to bear in resolving doubtful meaning. We indulge the presumption that the Legislature acted with the knowledge that these traditional methods would be used to determine its will and intention."¹

¹ *Atlantic Coast Line R. Co. v. Commonwealth*, 302 Ky. 36, 193 S.W.2d 749 (1946).

ERNST FREUND, THE USE OF INDEFINITE TERMS
IN STATUTES

30 Yale L.J. 437 (1921).

It is possible to distinguish roughly three grades of certainty in the language of statutes of general operation: precisely measured terms, abstractions of common certainty, and terms involving an appeal to judgment or a question of degree. The great majority of statutes operate with the middle grade of certainty. The language of the law always aims at precision, while the language of politics favors vagueness and ambiguity, for the former is chosen with a view to the ultimate arbitrament of a court of justice, the latter with a view to immediate effect upon sentiment or opinion. Some of the most general clauses of American constitutions are phrased politically rather than legally, but they are more legal in form than the Declaration of Independence; and the more recent American constitutions are written almost like statutes.

Abstractions of common certainty may be furnished by words of popular usage, by technical terms, or by circumscribing definitions. No general rule can be laid down as to which of these serves statutory purposes best, although a good deal might be said about the illusory certainty of some technical terms, and of cumulations and qualifications sanctioned by traditional practice. Every common abstraction has its "marginal" ambiguity, which mere elaboration of definition cannot altogether remove.

The closest approach to certainty is found in precise measurement, where that form of expression is available. Matters of quantity and quality can often be dealt with in this manner. The law may speak of intoxicating liquors, or it may fix upon a percentage of alcohol. In the history of liquor legislation the more generic term has not been found altogether inadequate, while the superiority of the precise definition has to be paid for by the inconvenience of a more elaborate technical apparatus of administration and proof.

From the past and present practice of legislation we can learn a great deal as to the relative advantage of precisely measured terms and common abstractions, and the ways of handling either; but the considerations applicable vary too much from case to case to be summarized in comprehensive fashion.

It is otherwise with regard to the third class of terms, those representing the lowest grade of certainty, which may be characterized, if we think of them favorably, as flexible, if we think of them unfavorably, as indefinite. They involve either an appeal to judgment, or a question of degree. The former category is represented by such terms as reasonable, proper, sufficient, suitable, necessary; where they are used, flexibility is a deliberate object of legislative policy. The latter category is represented by such terms as nuisance, coercion, undue influence, immorality, depravity, reputability, sedition, unprofessional conduct, unfairness, unsightliness, restraint of trade; their choice is not

so much matter of policy, as of inability to deal with a problem. Some of these latter terms have the sanction of common-law recognition, while others represent new standards of which the common law did not take cognizance. They fail to differentiate adequately either the province of morals or of social restraint from the province of law, or the province of the unlawful from that of the legitimate and even valuable. Both categories, considered from the point of view of justice, fail to give certain and equal operation, but on the other hand are more adaptable to varying circumstances than fixed terms. From the legislative point of view, facility of formulation counts in their favor. From the point of view of official administration and individual application, flexibility or indefiniteness has the double aspect of liberty and peril. Liberty means not only a desirable latitude of action, but also the temptation to take the benefit of the doubt; the peril lies in the risk of error and misjudgment and its attendant consequences.

It follows that in deciding upon the admissibility of flexible or indefinite terms, regard must be had to the circumstances under which, the persons by whom, and the sense of responsibility with which, the law will be applied, and to the consequences which an error will entail. Is there any risk of loss and on whom will it fall? Will it be the risk of a penalty? of unsettling title, securities, status rights, or public revenues? a risk of damages? a liability to equitable or administrative order or injunction? the risk that favorable official action will be denied? the risk that a regulation or order will turn out to be invalid? or will the risk be merely the disappointment of an expectation? . . .

NOTE

See also Aigler, "Legislation in Vague and General Terms", 21 Mich.L.Rev. 831 (1923); Nutting, "Definitive Standards in Federal Obscenity Legislation", 23 Iowa L.Rev. 24 (1937).

A. *The Meaning of Words*

(i) DETERMINED BY SUBJECT MATTER

NIX v. HEDDEN

Supreme Court of the United States, 1893.
149 U.S. 304, 13 S.Ct. 881, 37 L.Ed. 745.

MR. JUSTICE GRAY delivered the opinion of the court.

The single question in this case is whether tomatoes, considered as provisions, are to be classed as "vegetables" or as "fruit," within the meaning of the tariff act of 1883.

There being no evidence that the words "fruit" and "vegetables" have acquired any special meaning in trade or commerce, they must receive their ordinary meaning. Of that meaning the court is bound to take judicial notice, as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court. *Brown v. Piper*, 91 U.S. 37, 42; *Jones v. U. S.*, 137 U.S. 202,

216, 11 S.Ct. 80; *Nelson v. Cushing*, 2 Cush. 519, 532, 533; Page v. Fawcett, 1 Leon. 242; *Tayl.Ev.* (8th Ed.) §§ 16, 21.

Botanically speaking, tomatoes are the fruit of a vine, just as are cucumbers, squashes, beans, and peas. But in the common language of the people, whether sellers or consumers of provisions, all these are vegetables which are grown in kitchen gardens, and which, whether eaten cooked or raw, are, like potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery, and lettuce, usually served at dinner in, with, or after the soup, fish, or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert.

The attempt to class tomatoes as fruit is not unlike a recent attempt to class beans as seeds, of which Mr. Justice Bradley, speaking for this court, said: "We do not see why they should be classified as seeds, any more than walnuts should be so classified. Both are seeds in the language of botany or natural history, but not in commerce nor in common parlance. On the other hand in speaking generally of provisions, beans may well be included under the term 'vegetables.' As an article of food on our tables, whether baked or boiled, or forming the basis of soup, they are used as a vegetable, as well when ripe as when green. This is the principal use to which they are put. Beyond the common knowledge which we have on this subject, very little evidence is necessary, or can be produced." *Robertson v. Salomon*, 130 U.S. 412, 414, 9 S.Ct. 559.

Judgment affirmed.

KATZMAN v. COMMONWEALTH

Court of Appeals of Kentucky, 1910.

140 Ky. 124, 180 S.W. 990, 30 L.R.A.,N.S., 519, 140 Am.St.Rep. 359.

CARROLL, J. The information filed by the commonwealth against the appellant, who is a druggist, charged that he unlawfully sold at retail, not on a physician's prescription, to Will Frazier a certain quantity of poison, to wit, opium, without satisfying himself that such poison was to be used for legitimate purposes, and with the knowledge that it was intended for smoking purposes or for habitual use. It was returned under section 2630 of the Kentucky Statutes (Russell's St. § 5057), reading in part: "No person shall sell at retail any poisons except as herein provided, without affixing to the bottle, box, vessel or package containing same, a label printed or plainly written, containing the name of the article, the word 'poison' and the name and place of business of the seller, with the common name of two or more readily accessible antidotes; nor shall he deliver poison to any person without satisfying himself that such poison is to be used for legitimate purposes. A poison, in the meaning of this act, shall be any drug, chemical, or preparation which, according to standard works of medicine or materia medica, is liable to be destructive to adult human life, in quantities of sixty grains or less. It shall be the further duty of any one selling or dispensing poisons, which are known to be destruc-

tive to adult human life in quantities of five grains or less, before delivering them, to enter in a book kept for that purpose the name of the seller, the name and residence of the buyer, the name of the article, the quantity sold or disposed of, and the purpose for which it is said to be intended. . . . The provisions of this section shall not apply to the dispensing of poisons in not unusual quantities, or doses, on physicians' prescriptions, nor to the sale to agriculturists or horticulturists of such articles as are commonly used by them as insecticides. . . ."

It is agreed that the appellant is a retail druggist; that he sold the opium charged in the information to the purchaser for the purpose of allowing the purchaser to smoke the same; that he knew before making the sale that the purchaser was addicted to the use of opium; that it was not sold on a physician's prescription; that it is a poison, destructive to adult human life in quantities of five grains or less. It is further agreed that there was affixed to the bottle or package containing the opium a printed label, giving the name of the article, the word "poison," and the name and place of the seller, with the common name of two readily accessible antidotes, and that, before delivering the poison, appellant entered in a book kept for that purpose as required by the statute the name of the seller, the name and residence of the buyer, the name of the article, the quantity sold, and the purpose for which it was said to be intended. It will thus be observed that the offending charge against the appellant consisted in selling the drug by retail without a prescription to a person addicted to the use of it; and, this being so, the sale was not made for a legitimate purpose. The law and facts were submitted to the court without the intervention of a jury, and the appellant was found guilty of violating the statute.

A reversal is asked upon the ground that the statute is invalid upon the ground of uncertainty because it does not define with sufficient precision the words "retail" and "legitimate purposes," . . .

On the trial of this case a number of physicians were introduced for the commonwealth for the purpose of showing that the sale of opium for smoking purposes or to an habitual user of the drug was not a sale for legitimate purposes. These physicians graphically described the ruinous effects of opium, physically, mentally, and morally, when used habitually in any manner, and declared in emphatic terms the habit to be the most degrading and destructive that any person can acquire. Their testimony was objected to, but we think that in a prosecution under the statute, if the accused should make the defense that the sale of opium to a person for smoking purposes or who was an habitual user of the drug was legitimate, it would be competent to introduce as witnesses upon this point physicians or druggists to give an opinion whether or not the sale under the described circumstances and conditions was for a legitimate purpose. The statute was intended to regulate sales by druggists, and, when it is sought to apply the words "legitimate purposes" to a sale of drugs or poisons by druggists, they have a technical meaning that may not be clearly known or under-

slood by courts or jurors, and so it is permissible to allow experts to give evidence as to what is regarded by qualified druggists and physicians legitimate purposes for which sales may be made so that the trial court and jury may be informed as to what is recognized as a legitimate purpose for which these drugs may be sold by those intrusted with their sale, and to whom, in a measure, is confined the knowledge as to what constitutes a sale for legitimate purposes. When words are used in a penal statute that have both a popular and a trade or technical meaning, and as used in the statute they have reference to a trade or profession, these words in construing the statute should be given their meaning as understood by the trade or profession to which they apply. . . .

The question is further suggested that the construction of words and phrases in a statute is usually for the court. Generally this is true. But, if it is shown by evidence that words and phrases are susceptible of two meanings, depending on the state of facts it is attempted to apply them to, the court may instruct the jury in the words of the statute and leave them to find from the evidence whether it has been violated. To illustrate, if there should be difference of opinion on the part of witnesses as to whether or not the sale being inquired into was made for a legitimate purpose, the court should leave it to the jury to find the fact and make their verdict accordingly.

. . . The judgment of the lower court is affirmed.

TOWN OF PLYMOUTH v. HEY

Supreme Judicial Court of Massachusetts, 1934. 285 Mass. 357, 189 N.E. 100.

CROSBY, JUSTICE. This suit is brought under the provisions of G.L. (Ter.Ed.) c. 117, §§ 6-11, to compel the defendant to reimburse the plaintiff for the expense incurred for the support of Gladys M. Hey, an illegitimate daughter of Gladys L. Hey, deceased daughter of the defendant, and to require the defendant to provide for the future support of the child. The case was heard by a judge of the Superior Court who found and ruled that the bill should be dismissed with costs. He found that at the time of her death Gladys L. Hey retained a settlement in Plymouth; that she left no property and her illegitimate child, Gladys M. Hey, is without any means of support; that the defendant has sufficient ability to support the child; and that \$5 a week is a reasonable sum for her support.

G.L. c. 117, § 6, as amended by St.1928, c. 155, § 15, provides: "The kindred of such poor persons, in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, living in the commonwealth, and of sufficient ability, shall be bound to support such poor persons in proportion to their respective ability." This statute is substantially the same as the original statute dealing with this subject, enacted in 1692 and re-enacted in 1788 and 1793, and found in each subsequent revision of the laws, and

since at common law an illegitimate child was regarded as the child of no one, the defendant cannot be charged with liability.

It is the contention of the plaintiff that the terms "kindred" and "consanguinity" mean relationship by ties of blood in the direct line from a common ancestor, and that the words according to their natural import and accepted meaning refer to the children, grandchildren, parents and grandparents of paupers irrespective of any question of the legitimacy of the relationship. . . . It was said in *Wright v. Wright*, 2 Mass. 109, 110: "In legal contemplation, a bastard is generally considered as the relative of no one." In construing Pub.St. c. 125, § 4, as amended by St.1882, c. 132, it was said by Knowlton, J., in *Sanford v. Marsh*, 180 Mass. 210, 211, 62 N.E. 268: "By the common law a bastard is nullius filius. He can be the heir of no one, nor have heirs, except of his own body. He has no ancestors from whom any inheritable blood can be derived. The common law on this subject is in force in Massachusetts, except as it has been changed by the statutes. The statutes which have been adopted here have all been construed strictly." In *Cooley v. Dewey*, 4 Pick. 93, 94, 16 Am.Dec. 326, it was said that "there seems to be no maxim of [the common] law less questionable, than that a bastard is filius nullius," it being there held that the mother of an illegitimate child does not inherit his estate. . . .

Although most of the decided cases in this Commonwealth respecting an illegitimate child deal with questions of inheritance, they plainly show that "child" and "children" at common law have been interpreted to mean only a legitimate child or children. It follows by the same reasoning that the term grandchild must be interpreted as meaning legitimate grandchild. . . .

Neither in the original statute enacted in 1692 nor in any subsequent revisions or codifications of it does it appear that illegitimate children are included. Whenever somewhat analogous statutes have been considered by this court, it has without exception been held that the words "child" and "children" refer only to legitimate children. The word "kindred" as used in G.L.(Ter.Ed.) c. 117, § 6, has no application to the present case. The statute which imposes a financial burden upon the persons therein named is to be construed strictly. It appears, as pointed out by the trial judge, that the statutes from 1692 down to the present applicable to the support of bastard children have been grouped under the title "Of the Maintenance of Bastard Children." Rev.St. c. 49, Gen.St. c. 72. In none of these codifications of the law applicable to such persons is there a provision imposing responsibility for their support upon the maternal next of kin. It cannot be thought that the Legislature in re-enacting the statute in substantially the same terms intended any change of meaning. In *re Opinion of the Justices*, 237 Mass. 591, 594, 130 N.E. 685. The words "by consanguinity" in the statute cannot be construed to include illegitimate children. The words "by consanguinity" are apt to distinguish them from the persons named by affinity.

It results that as no liability for the support of this child is imposed upon the defendant, either by the common law or by statute, G.L. (Ter.Ed.) c. 117, § 6, the bill cannot be maintained. In accordance with the terms of the reservation a decree is to be entered dismissing the bill.

Ordered accordingly.

NOTES

1. Using the same technique as in the principal case, the Superior Court of Pennsylvania in *In re Shriver's Estate*, 159 Pa.Super. 314, 48 A.2d 52 (1946), held that an illegitimate son of an illegitimate son of the deceased was not "issue" within the meaning of that term in a statute giving the surviving spouse of an intestate dying without issue an allowance.

2. In *Henry v. United States*, 251 U.S. 393, 40 S.Ct. 185, 64 L.Ed. 322, Holmes, J., interpreted "vested interest" as used in the Spanish War Revenue Act 1898, to include legacies paid by the executor of an estate before the time at which the legatees could have demanded payment as of right and subject to being repaid if the remainder of the estate proved insufficient to pay its debts. He said: "The law uses familiar legal expressions in their familiar legal sense, and the distinction between a contingent interest and a vested interest subject to be divested is familiar to the law."

3. In *Bell v. Bell*, 1940 Session Cases 229, the decision turned on the meaning of "desertion" in the Divorce (Scotland) Act 1938. Lord Carmont said at p. 264: ". . . The word 'desertion' does not appear in either of the statutory (divorce) enactments before 1938. . . . The word 'desertion' lay at hand encrusted with the case law of the ages. . . . It is to have this wealth of meaning that the new Act has had recourse to the words 'desertion' and 'deserted', and it has adopted, not casually, words which are charged with legal meaning. It is difficult, I think, to imagine that this was not done with a view to attaching the decisions of the past to new legislation."

4. Concerning the effect given to judicial and administrative interpretations of statutory language when a court is later required to interpret that language, see *infra*, 1078 et seq.

CITY AFFAIRS COMMITTEE v. BOARD OF COMMISSIONERS

Court of Errors and Appeals of New Jersey, 1946.
134 N.J.L. 180, 46 A.2d 425.

HEHER, JUSTICE. We hold the view that a municipality may lawfully publicize, at public expense, what its governing body conceives to be sound reasons, relating to the essential local welfare, for the rejection by the people of the State of proposed amendments to the Constitution. . . .

We are . . . brought to a consideration of the question of whether the expenditures so made are fairly comprehended in the appropriation of the then current year for "Railroad Tax Litigation."

We are of opinion that the appropriation here fairly comprehends the expenditures made. Generally, municipal ordinances are con-

strued by the same rules which apply in the interpretation of statutes. Ordinances are to receive a reasonable construction and application. The aim of judicial construction is to discover the sense in which the terms were employed by the legislative body. The words "Railroad Tax Litigation" are to be given their ordinary acceptance and significance. The natural import of the words employed in the enactment, according to their common use, when applied to the subject matter of the act, is ordinarily considered as expressing the intention of the lawmaking body. *Bayonne Textile Corp. v. American, etc., Silk Workers*, 116 N.J.Eq. 146, 160, 172 A. 551, 92 A.L.R. 1450. We are convinced that, by this construction, the words "Railroad Tax Litigation" are given the sense and meaning intended by the local legislative body. The term "litigation" has a broad significance in common usage. It is defined thus: "Act or process of litigating; a suit at law; a judicial contest; also, figuratively, dispute; discussion." Webster's New International Dictionary, 2d Ed.

At the time of the enactment of the appropriation measure, the controversy respecting railroad taxes, accrued and to accrue, had taken a wide range, which included also the question of the tax formula that would approximate justice between the state and the railroads. There was then pending litigation involving the validity of Chap. 291 of the Laws of 1941, Pamph.L. 788, as amended by Chap. 169 of the Laws of 1942, Pamph.L. 513, N.J.S.A. 54:29A-1 et seq.; and it was the position of the city that the rate of \$3. for each \$100. of valuation therein fixed contravened the state constitutional mandate, Art. IV, sec. VII, par. 12, N.J.S.A., that property shall be assessed for taxes "under general laws, and by uniform rules, according to its true value," and that the adoption of the tax formula embodied in the suggested revision of that constitutional precept would "destroy the legal basis for the attack then pending" upon these statutes. This issue has since been determined by the Supreme Court. *City of Jersey City v. State Board of Tax Appeals*, 133 N.J.L. 202, 43 A.2d 799. An appeal from the judgment therein is now pending in this court. We consider that these questions are all so interrelated in subject matter as to be embraced within the general head of "Railroad Tax Litigation." In popular acceptance and meaning, this legend was designed to cover expenditures deemed essential to the proper presentation of the issues and the city's cause, not only in judicial tribunals but in the forum of public opinion. That such was the conception of the purpose of the appropriation in the popular mind is reasonably clear; and thus the policy of the statutory provision for appropriation of funds for public purposes was satisfied. R.S. 40:2-12, 40:2-29, 40:50-6, N.J.S.A. And we are not required to give the term "litigation" its strict literal meaning. It has a figurative, analogical sense in common usage which covers the expenditures under consideration; and we are aware of no reason why it should not have that significance here. We do not think that the local legislative body had in mind the restricted meaning of that term, nor that it was so understood by the public. Such nicety of distinction is

not ordinarily to be found either in the expression or the understanding of local legislative enactments.

THE CHANCELLOR, THE CHIEF JUSTICE, JUSTICES DONGES, and PER-SKIE, and JUDGES RAFFERTY, DILL, and MCGEEHAN concurred.

COLIE, JUSTICE (dissenting). . . . The majority opinion holds that the words "railroad tax litigation" are to be given the sense and meaning intended by the local legislative body. With that statement I cannot agree. Our Legislature has provided that "the budget . . . shall be itemized according to the respective objects and purposes for which appropriations are made" One of the purposes sought to be achieved by the budget act was to give publicity to the items of the budget and to afford the public a better understanding of the financial condition and affairs of municipalities in which they are interested. *Chamber of Commerce v. Essex County*, 96 N.J.L. 238, 114 A. 426; *Mackey v. Mayor, etc., of Belvidere*, 101 N.J.L. 250, 128 A. 859. It is utterly immaterial what sense and meaning the local body may have had in mind when it used the words "railroad tax litigation". What is of importance is the actual meaning. The majority opinion says, I quote: "The term 'litigation' has a broad significance in common usage. It is defined thus: 'Act or process of litigating; a suit at law; a judicial contest; also, figuratively, dispute; discussion.' Webster's New International Dictionary (2d Ed.)." If this definition is meant to show that the word "litigation" encompasses "dispute" or "discussion", I think that it falls far short of the purpose, since the word is defined only in a figurative sense as including "dispute" or "discussion", and there is no authority that I know of which justifies using words in a municipal budget in a figurative sense. An exhaustive research has failed to disclose a single definition of the word "litigation" so broad so to cover what was done in this case.

The following are typical definitions of "litigation":

"The act or process of litigating, or carrying on a lawsuit in any forum, whether a court of law or otherwise." 13 Am. & Eng. Encyc. of Law, 1st Ed., p. 925.

"A contest in a court of justice, for the purpose of enforcing a right; a judicial contest, a judicial controversy; a suit at law." 38 C.J. 68 quoted in *Re Loudenslager's Estate*, 113 N.J.Eq. 418, 167 A. 194.

"A contest, authorized by law, in a court of justice, for the purpose of enforcing a right." 2 Bouv. Law Dict., Rawle's 3d Rev., p. 2036, also Shumaker & Longsdorf, *Cyclopedic Law Dictionary*.

"Services and activities of attorneys at law and others in appearing before the Legislature and the committees thereof, and in otherwise combating a movement to create by constitutional amendment a new county, however commendable it may be in the county authorities to resist the subtraction from their county of territory necessary in the creation of the proposed new county, does not come within the definition of 'litigation,' when that term is given its broadest possible legitimate signification. *DeVaughn v. Booten*, 146 Ga. 836, 92 S.E. 629:"

See Words and Phrases, Permanent Edition, Volume 25, Litigation, pages 402 to 405.

For the reasons stated above, I vote to reverse the judgment under appeal.

JUSTICES PARKER and OLIPHANT and JUDGE FREUND desire to be recorded as concurring herein.

(ii) DETERMINED BY CONTEXT. HEREIN OF CERTAIN
SO-CALLED CANONS

SUWANNEE FRUIT & STEAMSHIP CO. v. FLEMING

United States Emergency Court of Appeals, 1947. 160 F.2d 897.

MARIS, CHIEF JUDGE. Maximum Price Regulation No. 285, imported Fresh Bananas, Sales Except at Retail ¹ established maximum prices of \$4.50 per cwt. for bananas from Costa Rica, Panama, Guatemala, Honduras and from the southern Mexican states of Chiapas and Tabasco; \$3.25 per cwt. for bananas from other parts of Mexico; and \$4.00 per cwt. for bananas from all other countries, which included those from the Dominican Republic. The maximum prices for bananas from the four Central American countries and from Chiapas and Tabasco was increased to \$5.50 per cwt. by Amendment No. 2,² decreased to \$5.00 per cwt. by Amendment No. 4³ and further decreased to the original figure of \$4.50 by Amendment No. 9.⁴ Neither MPR 285 nor Amendments 2, 4 and 9 thereto were approved by the Secretary of Agriculture. . . .

The complainant contends that the regulation and its amendments are invalid because they were promulgated and issued by the Price Administrator without the approval of the Secretary of Agriculture or of the War Food Administrator⁵ as required by Section 3(e) of the Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix, § 903(e). Subsection (e) of Section 3 of the Act, commonly referred to as the Bankhead Amendment, as originally enacted and in force during the period here relevant read:

"(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any

¹ 7 F.R. 10481, issued December 12, 1942.

² 8 F.R. 3050, issued March 10, 1943.

³ 8 F.R. 16626, issued December 8, 1943.

⁴ 9 F.R. 14106, issued November 28, 1944.

⁵ Following the President's Executive Order No. 9322, issued March 26, 1943, 50 U.S.C.A. Appendix, § 601 note, 8 F.R. 3807, No. 9328, issued April 8, 1943, 50 U.S.C.A. Appendix, § 901 note, 8 F.R. 4681, and No. 9334, issued April 19, 1943, 50 U.S.C.A. Appendix, § 601 note, 8 F.R. 5423, transferring the authority of the Secretary of Agriculture under Section 3(e) of the Act to approve maximum price regulations to the War Food Administrator, approval by the War Food Administrator was the legal equivalent of approval by the Secretary of Agriculture. See California Lima Bean Growers Ass'n v. Bowles, 1945, 150 F.2d 964.

other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 [(a) and (b)] to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture."

The language just quoted would seem to be so clear as to leave no room for construction. If each word in the section is given its ordinary meaning it would follow, as contended by the complainant, that the approval of the Secretary of Agriculture was a condition precedent to the validity of the regulation by which the Price Administrator established maximum prices for bananas since they are unquestionably an agricultural commodity in the normal meaning of those words. The Administrator urges, however, that the words "any agricultural commodity" as used in the Bankhead Amendment should not be given their usual meaning but rather should be read as words of art so limited in scope as to exclude agricultural commodities imported into the United States. If the phrase "any agricultural commodity" does not apply to imports then a regulation which establishes maximum prices for imported bananas would not require the prior approval of the Secretary of Agriculture. It would follow, the Administrator argues, that MPR 285 and its amendments were not invalid by reason of the fact that they were issued by the Price Administrator without the approval of the Secretary of Agriculture. The issue between the complainant and the Administrator on this point is, therefore, reduced to the narrow question as to the meaning which is to be given the phrase "any agricultural commodity" as that phrase is used in Section 3(e) of the Act. We shall accordingly examine the reasons which the Administrator advances for his assertion that the phrase in question is not to be given its plain and ordinary meaning.

The Administrator asserts that when Congress used the phrase "any agricultural commodity" in Section 3 of the Act it meant only those commodities for which the Secretary of Agriculture had power to fix parity or comparable prices. He argues that the Secretary of Agriculture had neither the duty nor the authority to fix parity or comparable prices for any agricultural commodity not grown in the United States and he asserts that it necessarily follows that an imported commodity could never be an "agricultural commodity" within the meaning of the Bankhead Amendment. In support of his suggested construction of the Bankhead Amendment the Administrator primarily relies upon the proposition that the phrase "any agricultural commodity" is used as a term of art in that restricted sense throughout the whole of Section 3 of the Emergency Price Control Act, including subsection (e) thereof. He also claims to find support for his view in the reports of the debates in Congress on the Bankhead Amendment, in his own administrative practice, in an opinion of a federal district court, and in an advisory opinion of the solicitor for the Department of Agriculture.

In advancing his primary contention the Administrator points out that the phrase "any agricultural commodity" is used in four of the subsections of Section 3 and asserts, as we have said, that the phrase is used as a term of art in all of them. He argues that in subsections (a), (b) and (c) the phrase is used in the restricted sense for which he contends and he urges that it is necessary to the proper and unified construction of the section that the phrase be given that restricted meaning in subsection (e) also. Basic to this contention is the Administrator's assertion that Congress intended to give the phrase exactly the same meaning when using it in each of the subsections preceding subsection (e). For, as he thus recognizes, by a term of art is meant one which is used in a particular field with a precise technical meaning. In testing the soundness of the premise upon which the Administrator's contention is based, therefore, it is necessary only to examine the preceding subsections to which he points in order to determine whether the phrase "any agricultural commodity" is used in each of them in exactly the same sense.

Subsections (a), (b) and (c) of Section 3 are as follows:

"(a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

"(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

"(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a)."

It will be observed that subsections (a) and (c) are similar in that each imposes a specific limitation upon the power of the Administrator to establish maximum prices for "any agricultural commodity", or commodity processed therefrom, as the case may be. Subsection (b) on the other hand is directed to a different object. Its purpose is to

impose upon the Secretary of Agriculture the duty to determine and publish parity or comparable prices.

It will be seen that subsections (a) and (c), impose a limitation upon the maximum prices which may be fixed for the agricultural commodities to which the subsections refer. It read literally as applying to all agricultural commodities the subsections would operate to prevent the Administrator from fixing any maximum prices for agricultural commodities (or commodities processed therefrom) for which parity or comparable prices have not previously been determined by the Secretary of Agriculture. For it is obvious that the limiting figure which the subsections impose upon the Administrator's action with respect to an agricultural commodity could not be ascertained and applied in the absence of its principal element, the parity or comparable price of the commodity. It seems clear, therefore, that the phrase "any agricultural commodity" as used in these two subsections must be limited by the context to refer to those agricultural commodities only for which parity or comparable prices have actually been determined and published and that the restriction which these subsections impose upon the Administrator's power to control the prices of agricultural commodities must be construed as limited to those particular agricultural commodities. We took this view in *California Lima Bean Growers Ass'n v. Bowles*, 1945, Em.App., 150 F.2d 964, and we still adhere to it.

We think that Congress recognized this limitation upon the meaning of the phrase "any agricultural commodity" in subsections (a) and (c) when in the First Supplemental National Defense Appropriation Act approved July 25, 1942, it attached to the appropriation made to the Office of Price Administration the proviso

"That no part of this appropriation shall be used to enforce any maximum price or prices on any agricultural commodity or any commodity processed or manufactured in whole or substantial part from any agricultural commodity unless and until (1) the Secretary of Agriculture has determined and published for such agricultural commodity the prices specified in section 3(a) of the Emergency Price Control Act of 1942; (2) in case of a comparable price for such agricultural commodity, the Secretary of Agriculture has held public hearings and determined and published such comparable price in the manner prescribed by section 3(b) of said Act; and (3) the Secretary of Agriculture has determined after investigation and proclaimed that the maximum price or prices so established on any such agricultural commodity will reflect to the producer of such agricultural commodity a price in conformity with section 3(c) of said Act: Provided further, That in the case of a maximum price or maximum prices heretofore established the provisions of the foregoing proviso shall not apply until the expiration of sixty days after the date of enactment of this Act." ⁶

⁶ 56 Stat. 712, 713.

This whole proviso is evidently based upon the premise that the Administrator could lawfully fix maximum prices for agricultural commodities (or commodities processed therefrom) without regard to the limitations of subsections (a) and (c), in the case of those agricultural commodities for which parity or comparable prices had not actually been determined.

When we turn to subsection (b) of Section 3, however, it is obvious that the phrase "any agricultural commodity" is used with a quite different and much broader meaning. In this subsection it clearly comprehends agricultural commodities for which parity or comparable prices have not been determined or published by the Secretary of Agriculture, since its principal purpose is to direct him to make such determinations and publications in appropriate cases.

It will thus be seen that the phrase "any agricultural commodity" is used in one very restricted sense in subsections (a) and (c) and in another and much broader sense in subsection (b). In each case the normal and inclusive meaning of the phrase is limited by the particular context in which it is used. We are thus compelled to the conclusion that Congress did not use the phrase "any agricultural commodity" as a phrase of art with a uniform meaning in all the various subsections of Section 3, but that on the contrary it was used in each subsection in its ordinary meaning limited only by the particular context. In subsection (e), however, the context imposes no limitation upon the normal meaning of the phrase. On the contrary, as we shall later see, there are valid reasons for thinking that Congress may well have intended the phrase as used in subsection (e) to have its broadest possible meaning. We, therefore, reject the Administrator's contention that the phrase "any agricultural commodity" was used in Section 3 as a phrase of art and that it must for that reason be given a limited meaning in subsection (e). . . .

Judgments will be entered declaring Maximum Price Regulation No. 285 and Amendments 2, 4 and 9 thereto invalid *ab initio*.

LENROOT v. WESTERN UNION TELEGRAPH CO.

Circuit Court of Appeals of the United States, 1944. 141 F.2d 400.

L. HAND, CIRCUIT JUDGE. The defendant appeals from an injunction, forbidding it to violate § 212(a) of Title 29 U.S.C.A., by using messengers under sixteen, or motorcar drivers between sixteen and eighteen in transmitting telegrams. Both parties agree that the employment in question is within the meaning of "oppressive child labor" in § 203(l) of Title 29 U.S.C.A., and as defined by § 422.2 of Chapter 4, Title 29 of the Code of Federal Regulations; but the defendant maintains that the act does not apply to its business. The case was tried upon stipulated facts, most of which it is not necessary to state, as the general nature of the defendant's business is so well understood. All that we need say is that over eleven per cent of the telegraph messengers employed by the defendant are under sixteen years of age, and

that a small percentage of its motorcar drivers are between sixteen and eighteen. Both sides moved for summary judgment, since the outcome depended altogether upon the meaning of the statute; and the judge, believing defendant to be within it, granted judgment for the plaintiff. We do not understand that the defendant disputes that it is engaged in interstate commerce; at any rate there can be no doubt that it is. . . .

Thus, Congress could unquestionably have forbidden the employment of the messengers and drivers here in question, if it had wished. That does not, however, answer the question whether § 212(a) covers the business; and it does not do so, unless the defendant is a "producer" of "goods" which it "ships" in interstate commerce. While it is of course true that, taken in their colloquial sense, these words do not apply to its activities, they should not be so taken, for the statute has made its own definitions in § 203. Subdivision (i) of that section reads as follows: "'Goods' means goods . . . wares, products, commodities, merchandise, or articles or subjects of commerce of any character." (Originally the words, "or subjects," were absent; they were added in the Senate Committee on Education and Labor.) Subdivision (j) reads: "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on."

In order to learn whether the defendant's business falls within the section so defined, we must consider exactly what steps sending a telegram comprises. Ordinarily, it is true, the sender thinks of the telegram as the actual transmission of his words to the addressee; and so he speaks of "sending" it and of its being "delivered," as though the same thing had left him, passed to the addressee's home or office and was there handed to him. Indeed, the defendant itself uses that very argument in order to bring itself within the exception in § 215(a) (1) which exempts common carriers from the act as to any goods not produced by them. It does no more, it says, than transport to the addressee intangible objects—the sender's words transformed into electric impulses; it "produces" no "goods," even though we read those words with their definitions. We might indeed agree, if the defendant did no more than carry written messages between the parties; conceivably the same might even be true, if it only provided means—like a telephone—by which the parties could communicate, though these consisted of pulsations of an electric current. But neither of these is what the defendant does. The sender either writes out his message on paper and delivers it to one of the defendant's messengers, or delivers it himself at one of the defendant's offices; or he dictates or telephones it to an employee at an office, who takes it down on paper in shorthand, or types it. The message so received never leaves that office; the addressee never sees it. Another employee—or perhaps the same one—either uses it as a text for pressing a key in suitable dots and dashes, having a conventional significance to him and to another employee at the opposite end of a wire; or as a text for manipulating some other suitable device—like a "teletype"—by which equivalent movements will appear upon a similar device at the end of a wire.

In either case nothing can be said to be "sent" between the office except pulsations of electrical current, which are not only not the sender's message, but would be totally incomprehensible to him or to the addressee, if either could perceive them. When these have been transmitted, they are either translated, if they are in code, or transcribed, if they are not; and the message so resulting is delivered either by messenger or by telephone to the addressee. From the foregoing it is at once apparent that there is not the least similarity between what the defendant does and the transportation of goods by a common carrier. It is also apparent that the defendant's activities are within the definition of "produced" in subdivision (j) of § 203; for, not only does it "handle" the sender's message, but it "works on" it, first, by changing it into something wholly different, and then by changing it back to a form like the original.

The only remaining question is whether the defendant "ships" any "goods." First, are there any "goods" concerned? To prove that there are the plaintiff relies upon the phrase, "subjects of commerce of any character" in subdivision (i); to which the defendant answers that we must judge that phrase by its context, which necessarily limits its meaning to "tangible" objects. It is here that the Senate amendment becomes important. Until that was made the subdivision had read: "wares, products, commodities, merchandise or articles of commerce of any character." So far as we can see, no more complete enumeration could have been made of every kind of "tangible"; so that, when the Senate expanded the phrase to include, not only "articles" of commerce, but "subjects" of commerce, the opposition would have meant nothing, if it had not included "intangibles." Moreover, not only had all kinds of "tangibles" been already included, but "subjects of commerce" was not a good description of "tangibles." Its introduction into a phrase which had been sufficient to include all kinds of "tangibles," cannot be set down to tautology, or slovenly draughting; it demands that some additional significance be added. We need not with the plaintiff resort to opinions such as those of Johnson, J., in *Gibbons v. Ogden*, 9 Wheat. 1, 229, 230, 6 L.Ed. 23, in which the transmission of "intelligence" is spoken of as a "subject" of commerce. It is enough that we have unmistakable evidence of a purpose to extend the definition of subdivision (i) to everything which had been considered a "subject [s] of commerce": that is, to whatever Congress could regulate as such a subject. Last, we have to say whether, assuming that a message received for transmission is "goods," and that the defendant "produces" it, it also "ships" the message, when it sends the pulsations over the telegraph wires. Although that is indeed an inappropriate word to apply to "intangibles," its unfitness for the most part disappears, once we treat messages as "goods." Certainly we should stultify ourselves, having gone so far, if we were to refuse to understand it as covering what is here involved.

So much for textual analysis. The defendant also argues that, aside from any verbal correspondence which can be spelled out between the section and its business, § 212(a) as a whole and particularly the con-

trast between it and §§ 206 and 207, show that Congress did not mean to forbid the use of child labor when an employer was merely engaged in interstate commerce, but only in case he was engaged in shipping goods in commerce; in other words, that § 212(a) covers only those who are not engaged in interstate commerce. No reason is suggested for such a capricious limitation upon a purpose which was apparently pervasive; and the curious result would be that Congress singled out the more vulnerable of its powers for exercise, for in 1938, *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101, 3 A.L.R. 649, Ann.Cas.1918E, 724, had not yet been overruled. If it is right we must suppose that Congress meant to control the passage across state lines of goods made in a state under conditions which it disapproved—a power which at that time was still in doubt—but did not mean to regulate the conduct of interstate commerce in goods—a power which it had always incontestibly had. Moreover, there is no basis for the argument in the statute itself, for the contrast between the language of § 212(a) and of §§ 206 and 207 does not justify the inference made from it. The act was a compromise of two quite separate designs: that of the House, which was to regulate child labor by national standards; that of the Senate, which was to prevent one state from breaking down the standards of another by unregulated competition. The House won, and it would leave its plan in large part unrealized to omit child labor in interstate commerce—to say nothing of the fact that such commerce, and the shipment in commerce of goods made by child labor, are not inevitably mutually exclusive. *Fleming v. A. B. Kirschbaum Co.*, 3 Cir., 124 F.2d 567, 571, 572, note 5, affirmed 316 U.S. 517, 62 S.Ct. 1116, 86 L.Ed. 1195.

The difference in language can be otherwise accounted for. The original scheme of the House was to give to the Secretary of Labor power to declare what industries "affected" interstate commerce. That was to be a condition upon both the child labor provisions, and wages and hours regulation. It had nothing to do with interstate commerce which was to be regulated anyway, without any action by the Secretary. The House plan was amended, however, changing the definition in §§ 206 and 207 to the phrase, "production of goods for commerce," which the courts were to construe without any aid from the Secretary. Section 212—then § 10—as originally proposed, contained two subdivisions: subdivision (a) being the same as it now is, and subdivision (b) containing the phrase, "engaged in commerce in any industry affecting commerce." That was the form also of §§ 206 and 207 during the period while the Secretary was to declare what industries did "affect commerce." Subdivision (b) was deleted, because, as the Conference Report declared, the power given to the Secretary in section 6 of the House amendment had been taken away in Conference. That was perhaps a good reason for not retaining the phrase, "in any industry affecting commerce"; but it must be admitted that it is not clear why subdivision (a) was not amended to conform to §§ 206 and 207. Nevertheless, that gives us no ground for inferring that subdivision (a) was supposed to be more limited than §§

206 and 207 in their amended form; verbally, as we have seen, it covers the situation at bar, and the reason given for deleting subdivision (b) suffices to show that Congress had no such purpose as the defendant imputes to it.

The defendant's arguments based upon the well-known canons of statutory interpretations we have not disregarded; but it is not necessary to say more than that, whatever their weight, they do not in our judgment overbear the construction we have adopted.

Judgment affirmed.

WESTERN UNION TELEGRAPH CO. v. LENROOT

Supreme Court of the United States, 1945.
323 U.S. 490, 65 S.Ct. 335, 89 L.Ed. 414.

[This case appears supra p. 729.]

NOTE

See commentaries on the principal case in 8 U.Detroit L.J. 125 (1945), and 13 Geo. Wash.L.Rev. 383 (1945).

VLASAK v. VLASAK

Supreme Court of Minnesota, 1939. 204 Minn. 331, 283 N.W. 489.

STONE, JUSTICE. In this action by daughter against father, the former had judgment for damages resulting from personal injuries, sustained, so the jury found, because of defendant's negligence. For defendant it is urged that plaintiff, at the time of the accident, was an unemancipated minor, and in consequence without right to sue her father for his personal tort. So far as the question of emancipation depends upon facts, we have no present concern with it.

At the time of the accident, December 31, 1936, plaintiff was 20 years and 4 days of age. Under the then law, she was not a minor.

At common law, children of both sexes under 21 years were infants or minors. *Anderson v. Peterson*, 36 Minn. 547, 32 N.W. 861, 1 Am. St.Rep. 698. That was changed for Minnesota by G.S.1866, c. 59, § 2, declaring that: "Males of the age of twenty-one years and females of the age of eighteen years shall be considered of full age for all purposes; before those ages they shall be considered minors."

So our law remained until the revision of 1905. In the probate code, as thereby revised, Rev.Laws, 1905, § 3636, we find this: "*Definitions*—The word 'representative,' when used in these laws with reference to probate courts and proceedings therein, shall be construed as including executors, administrators, special administrators, administrators with the will annexed, administrators de bonis non, and guardians. The word 'minor' means a male under the age of twenty-one years, or a female under the age of eighteen years."

Whatever it meant, that was the law at the time of plaintiff's injury, Mason's Minn.St.1927, § 8706, and so determinative of her then status. By Laws 1937, c. 435, § 24, Mason's Minn.St.1938 Supp. § 8892-185, the word "minor" is declared to mean "a person under the age of twenty-one years." Thereby was removed the former discrimination against masculine youth. Both sexes now attain majority at 21 years.

The argument for defendant is untenable that the definition of "minor" above quoted from Rev.Laws 1905, was restricted by the contextual "reference to probate courts and proceedings therein." It had long been our law that females attain majority at 18. There is nothing in the revision of 1905 to indicate intention to modify the law in that respect.

The conclusion just stated is the only one permissible from the phrasing of the 1905 revision, considered against its background of the long existing statutory rule. It is enforced by another consideration. If there is need for construction, which we doubt, it should not result in absurdity. For plaintiff it is well argued, that if defendant's argument were to prevail, women between the ages of 18 and 21, from the effective date of the 1905 revision to that of Laws of 1937, c. 435, April 26, 1937, would have been in this dilemma; if 21 were the age of majority for both sexes, except for probate purposes, young women at that stage of life could not have given valid deeds of real estate. Nor could they have conducted other business affairs, even if their estates so required. But, on the other hand, they could not have had guardians appointed by the probate court, because, for probate purposes only, being over 18, they were not minors. Counsel for plaintiff are right in concluding that neither the revision commission of 1905 nor any legislature could have intended to mar our law with such a blemish of unworkable anomaly.

In consequence, our holding is that before April 26, 1937, the effective date of Laws 1937, c. 435, women attained their majority for all purposes at the age of 18. That requires that the judgment be, and it is affirmed.

NOTE

A commentary on the principal case appears in 23 Minn.L.Rev. 851 (1939).

CAMINETTI v. UNITED STATES.

Supreme Court of the United States, 1916:

242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442, L.R.A.1917F, 502, Ann.Cas.1917B, 1168.

[The case appears *supra*, p. 691.]

Here of Certain Canons

Of the many so-called canons of interpretation discussed elaborately in text books only the three most often resorted to in briefs of counsel and judicial opinions are treated here. Observe the typical ways

in which they are used by the courts and their degrees of utility as devices for resolving textual ambiguity.

(1) *NOSCITUR A SOCIIS*

CARSON & CO. v. SHELTON.

Court of Appeals of Kentucky, 1908.

128 Ky. 248, 107 S.W. 793, 15 L.R.A.,N.S., 509.

HOBSON, J. Walton, Wilson, Rhodes & Co. were the general contractors for the building of the Madisonville, Hartford & Eastern Railroad. G. A. Shelton was a subcontractor under them. Shelton boarded his hands, and bought from Carson & Co. the supplies necessary for this purpose and for the feeding of his teams, as well as for his household. He failed to pay Carson & Co. the grocery bill, and they filed a claim in the county clerk's office, asserting a lien upon the railroad for the balance due them. They brought this suit to enforce their lien. The circuit court sustained a demurrer to their petition, and they declining to plead further, dismissed it. From this judgment, they appeal.

The rights of the parties are governed by section 2492, Ky.St. 1903, which is as follows: "All persons who perform or furnish labor, material, supplies or teams, for the construction or improvement of any canal, railroad, turnpike or other public improvement in this commonwealth, by contract expressed or implied, with the owner or owners thereof, or by subcontract thereunder, shall have a lien thereon, and upon all the property and franchise of the owner or the owners thereof, for the full contract price of such labor, material, supplies and teams so furnished or performed, which said lien shall be prior and superior to all other liens thereafter created thereon." It will be observed that the statute gives a lien to all persons who furnish labor, material, supplies, or teams for the construction of any railroad by contract, expressed or implied, with the owner, or by subcontract thereunder. The things for which the statute gives a lien are labor, material, supplies, or teams for the construction of the railroad. The material referred to is that which enters into the construction of the railroad. The labor and teams are those used in the construction of the railroad. The word "supplies" must receive a similar construction and must include such things as are used in the construction of the railroad. To construe it to refer to all supplies furnished to any subcontractor for his personal use, or for the personal use of his hands, would be to entirely disregard the rule that, in construing statutes, a word is always construed in connection with the words with which it is associated, and, where several things are referred to, they are presumed to be of the same class, when connected by a copulative conjunction, unless a contrary intent appears. The word "supplies" would include powder or dynamite used in the construction of the railroad, or fuses to set off the powder, shovels and carts with which the work was done, and like. But the food that was furnished Shelton was not used in the construction of the railroad. The fact that Shelton, who was a sub-

contractor, also boarded his hands, is not material. If another person had run the boarding house, there would be as much ground for adjudging the supplies furnished for the hands a lien on the railroads as there is now. The plaintiff sold his groceries to Shelton. Shelton used the groceries in running his boarding house and in feeding his household, and, if there was a lien on the road for such things as these, there would be no limit to the things that would be included by the statute, and a railroad company would never be safe in settling with the contractor. In *Flightower v. Bailey*, 108 Ky. 208, 56 S.W. 149, 49 L.R.A. 255, 94 Am.St.Rep. 350, when we had before us a similar statute, we said: "We cannot extend the statute beyond its plain language and evident meaning. The hardships to owners are apt to be considerable, even under the terms of the statute. If the right to the lien be extended beyond its terms, then it can be extended indefinitely, and there would be no safety in contracting for the erection of a building."

Judgment affirmed.

RUSSELL MOTOR CAR CO. v. UNITED STATES.

Supreme Court of the United States, 1923.
261 U.S. 514, 43 S.Ct. 428, 67 L.Ed. 778.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases, here on appeal from the Court of Claims, differ in details of fact, but are controlled by the same principles of law, and depend alike upon the construction and application of the same statutory provisions.

The salient facts in the case of the Motor Car Company are as follows: That company, on May 14, 1918, entered into a contract, numbered 1498, with the United States, acting through the Secretary of the Navy, to make 250 anti-air craft gun mounts, at an agreed price of \$7,860 each to be delivered at stipulated periods; the last being the 60 days ending April 30, 1919.

Prior to the making of the foregoing contract, viz. in November, 1917, a similar contract, numbered 949, had been entered into by the same parties; the last period for delivery being the 60 days ending January 15, 1919. The actual work under contract 949 was begun about March, 1918, and some time later, and after the making of contract 1498, at the request of the company, the Secretary consented to allow all shipments of mounts to be applied upon contract 949 until its completion. Deliveries under that contract were finished in June, 1919.

On November 18, 1918, the Navy Department expressed a desire that the manufacture of gun mounts under both contracts be greatly decreased and that the company resume production of peace-time products as soon as possible, "so that the minimum of economic disturbance will be felt during the transition." In its communication the Navy Department requested that immediate arrangements be made for the reduction and eventual stoppage of production of materials

under these contracts and the substitution therefor of commercial products, and that the company "initiate preparations for the cancellation along the lines indicated." On November 23, 1918, the company was notified that the Secretary had authorized the cancellation of contract 1498, directed to cease work in connection therewith not later than December 2, 1918, and informed that a just and fair settlement would be made as provided by contract and in accordance with the statute covering such cases. Extended negotiations followed, in an effort to bring about a settlement, and the Secretary finally fixed the sum of \$444,847.68 as just compensation for the cancellation of the contract. Seventy-five per cent. of this amount was paid and accepted by the company, expressly without prejudice to its rights.

The Court of Claims, after hearing the case, found that just compensation for the cancellation of the contract was the sum of \$495,-250.34, which amount included a number of elements and items not necessary to be set forth. The court further found that, if the company had been permitted to complete the contract according to its terms, it could and would have earned a profit, in round figures, of \$960,000, but held that the action of the Secretary of the Navy in canceling the contract was within the authority conferred by the statute, presently to be mentioned, and that the company consequently was not entitled to an award including anticipated profits.

The statute upon which this determination rested was the Act of June 15, 1917 (40 Stat. p. 182, c. 29), making deficiency appropriations for the military and naval establishment on account of war expenses, and for other purposes. This act contained a provision authorizing and empowering the President, within the limits of the amounts appropriated:

" . . . (b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material." Comp.St.1918, Comp.St.Ann.Supp.1919, § 3115½d.

The President was authorized to exercise the authority conferred upon him by the act and expend the money therein and thereafter appropriated "through such agency or agencies as he shall determine from time to time." The authority so far as it concerned the Navy, was by him delegated to the Secretary of the Navy in an order dated August 21, 1917,

"in so far as applicable to and in furtherance of the construction of vessels for the use of the Navy and of contracts for the construction of such vessels, and the completion thereof, and all powers and authority applicable to and in furtherance of the production, purchase and requisitioning of materials for construction of vessels for the Navy and for war materials, equipment, and munitions required for the use of the Navy, and the more economical and expeditious delivery thereof."

The word "material," the act provided, should include stores, supplies and equipment for ships and everything required for or in connection with the production thereof, and in our opinion included the articles contracted for in this as well as in the other two cases. The

act provided that whenever the United States should cancel, modify, suspend, or requisition any contract just compensation should be made therefor to be determined by the President. If the amount so determined should be unsatisfactory, the person entitled to receive it could accept 75 per cent. thereof and bring suit to recover such further sum as added to the 75 per cent. would make just compensation. By the terms of the act the authority granted to the President or delegated by him was to "cease six months after the final treaty of peace is proclaimed between this government and the German Empire."

The Motor Car Company contends that subdivision (b) of the statute above quoted applies to private contracts alone and affords no authority for the cancellation by the government of its own contracts. The Court of Claims held otherwise and whether its holding or the company's contention is correct presents the principal question for our consideration.

It must be apparent, we think, that the words of the provision, "*any* existing or future contract," read with literal exactness, include all contracts, whether private or governmental. But it is pointed out that the power to "requisition" cannot apply to a governmental contract; and this may be conceded, since the government cannot requisition what it already has. Then it is said that inasmuch as the application of the word "requisition" must be confined to private contracts, the other words associated with it must be likewise restricted by virtue of the maxim "*noscitur a sociis*." That a word may be known by the company it keeps is, however, not an invariable rule, for the word may have a character of its own not to be submerged by its association. Rules of statutory construction are to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place, as this court has many times held, except in the domain of ambiguity. *Hamilton v. Rathbone*, 175 U.S. 414, 421, 20 S.Ct. 155, 44 L.Ed. 219; *United States v. Barnes*, 222 U.S. 513, 518-519, 32 S.Ct. 117, 56 L.Ed. 291. They may not be used to create but only to remove doubt. *Id.* Moreover, in cases of ambiguity the rule here relied upon is not exclusive. The problem may be submitted to all appropriate and reasonable tests, of which "*noscitur a sociis*" is one. Here we have one word which it may be conceded applies only to private contracts, but the other three words, standing alone, it likewise must be conceded, naturally apply to governmental contracts as well. Indeed they more naturally apply to such contracts. The power to modify the obligations of a private contract is, to say the least, a most unusual one for governmental exercise. To modify a contract is in effect to make a new one, and it puts something of a strain on our conception of the functions of government to concede its power to make contracts between private parties, to which neither may assent, and which consequently, neither will be bound to perform.

We do not mean to deny the power of Congress, in time of war, to authorize the President to modify private contracts (leaving the parties free, as between themselves, to accept or not), nor do we suggest that Congress has not done so by the present statute; but the

contention here is, not that the power in question extends to private contracts, but that it is limited to them. This cannot be conceded. The meaning of four predicate words is not doubtful; in that respect, as well as in their operative scope, they obviously differ from one another. The question we are called upon to answer is whether, because the words "*any* . . . contract" must be given a narrower meaning when qualified by the predicate "requisition," their meaning must be limited in like manner when qualified by one of the other three predicates. "*Noscitur a sociis*" is a well-established and useful rule of construction, where words are of obscure or doubtful meaning, and then, but only then, its aid may be sought to remove the obscurity or doubt by reference to the associated words. *Virginia v. Tennessee*, 148 U.S. 503, 519, 13 S.Ct. 728, 37 L.Ed. 537; *Benson v. Chicago, etc., R. Co.*, 75 Minn. 163, 77 N.W. 798, 74 Am.St.Rep. 444. But here the meaning of the words considered severally is not in doubt, and the rule is invoked not to remove an obscurity, but to import one. There is nothing in the rule or in the statute which requires us to assimilate the words "modify" "cancel" to the scope of the word "requisition," simply because the latter has a necessarily narrower application. The meaning of the several words, standing apart, being perfectly plain, what should be done is to apply them distributively, *diverso intuitu*, giving to each its natural value and appropriate scope when read in connection with the object (any contract) which they are severally meant to control. Thus, the predicate "requisition" will be limited to private contracts, while the other words may be appropriately extended to include governmental contracts as well. An illustration is afforded by the commerce clause of the Constitution. The power to regulate interstate and foreign commerce is found in the same clause and conferred by the same words, but the scope of the power when applied to the former may be narrower than when applied to the latter. *Groves v. Slaughter*, 15 Pet. 449, 505, 10 L.Ed. 800.

This disposition of the question also accords with the broad purposes of the legislation. When the act was passed we were in the midst of a great war, which called for the utilization of all our resources. The necessities were great, beyond the power of statement. The government was confronted with the vital necessity, not only of producing ships and supplies in unprecedented quantities, but of producing them with the utmost haste. Hence it was necessary that everything which stood in the way of or hindered such production should be put aside. But this was a necessity which Congress, of course, realized must sooner or later come to an end, suddenly and completely. With the termination of the war the continued production of war supplies would become, not only unnecessary, but wasteful. Not to provide, therefore, for the cessation of this production, when the need for it had passed, would have been a distinct neglect of the public interest. The situation, it is plain, required that production should proceed while the war lasted to the utmost limit of the nation's power, but that it should come to an end as soon as possible upon the passing of the emergency. In the light of these circumstances, it is not unreasonable to regard the statute

now under consideration as intended to accomplish both results, that is: (1) To enable the President, during the emergency, to utilize his powers over contracts to stimulate production to the utmost; and then, (2) upon the passing of the emergency, to enable him to utilize these same powers to stop that production as quickly as possible. To the latter accomplishment authority to modify and cancel government war contracts would contribute most effectively. These considerations lend support to the judgment of the court below construing the statute as having this effect.

In this connection it is not without significance that the authority granted to the President was to cease six months after the final treaty of peace. Obviously, the powers granted to him—among them to modify and cancel contracts—were to continue during the six months' period, not for the purpose of forwarding war production, but, on the contrary, for the purpose of stopping it. To that end, we conclude, he was authorized to cancel the government's own contracts, such as the one here involved, upon making just compensation to the parties concerned.

The judgments of the Court of Claims are severally
Affirmed.

(2) *EJUSDEM GENERIS*

CLEVELAND v. UNITED STATES

Supreme Court of the United States, 1946.

329 U.S. 14, 67 S.Ct. 13, 91 L.Ed. 1.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioners are members of a Mormon sect, known as Fundamentalists. They not only believe in polygamy; unlike other Mormons,¹ they practice it. Each of petitioners, except Stubbs, has, in addition to his lawful wife, one or more plural wives. Each transported at least one plural wife across state lines² either for the purpose of cohabiting with her, or for the purpose of aiding another member of the cult in such a project. They were convicted of violating the Mann Act, 36 Stat. 825, 18 U.S.C. § 398, 18 U.S.C.A. § 398, on a trial to the court, a jury having been waived. D.C. 56 F.Supp. 890. The judgments of conviction were affirmed on appeal. 10 Cir., 146 F.2d 730. The cases are here on petitions for certiorari which we granted in view of the asserted conflict between the decision below and *Mortensen v. United States*, 322 U.S. 369, 64 S.Ct. 1037, 88 L.Ed. 1331.

The Act makes an offense the transportation in interstate commerce of "any woman or girl for the purpose of prostitution or debauchery,

¹The Church of Jesus Christ of Latter-Day Saints has forbidden plural marriages since 1890. See *Toncray v. Budge*, 14 Idaho 621, 654, 655, 95 P. 26.

²Petitioners' activities extended into Arizona, California, Colorado, Idaho, Utah and Wyoming.

or for any other immoral purpose". The decision turns on the meaning of the latter phrase, "for any other immoral purpose".

United States v. Bitty, 208 U.S. 393, 28 S.Ct. 396, 52 L.Ed. 543, involved a prosecution under a federal statute making it a crime to import an alien woman "for the purpose of prostitution, or for any other immoral purpose." 34 Stat. 898, 899, § 3. The act was construed to cover a case where a man imported an alien woman so that she should live with him as his concubine. Two years later the Mann Act was passed. Because of the similarity of the language used in the two acts the Bitty case became a forceful precedent for the construction of the Mann Act. Thus one who transported a woman in interstate commerce so that she should become his mistress or concubine was held to have transported her for an "immoral purpose" within the meaning of the Mann Act. Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442, L.R.A.1917F, 502, Ann.Cas.1917B, 1168.

It is argued that the Caminetti decision gave too wide a sweep to the Act; that the Act was designed to cover only the white slave business and related vices; that it was not designed to cover voluntary actions bereft of sex commercialism; and that in any event it should not be construed to embrace polygamy which is a form of marriage and, unlike prostitution or debauchery or the concubinage involved in the Caminetti case, has as its object parenthood and the creation and maintenance of family life. In support of that interpretation an exhaustive legislative history is submitted which, it is said, gives no indication that the Act was aimed at polygamous practices.

While Mortensen v. United States, supra, 322 U.S. at page 377, 64 S.Ct. at page 1041, 88 L.Ed. 1331, rightly indicated that the Act was aimed "primarily" at the use of interstate commerce for the conduct of the white slave business we find no indication that a profit motive is a *sine qua non* to its application. Prostitution, to be sure, normally suggests sexual relations for hire.³ But debauchery has no such implied limitation. In common understanding the indulgence which the term suggests may be motivated solely by lust.⁴ And so we start with words which by their natural import embrace more than commercialized sex. What follows is "any other immoral purpose". Under the *eiusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it. But we could not give the words a faithful interpretation if we confined them more narrowly than the class of which they are a part.

That was the view taken by the Court in the Bitty and Caminetti cases. We do not stop to re-examine the Caminetti case to determine whether the Act was properly applied to the facts there presented.

³ "Of women: The offering of the body to indiscriminate lewdness for hire (esp. as a practice or institution); whoredom, harlotry." 8 Oxford English Dictionary 1497.

⁴ "Vicious indulgence in sensual pleasures." 3 Oxford English Dictionary 79; "Excessive indulgence in sensual pleasures of any kind; gluttony; intemperance; sexual immorality; unlawful indulgence of lust." 3 Century Dict.Rev.Ed. 1477.

But we adhere to its holding which has been in force for almost 30 years, that the Act, while primarily aimed at the use of interstate commerce for the purposes of commercialized sex, is not restricted to that end.

We conclude, moreover, that polygamous practices are not excluded from the Act. They have long been outlawed in our society. As stated in *Reynolds v. United States*, 98 U.S. 145, 164, 25 L.Ed. 244: "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offense against society."

As subsequently stated in *Mormon Church v. United States*, 136 U.S. 1, 49, 10 S.Ct. 792, 805, 34 L.Ed. 481, "The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the western world." And see *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637. Polygamy is a practice with far more pervasive influences in society than the casual, isolated transgressions involved in the *Caminetti* case. The establishment or maintenance of polygamous households is a notorious example of promiscuity. The permanent advertisement of their existence is an example of the sharp repercussions which they have in the community. We could conclude that Congress excluded these practices from the Act only if it were clear that the Act is confined to commercialized sexual vice. Since we cannot say it is, we see no way by which the present transgressions can be excluded. These polygamous practices have long been branded as immoral in the law. Though they have different ramifications, they are in the same genus as the other immoral practices covered by the Act. . . .

Affirmed.

MR. JUSTICE MURPHY, dissenting.

Mr. Justice Black and Mr. Justice Jackson think the cases should be reversed. . . .

[Mr. Justice Rutledge concurred with the majority.]

Today another unfortunate chapter is added to the troubled history of the White Slave Traffic Act. It is a chapter written in terms that misapply the statutory language and that disregard the intention of the legislative framers. It results in the imprisonment of individuals whose actions have none of the earmarks of white slavery, whatever else may be said of their conduct. I am accordingly forced to dissent.

The statute in so many words refers to transportation of women and girls across state lines "for the purpose of prostitution or debauchery, or for any other immoral purpose." The issue here is whether the act of taking polygamous or plural wives across state lines or taking girls across state borders for the purpose of entering into plural mar-

riage, constitutes transportation "for any other immoral purpose" so as to come within the interdict of the statute.

The Court holds, and I agree that under the *ejusdem generis* rule of statutory construction the phrase "any other immoral purpose" must be confined to the same class of unlawful sexual immoralities as that to which prostitution and debauchery belong. But I disagree with the conclusion that polygamy is "in the same genus" as prostitution and debauchery and hence within the phrase "any other immoral purpose" simply because it has sexual connotations and has "long been branded as immoral in the law" of this nation. Such reasoning ignores reality and results in an unfair application of the statutory words.

It is not my purpose to defend the practice of polygamy or to claim that it is morally the equivalent of monogamy. But it is essential to understand what it is as well as what it is not. Only in that way can we intelligently decide whether it falls within the same genus as prostitution or debauchery.

There are four fundamental forms of marriage: (1) monogamy; (2) polygamy, or one man with several wives; (3) polyandry, or one woman with several husbands; and (4) group marriage. The term "polygamy" covers both polygyny and polyandry. Thus we are dealing here with polygyny, one of the basic forms of marriage. Historically, its use has far exceeded that of any other form. It was quite common among ancient civilizations and was referred to many times by the writers of the Old Testament; even today it is to be found frequently among certain pagan and non-Christian peoples of the world. We must recognize, then, that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears. It is equally true that the beliefs and mores of the dominant culture of the contemporary world condemn the practice as immoral and substitute monogamy in its place. To those beliefs and mores I subscribe, but that does not alter the fact that polygyny is a form of marriage built upon a set of social and moral principles. It must be recognized and treated as such.

The Court states that polygamy is "a notorious example of promiscuity." The important fact, however, is that, despite the differences that may exist between polygamy and monogamy, such differences do not place polygamy in the same category as prostitution or debauchery. When we use those terms we are speaking of acts of an entirely different nature, having no relation whatever to the various forms of marriage. It takes no elaboration here to point out that marriage, even when it occurs in a form of which we disapprove, is not to be compared with prostitution or debauchery or other immoralities of that character.

The Court's failure to recognize this vital distinction and its insistence that polygyny is "in the same genus" as prostitution and debauchery do violence to the anthropological factors involved. Even etymologically, the words "polygyny" and "polygamy" are quite distinct

from "prostitution," "debauchery" and words of that ilk. There is thus no basis in fact for including polygyny within the phrase "any other immoral purpose" as used in this statute. . . .

Hence I would reverse the judgments of conviction in these cases.

NOTES

1. In *Rhone v. Loomis*, 74 Minn. 200, 77 N.W. 31 (1898), the conclusions of both the majority and dissenting opinions were reached by applying the *ejusdem generis* canon, the disagreement being as to what was the factor common to the enumerated things. Mitchell J. said: ". . . The doctrine of *ejusdem generis*, or what is commonly called 'Lord Tenterden's rule' . . . generally stated, is that where a statute or document specifically enumerates several classes of persons or things, and immediately following, and classed with such enumeration, the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that person or things therein comprised may be read as *ejusdem generis* 'with,' and not of a quality superior to or different from, those specifically enumerated. See *Sandiman v. Breach*, 7 Barn. & C. 99; also, 17 Am. & Eng. Enc. Law, p. 278, tit. 'Other.' The reason of this rule is that 'if the legislature had meant the general words to apply, without restriction, it would have used only one compendious word.' *Rex v. Wallis*, 5 Term.R. 379."

2. In *United States v. One Zumstein Briefmarken Katalog*, 24 F.Supp. 516 (D.C.Pa.1938), the court said that since *ejusdem generis* is a "rule of strict construction" it is peculiarly applicable to penal statutes. (See Chapter 8, Section 2c *infra*, p. 1219 et seq.). See commentary in 23 Minn.L.Rev. 545 (1939).

3. In *Benson v. Chicago, St. P., M. & O. Ry.*, 75 Minn. 163, 77 N.W. 798 (1899), Mitchell, J., referring to both the *noscitur a sociis* and *ejusdem generis* canons, said: "These rules are not the masters of the courts, but merely their servants, to aid them in ascertaining the legislative intent. They afford a mere suggestion to the judicial mind that, where it clearly appears that the lawmakers were thinking of a particular class of persons or objects, their words of more general description may not have been intended to embrace any other than those within the class".

PEOPLE v. KAYE

Court of Appeals of New York, 1914. 212 N.Y. 407, 106 N.E. 122.

CUDDEBACK, J. The defendant has been convicted of a misdemeanor for violating an order made by the fire commissioner of the city of New York, which required the defendant to install "a separate and distinct system of automatic sprinklers" upon his premises, used for manufacturing purposes, at Nos. 30-34 West Twenty-Sixth street, borough of Manhattan. The order was made under section 775, tit. 3, c. 15, of the city charter (L.1901, c. 466). Section 775 was added to the charter by an amendment contained in chapter 899, Laws of 1911. The amendment, among other things, empowered the fire commissioner to—

"(3) require, in writing, the installation, *as prescribed by any law or ordinance*, in any building, structure or inclosure of automatic or other fire alarm system or fire extinguishing equipment and the main-

tenance and repair thereof, or the construction, as prescribed by any law or ordinance, of adequate and safe means of exit."

First. The defendant's main defense is that there is no *law or ordinance* requiring the installation in any building of automatic sprinklers as called for by the order.

Section 762, tit. 3, c. 15, of the charter, as it was in force in 1897 (L.1897, c. 378), and as it was continued in force, in the way that will be explained, by the present charter (L.1901, c. 466), provided that the owners and proprietors of all manufactories, hotels, tenement houses, and other buildings particularly mentioned "shall provide such means of communicating alarms of fire, accident or danger, to the police and fire departments, respectively, as the fire commissioner or police board may direct, and shall also provide such fire hose, fire extinguishers, buckets, axes, fire hooks, fire doors *and other means of preventing and extinguishing fires* as said fire commissioner may direct." Section 773 of the same title makes it a misdemeanor not to obey any such direction.

The defendant, applying to these provisions the doctrine of *ejusdem generis*, argues that the words italicized, namely, "other means of preventing and extinguishing fires," include only things of the same kind as fire hose, fire extinguishers, buckets, axes, fire hooks, and fire doors. That seems a narrow interpretation of the statute.

It is said in Halsbury's Laws of England, (vol. 27, p. 145):

"As a rule, general words following specific words are limited to things *ejusdem generis* with those before enumerated, although this, as a rule of construction, must be controlled by another equally general rule, that statutes ought, like wills or other documents, to be construed so as to carry out the objects sought to be accomplished by them."

In Schouler on Wills (3d Ed.) § 514, it is said that the rule of *ejusdem generis* "is after all but a rule of presumption as we should bear carefully in mind. . . . In fine, courts at the present day decline to be hampered by any rule which would sacrifice the testator's true meaning out of undue regard for association of words of limited scope with broad generic terms."

The court said in *Given v. Hilton*, 95 U.S. 591, 598 (24 L.Ed. 458), speaking of the rule of *ejusdem generis*:

"This rule of construction rests on a mere presumption, easily rebutted by anything that shows the larger subject was in fact in the testator's view."

In *Matter of Robinson*, 203 N.Y. 380, 386, 96 N.E. 925, 37 L.R.A. (N.S.) 1023, the testator gave to his executors and trustees a fund "to provide shelter, necessities of life, education, general or specific, and such other financial aid as may seem to them fitting and proper to such persons as they shall select as being in need of the same." The court said:

"In construing the will now under consideration, the words 'such other financial aid' must be read with the words that precede them,

. . . and as so read, the preceding words not being exhaustive, such comprehensive words should be held to refer to financial aid of the same general character and . . . purpose as that included in such preceding words."

The cases on which the defendant relies are mostly those which involved bequests of property or penal laws enumerating crimes, or were cases where the particular things mentioned were the essential features of the subject-matter before the court. In a bequest, it is his property, and the objects of his bounty, which the donor has in mind, and in penal laws, the principal thing is the definition of crime. But in section 762 of the New York charter, the Legislature was not dealing with special reference to the particular articles therein enumerated, viz., fire hose, fire extinguishers, buckets, axes, fire hooks, and fire doors. The main object in view was the prevention and extinguishment of fires. That is, perhaps, sufficient to distinguish this case from those cited by the defendant, and to rebut the presumption that the general words of the statute are limited by the particular words preceding them.

But the case is rather within the doctrine of *Matter of Robinson*, supra. The words of section 762, which speak of certain kinds of fire extinguishing apparatus, are not exhaustive, and the comprehensive words "other means of preventing and extinguishing fires," which follow, should be held to include other means of the same general character and purpose as those particularly enumerated. *Id.* Now, automatic sprinklers, though they may cost a little more than the articles specifically mentioned in the section, are of the same general character, and are intended for the same purpose, as those articles. This liberal construction has been placed on section 762 in every case where it has come before the courts. It was held by the Appellate Term of the Supreme Court in New York (*Lantry v. Hoffman*, 55 Misc. 261, 105 N.Y.S. 353 [1907]) that the section authorized the fire commissioner to require the installation of perforated pipes on and along the ceiling, and connected with a valve outside the building, located above the curb level in a position accessible for the use of the fire department. This decision was affirmed by the Appellate Division (124 App. Div. 937, 109 N.Y.S. 1135). In *Waldo v. Christman*, 72 Misc. 349, 130 N.Y.S. 260 (1911), it was held that section 762 empowered the fire commissioner to require the installation of a separate and distinct system of automatic sprinklers of practically the same character as that required in this case.

The question is asked: Why, if section 762 in the charter already included automatic sprinklers, was it deemed necessary to mention them particularly in section 775 of chapter 899, Laws of 1911? A consideration of the act will show that the Legislature intended to confirm the construction which the court in the cases cited had theretofore put on section 762, and authorized the city to extend the requirements of the section to all buildings.

The act of 1911 added 11 sections (774-778c) to title 3, c. 15, of the charter. In these sections the Legislature brought together in one

act many provisions of the charter relating to the prevention of fire, couching them in general language, and, at times, extending their application. For example, section 762 of the charter (L.1897, c. 378) required the owners and proprietors of some 15 different kinds of buildings mentioned to "provide such means of communicating alarms of fire, accident or danger, to the police and fire departments, respectively, as the fire commissioner or police board may direct." Subdivision 3, § 775, added by the act of 1911, empowered the fire commissioner to require "the installation, as prescribed by any law or ordinance, in any building, structure or inclosure of automatic or other fire alarm system." The only effect of this provision in subdivision 3 was to empower the city to require that all buildings, structures, and inclosures, not merely those mentioned in section 762, be provided with fire alarm systems. Space will not admit of further comparisons, but it will be found that other subdivisions of section 775 empower the city to extend pre-existing requirements of the charter, which were limited, the same as those relating to fire alarm systems, to all buildings, structures, and inclosures. I believe it was the intention of the Legislature, in like manner, to authorize the extension of the provisions of section 762, relating to the installation of fire extinguishing apparatus, as those provisions had been interpreted by the court, to all buildings, structures, and inclosures. This construction of chapter 899, Laws of 1911, is supported by other provisions found therein. The act amended the heading of title 3 of chapter 15 (in a manner not now important), and for some reason expressly repeated the headings without including the text of the sections (760-773) in title 3, which preceded the 11 sections added. This shows that the Legislature had those preceding sections in mind, and it must be held that it was aware of and approved the construction which the court had placed upon section 762. And when, in section 775, the Legislature empowered the fire commissioner to require the installation of automatic sprinklers, "as prescribed by any law or ordinance," it knew that a law to that effect, according to the construction placed thereon by the courts, was already in force.

I recommend that the judgment of conviction appealed from be affirmed.

HOGAN, J. (dissenting). A rule common to the construction of statutes that, where two or more words of analogous meaning are coupled together, they are presumed to be used in their cognate sense, express the same relations, and give color and expression to each other, must be applied to the statute and ordinance under consideration; therefore the language quoted, which is general in its terms, must be limited by the more specific language preceding the same and with which it is associated, and held only to comprehend "means" of a character such as the words preceding specified. To give to the section and ordinances the construction claimed for would authorize the fire commissioner to require the installation of any "means" specified by him for extinguishing fires in the buildings specified in the section, including churches, stores, offices, boarding houses, lodging houses, and all other

buildings referred to in the section, and would confer upon the fire commissioner unlimited power as to the character of the means for preventing or extinguishing fires. He might, in his discretion, require an automatic sprinkling system in every church, boarding house, and building described in the section. He might require that certain of the churches and buildings specified should maintain a fire steamer for the purpose of extinguishing fires, if the language used is to be given the broad construction claimed for it. He might to-day require the installation of an automatic sprinkler system at large expense and one year later condemn it and order an improved system installed. The words "and other means of preventing and extinguishing fires as said fire commissioner may direct" must be read in connection with the words preceding, "fire hose, fire extinguishers, buckets, axes, fire nooks," etc., and held to be limited to such means as the specified means preceding the language used in the section imply.

[Motion for reargument denied, 213 N.Y. 648, 107 N.E. 1083 (1914).]

(3) EXPRESSIO UNIUS

STATE ex rel. CURTIS v. DE CORPS

Supreme Court of Ohio, 1938. 134 Ohio St. 295, 16 N.E.2d 459.

The City Council of Canton passed an ordinance in August, 1932 [sic; agreed statement of facts], creating nine pumpmen positions in the waterworks department of that city. On June 27, 1932, appellant and another who had passed a competitive civil service examination were appointed to two of these positions. More than a half year later, namely, on February 3, 1933, seven others were appointed from an eligible list furnished by the civil service commission to fill the remaining positions.

On February 26, 1934, the City Council of Canton passed an ordinance, effective March 1, 1934, reducing the number of these positions from nine to seven. On February 27, 1934, appellant was notified, in writing, by Service Director Frank L. DeCorps, appellee herein, that he was being laid off for the purpose of economy. There was then in force and effect the following worded resolution, adopted by the Canton Civil Service Commission in 1921:

"Whenever from lack of work or funds, or other cause, it becomes necessary in any department or subdivision thereof to temporarily reduce the working force in any position, such reduction shall be made in the inverse order of the appointment of the employees in such position, and the employees last appointed being first laid off; and in determining the order in which such employees shall be laid off, the order in which such employees were certified by the commission shall control."

Since the lay-off of appellant, the number of pumpmen has continued at seven, during which time but one vacancy was filled, and that by the other pumpman who was examined with appellant.

Appellant instituted this action in mandamus in the Court of Common Pleas to compel his reinstatement, and to recover the emoluments of that position for the period during which he has been deprived thereof. The writ prayed for was denied and the judgment was affirmed by the Court of Appeals. The cause is here on the allowance of a motion to certify.

BY THE COURT. The question submitted is whether the civil service commission of a municipality has the power to make a regulation which would require the appointing authority to lay off employees in the inverse order of appointment.

That portion of Section 486-19, General Code, which is here pertinent, reads:

"Such municipal commission shall prescribe, amend and enforce rules not inconsistent with the provisions of this act for the classification of positions in the civil service of such city and city school district; for examinations and registrations therefor; and for appointments, promotions, removals, transfers, layoffs, suspensions, reductions and reinstatements therein; and for standardizing positions and maintaining efficiency therein. Said municipal commission shall have and exercise all other powers and perform all other duties with respect to the civil service of such city and city school district, as herein prescribed and conferred upon the state civil service commission with respect to the civil service of the state; and all authority granted to the state commission with respect to the service under its jurisdiction shall, except as otherwise provided in this act, be held to grant the same authority to the municipal commission with respect to the service under its jurisdiction."

Appellees argue that the Legislature, by enacting Section 486-17b, General Code, "having made lay-off in the police and fire departments in the inverse order, has indicated that it did not intend that same should apply to the other classifications. The application of the principle 'expressio unius est exclusio alterius' should of itself be decisive of the question."

The maxim is of utility only as an aid in ascertaining legislative intent, but when its employment operates to defeat such intent it will be held to be inapplicable.

"The rule should not be carried beyond the reason for its existence. It is to be applied only as an aid in arriving at the legislative intention, and not to defeat the apparent intention." 37 Ohio Jurisprudence, 557, Section 296. See also 25 Ruling Case Law, 981, 982, Section 229.

In *Springer v. Government of Philippine Islands*, 277 U.S. 189, 48 S.Ct. 480, 72 L.Ed. 845, the court said (page 484): "The general rule that the expression of one thing is the exclusion of others is subject to exceptions. Like other canons of statutory construction it is only an aid in the ascertainment of the meaning of the law, and must yield whenever a contrary intention on the part of the lawmaker is apparent. Where a statute contains a grant of power enumerating cer-

tain things which may be done and also a general grant of power which, standing alone, would include those things and more, the general grant may be given full effect if the context shows that the enumeration was not intended to be exclusive.

In *Ford v. United States*, 273 U.S. 593, 611, 47 S.Ct. 531, 537, 71 L.Ed. 793, 801, the court said: "This maxim properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment." Again, "The maxim of interpretation relied on is often helpful, but its wise application varies with the circumstances."

The fact that Section 486-17b, General Code, grants seniority rights to members of the police and fire departments is not indicative of an intention on the part of the Legislature to withdraw from the jurisdiction of municipal civil service commissions the element of seniority in service as a subject of regulation. The provisions of Section 486-17b, General Code, do not in any way amend, modify or restrict those of Section 486-19, General Code. The broad and comprehensive powers with which municipal civil service commissions are vested include the authority to prescribe the requirement that seniority in service shall be considered in laying off employees in classified civil service.

We find the resolution here challenged to be consistent with the provisions of the Civil Service Act and therefore valid and enforceable, and hold that appellant is entitled to a writ compelling his reinstatement as prayed for.

NOTE

See Williams, "Expressio Unius", 15 Marq.L.Rev. 191 (1931).

(iii) DETERMINED BY OTHER LAW

(1) STATUTES IN PARI MATERIA

(Since a bill obviously cannot be drafted with reference to statutes subsequently to be enacted, that aspect of the use of the *in pari materia* device is postponed for discussion in Chapter 7, The Methods of Interpretation and Construction.)

REX v. DOJACEK.

Manitoba Court of Appeal, 1919. 48 D.L.R. 36.

PERDUE, C.J.M. The accused was convicted under s. 49 of the Manitoba Temperance Act, 6 Geo.V. 1916, c. 112, by R. M. Noble, Police Magistrate, for that the accused "did unlawfully keep liquor in a place

READ & McDERMOTT, 1919, 48 D.L.R. 36.

other than in a private dwelling-house in which he resides." The accused is the manager of the Ruthenian Booksellers & Publishers, Ltd. This company is the distributing agent in western Canada for the manufacturers of a patent medicine known as "Triner's American Elixir of Bitter Wine." The offence proved was that the accused had in the bookstore, which was not his place of residence, a quantity of this medicine in bottles. It is admitted that the liquid in question contains 16 to 18% of alcohol in volume. It was shewn that it also contained 18 grains per fluid ounce of cascara sagrada, said to be a strong laxative, besides some 8 other drugs in lesser proportions. It was admitted by the prosecutor that this medicine is registered under the Patent Medicine Act, 7-8 Ed. VII. 1908, c. 56.

The magistrate has found on the evidence that the patent medicine in question "contains sufficient medication to prevent its use as an alcoholic beverage, and no more alcohol than is necessary to keep its component parts in solution." But he also finds that it "is a liquor as defined in the Manitoba Temperance Act, as it contains over 2½% proof spirits, also that it is a drinkable liquid which is intoxicating."

Sub-s. (e) of s. 2 of the Manitoba Temperance Act is as follows:

The expression "liquor" or "liquors" shall include all fermented, spirituous and malt liquors, and all combinations of liquors, and all drinks and drinkable liquids which are intoxicating; and any liquor which contains more than 2½% of proof spirits shall be conclusively deemed to be intoxicating.

The definition is in effect the same as that contained in the old Liquor License Act, which was repealed by the Temperance Act; see R.S.M., 1913, c. 117, c. 2, sub-s. (g); except that the last clause of sub-s. (e) of s. 2 of the Manitoba Temperance Act commencing "and any liquor etc.," is not found in the corresponding subsection of the Liquor License Act.

Taking the definition in the Manitoba Temperance Act, the medicine in question does not come within any of the terms "fermented," "spirituous," "malt liquors" or "combinations of liquors." It must therefore come under the expression "all drinks and drinkable liquids which are intoxicating," if the conviction is to be sustained. The evidence shews and the magistrate has found that the liquid in question is prevented from being used as a beverage by reason of its medication. It could not therefore be classed as a "drink." There remains the question, is it a "drinkable liquid" within the meaning of the Act? It appears to me that this case rests wholly upon the interpretation to be placed on this expression.

The word "drinkable" may mean capable of being drunk. In that case "drinkable liquids" would include all liquids, because a liquid, no matter how nauseous or deadly it may be, is capable of being drunk. The word "drinkable" would, if taken in that sense, be unnecessary, as "liquid" standing alone would be sufficient. But "drinkable" may also mean *suitable for drinking* and be synonymous with *potable*, using the word in the sense in which we speak of water as being drinkable or

undrinkable, that is, fit or unfit for drinking. I have already referred to the meaning placed upon the words "liquor" or "liquors" in the Liquor License Act. They are there defined as meaning and comprehending "all spirituous and malt liquors, and all combinations of liquors and drinks and drinkable liquids, which are intoxicating." The Liquor License Act authorized the issue of licenses to sell the liquors defined in the Act. These liquors were drinkable liquids which were intoxicating and were sold as beverages.

They were drinkable in the sense of being potable. Where, under the provisions of the Liquor License Act, local option was in force, no licenses for the sale of liquors were issued and a local prohibition prevailed within the local option district. No sale of liquors, and therefore no drinks or drinkable liquids which were intoxicating could lawfully be sold within such a district.

The clauses in the Liquor License Act relating to the prohibition of sales of liquor in local option districts very closely resemble, and in some respects are practically identical with, corresponding clauses in the Manitoba Temperance Act, 1916. The object of the local option clauses in the former Act was similar to that of the present Act. The former provided means for introducing local prohibition, the latter makes prohibition general throughout the Province. . . .

There is an intimate connection between the present law and the previous one. In ascertaining the meaning of an ambiguous expression in a statute an earlier Act dealing with the same subject should be referred to. Lord Mansfield thus stated the rule in *Rex v. Loxdale* (1758), 1 Burr. 445 at 447:

Where there are different statutes in *pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other. . . .

It is clear that the expression "drinks and drinkable liquids which are intoxicating," found in the definition of "liquor" or "liquors" in the Liquor License Act, meant intoxicating liquids suitable for drinking, having specially in view such alcoholic beverages as would be supplied to customers in a licensed hotel, or sold in a shop licensed to sell liquors. That being the meaning of the expression in question where it appeared in the Liquor License Act, the same meaning should be given to it in the present Act, which takes the place of the other in dealing with the subject of prohibition.

Going further back into the history of temperance legislation, we find that the Temperance Act, 27-28 Vict. 1864, c. 18, where in force prohibited the sale of any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage part of which is spirituous or otherwise intoxicating.

In the Canada Temperance Act, 41 Vict. 1878, c. 16(D), the prohibition is against the sale of any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage and part of which is spirituous or otherwise intoxicating.

In the Canada Temperance Act, 41 Vict. 1878, c. 16 (D.), the prohibition is against the sale of any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage and part of which is spirituous or otherwise intoxicating.

The Act of 1864 was intended to provide for the repression of abuses resulting from the sale of intoxicating liquors; see preamble.

The Act of 1878 aimed at promoting temperance and providing uniform legislation in all Provinces respecting the traffic in intoxicating liquors.

The intention of the Manitoba Temperance Act is to suppress the liquor traffic in that province by prohibiting provincial transactions in liquor; see preamble. It seems clear that all this legislation was aimed at preventing the excessive use of alcoholic liquors as beverages.

In the Alberta Liquor Act, Alta. stats., 1916, c. 4, the interpretation clause defining the meaning of the expression "liquor" or "liquors" was originally exactly the same as sub-s. (e) of s. 2 of the Manitoba Temperance Act. It was held by the Appellate Division of the Supreme Court (Harvey, C. J., dissenting), that the word "liquor" where used in the Act as it stood originally, meant a liquid commonly known as or adapted for reasonable use as a beverage for human consumption. See *Rex v. MacLean* (1918), 40 D.L.R. 443, 29 Can. Cr. Cas. 270.

In *Gleeson v. Hobson* (1907) V.L.R. 148, where the statute defined liquor as "any wine, spirits, ale, beer, porter, cider, perry or other spirituous or fermented liquor of an intoxicating nature," it was held that liquor meant a liquid commonly known and adapted as a drink or beverage for human consumption.

If this Court were to decide that "liquors" as defined in the Act includes all liquids capable of being drunk which contain over 2½% of alcohol, it would make illegal the sale, not only of patent medicines, but of well known specifics, liniments, tinctures, essences, extracts, perfumes, condiments, etc. If that interpretation were applied no licensed druggist could sell, except under a doctor's certificate, any patent medicine containing more than 2½% of alcohol, which would comprise virtually all patent medicines. No licensed retail druggist could sell to his ordinary customers any perfume in liquid form or any flavouring extract without danger of incurring the heavy penalties imposed by the Act.

In other Provinces power has been given to pass orders-in-council regulating and permitting the sale of liquids containing alcohol. I have not been able to find any such power in the Manitoba Temperance Act, 1916.

In Saskatchewan, flavouring extracts were thoughtfully excepted from the operation of the Act. In that Province a licensed retail druggist, or, perhaps even a grocer, may sell a phial of vanilla or peppermint without rendering himself liable to a fine of \$200 or imprisonment in default of immediate payment.

In the Encyc. Brittanica, 11th ed., under the heading "Alcohol" (S.S. Industrial Alcohol), I find the following passages:

The great importance of alcohol in the arts has necessitated the introduction of a duty-free product which is suitable for most industrial purposes, and at the same time is perfectly unfit for beverages or internal application.

(S. S. methylated spirit.) For retail purposes the "ordinary" methylated spirit is mixed with .357% of mineral naphtha, which has the effect of rendering it quite undrinkable.

I cannot believe that the Legislature intended to propound the paradox that a liquid which has been made *quite undrinkable* becomes a drinkable liquid for the purposes of temperance legislation.

I think the prosecution has failed to prove that the patent medicine in question was a "liquor" within the meaning of the Manitoba Temperance Act. I think the conviction should be quashed and that the fine and costs, if already paid, should be returned to the accused.

NOTE

See commentary on the principal case in 33 Harv.L.Rev. 615 (1920).

(2) THE COMMON LAW

PERRY v. STRAWBRIDGE

Supreme Court of Missouri, 1908.
209 Mo. 621, 108 S.W. 641, 16 L.R.A., N.S., 244,
123 Am.St.Rep. 510, 14 Ann.Cas. 92.

GRAVES, J. (after stating the facts as above). This is an exceedingly interesting case. The question for determination, bluntly stated, is, can a husband who murders his wife inherit the one-half part of her estate under section 2938, Rev.St.1899 [Ann.St.1906, p. 1694]? To this state it is a new question, and, with few exceptions, a new one in all the states. But few courts of last resort have been called upon to pass upon the question as to what effect the criminal act of a prospective legal heir will have upon his or her rights under positive statutes governing descents and distributions. Of those which have passed upon it, we frankly confess that the holdings of a majority thereof are against the views which we entertain and will hereafter express. We are not satisfied with the reasoning of those cases, and have been unable to reach the conclusion that a mere prospective legal heir, or devisee in a will, can make certain that which was uncertain, by his own felonious act, in the coldblooded murder of the party from whom he or she expects to inherit. We do not believe that these courts have fully applied and used the canons of statutory construction, which we have the right to use and ought to use to avoid a result so repugnant to common right and common decency. . . .

The statute we are called upon to construe reads: "When a wife shall die without any child or other descendants in being capable of inheriting, her widower shall be entitled to one-half of the real and personal estate belonging to the wife at the time of her death, absolutely, subject to the payment of the wife's debts." . . .

The section of our statute, Rev.St.1899, § 4151 [Ann.St.1906, p. 2250], which adopted the common law in Missouri, was first enacted January 18, 1816. . . .

When we took unto ourselves the common law, as we did in 1816, and in later reiterations of that statute, we took the body of all the common law, which could be made applicable under our Constitutions, state and federal, and such is the law of the state except where repealed, changed, or modified by statute.

In the case of *Box v. Lanier*, 112 Tenn., loc. cit. 409, 79 S.W. 1045, 64 L.R.A. 458, the Supreme Court of Tennessee said: "It has been well said that there are certain general and fundamental maxims of the common law which control laws as well as contracts. Among these are: 'No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are adopted by public policy, and have their foundation in universal law administered in all civilized countries.' These maxims embodied in the common law, and constituting an essential part of its warp and woof, are found announced both in text-books and in reported cases. Without their recognition and enforcement by the courts, their judgments would excite the indignation of all right-thinking people. The first of these maxims is applied in order to prevent one from taking the benefit of his own fraud. Why should not the last be enforced so as to forbid a party receiving the fruits of his own crime?"

And Earl, J., for the New York court of last resort (*Riggs et al. v. Palmer et al.*, 115 N.Y., loc. cit. 511, 22 N.E. 190, 5 L.R.A. 340, 12 Am.St.Rep. 819), said: "Besides, all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes."

Farther on in the same opinion, he says: "These maxims, without any statute giving them force or operation, frequently control the effect and nullify the language of wills. A will procured by fraud and deception, like any other instrument, may be decreed void and set aside, and so a particular portion of a will may be excluded from probate or held inoperative if induced by the fraud or undue influence of the person in whose favor it is. (*Allen v. M'Pherson*, 1 H.L. Cas. 191; *Harrison's Appeal*, 48 Conn. 202.) So a will may contain

provisions which are immoral, irreligious, or against public policy, and they will be held void. Here there was no certainty that this murderer would survive the testator, or that the testator would not change his will, and there was no certainty that he would not get this property if nature was allowed to take its course. He, therefore, murdered the testator expressly to vest himself with an estate. Under such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime? The will spoke and became operative at the death of the testator. He caused that death, and thus by his crime made it speak and have operation. Shall it speak and operate in his favor? If he had met the testator and taken his property by force, he would have had no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house and by force compelled him, or by fraud or undue influence had induced him, to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative, it seems to me, would be a reproach to the jurisprudence of our state, and an offense against public policy. Under the civil law evolved from the general principles of natural law and justice by many generations of jurisconsults, philosophers, and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered. (Domat. part 2, book 1, tit. 1, par. 3; Code Napoleon, par. 727; Mackeldy's Roman Law, 530, 550.) In the Civil Code of Lower Canada the provisions on the subject in the Code Napoleon have been substantially copied. But so far as I can find, in no country where the common law prevails had it been deemed important to enact a law to provide for such a case. Our revisers and lawmakers were familiar with the civil law, and they did not deem it important to incorporate into our statutes its provisions upon this subject. This is not a *casus omisus*. It was evidently supposed that the maxims of the common law were sufficient to regulate such a case, and that a specific enactment for that purpose was not needed."

These maxims of the common law are expressly made a part of our laws by the statute of this state, first adopted in 1816, as we have hereinabove indicated. They are a part of the law of the state by force of section 4151, Rev.St.1899, unless they have been repealed, changed, modified, or wiped out by statute law. Have we by statute either expressly or impliedly changed or modified the maxims discussed in the Tennessee and New York cases, *supra*? Has the common law in this respect been repealed, changed, or modified? We think not. If not, they are a part of our law. If not, then this statute must be read in connection therewith, and when so read the father of appellees acquired no interest in the estate in controversy, and appellees have none. "Statutes in derogation of the common law are to be strictly construed, unless as in some states there is a statutory provision to the contrary." 8 Cyc. 376, and cases cited.

The common-law rule is tersely stated in section 665 of Wharton on Homicide (3d Ed.) thus: "To permit a person who commits a murder, or any person claiming under him, to benefit by his criminal act, would be contrary to public policy. And no devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself. And, in applying this rule, no distinction can be made between a death caused by murder and one caused by manslaughter. Nor does the common-law right of succession by descent operate in favor of one who willfully takes the life of his ancestor for the purpose of succeeding to his property rights. And the common-law right of a man to succeed to the property of his wife upon her death does not operate in favor of one who murders his wife. And the rule that the common-law doctrine of succession to property does not operate in favor of one who willfully takes the life of his ancestor should apply against any person claiming through or under the slayer. Nor does a rule of law that common-law right of succession to property does not operate in favor of one who willfully takes the life of his ancestor contravene a constitutional provision that a conviction of crime shall not work a forfeiture of the estate."

To our mind our statutes of descents and distributions are so largely expressive of the common law that we must consider these maxims and the whole body of the applicable common-law doctrines; that we must read them together as parts and parcels of the same system, and when so read there can be but one answer to the query suggested by the facts of this case.

For these considerations alone, we think this case should be reversed, . . . i. e., that our statutes of descents and distributions and the live parts of the common law constitute one system of laws in this state upon that subject, and the statutory law must be construed with reference to that live portion of the common law . . .

B. Incomplete Expression: the Casus Omissus

STATE v. PARTLOW

Supreme Court of North Carolina, 1884. 91 N.C. 550.

MERRIMON, J. The act of 1881, ch. 234, prohibits the sale of spirituous liquors within designated distances from many churches and other places named therein. So much of it as is material to this case provides, "that the sale of spirituous liquors shall be prohibited within three miles of . . . Mount Zion church in Gaston county."

It appeared on the trial that there were two churches bearing the name "Mt. Zion" in Gaston county, and there is nothing in the statute indicating to which of them it applies.

It is plainly the duty of the court to so construe a statute, ambiguous in its meaning, as to give effect to the legislative intent, if this be

practicable. Its meaning in respect to what it has reference and the objects it embraces, as well as in other respects, is to be ascertained by appropriate means and *indicia*, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means. But the meaning must be ascertained from the statute itself, and the means and signs to which, as appears upon its face, it has reference. It cannot be proved by a member of the legislature or other person, whether interested in its enactment or not. A statute is an act of the legislature as an organized body. It expresses the collective will of that body, and no single member of it, or all the members as individuals, can be heard to say what the meaning of the statute is. It must speak for and be construed by itself, by the means and signs indicated above. Otherwise, each individual might attribute to it a different meaning, and thus the legislative will and meaning be lost sight of. Whatever may be the views and purposes of those who procure the enactment of a statute, the legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent. *State v. Boon*, 1 (N.C.) *Taylor's Rep.*, 103; *Drake v. Drake*, 4 Dev., 110; *Adams v. Turrentine*, 8 Ired., 147; *State v. Melton*, 44 (N.C.) *Busb.*, 49; *Blue v. McDuffie*, 1b., 131; *Potter's Dwarries on Statutes*, 179, et seq.

But a statute must be capable of construction and interpretation; otherwise it will be inoperative and void. The court must use every authorized means to ascertain and give it an intelligible meaning; but if after such effort it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to supply, to make one. The court may not allow "conjectural interpretation to usurp the place of judicial exposition." There must be a competent and efficient expression of the legislative will. In *Drake v. Drake*, *supra*, Chief Justice Ruffin said: "Whether a statute be a public or private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible."

When the statute intends to refer to and embrace within its provisions one or more of a multitude of things of the same kind, or one or more persons of many of the same name, it must do so in some way or manner, in terms, or by reasonable implication, or appropriate descriptive words, to designate what things or persons are intended by it. Else, how can the court or a ministerial officer decide what things or persons are meant? A member of the legislature might say one thing or person was meant; another might say another thing or person was meant; a third might say yet another thing or person was meant; and thus the legislative will might entirely fail. The statute must speak. The legislative expression of its purpose . . .

prevail; and if this does not appear with such a degree of certainty as that the court can learn what it is, the statute cannot operate.

Now the clause of the statute before us simply refers to "Mount Zion church in Gaston county," and there are two churches of that name in that county. There is nothing in the statute that in the remotest degree indicates to which of the two it refers. There are no means or signs of any kind appearing in it, in terms, by implication, by reference, or by any possible construction, that go to point to one of the two churches any more than to the other. It must, therefore, be as inoperative as if there was no church, or fifty churches of the same name in that county.

The testimony of the witness, who was a senator at the time the statute was enacted, was wholly incompetent for the reasons already stated.

We are constrained to declare that the clause of the statute under consideration is, because of its ambiguity, inoperative and void.

There is error, for which the judgment of the superior court must be reversed, and further proceedings had according to law. Let this be certified.

Error.

Reversed.

STATE ex rel. HUGHES v. REUSSWIG

Supreme Court of Minnesota, 1910. 110 Minn. 473, 126 N.W. 279.

JAGGARD, J. This is an appeal from an order sustaining a demurrer to the answer of respondent and appellant, who will hereafter be referred to as defendant, in quo warranto proceedings initiated by relator and appellee, who will hereafter be referred to as plaintiff. The plaintiff alleged that he had been elected as chairman of common school district No. 1 in Itasca county at an adjourned annual meeting held on or about August 5, 1908, that he thereafter qualified for said office, and that respondent refused to recognize the rights of relator and unlawfully withholds said office from him. In his answer defendant alleged that said common school district contains more than ten townships, and that he was elected as said chairman at a "general biennial state election" held on November 6, 1906, that he thereafter qualified as such officer, that he now claims said office by virtue thereof, and that certain minor irregularities in the election of relator by the annual school meeting also occurred. It is not alleged that there was any fraud or misconduct in the election of relator at the annual school meeting.

The merits of the controversy go to section 1311, Rev.Laws 1905, under which respondent claims, and which attempts to provide for an election in school districts containing ten or more townships at the general state election. Relator attacked this section on the ground, among others, that it was so inadequate and incomplete

that it could not be enforced. Section 1311 reads as follows: "In all common school districts embracing ten or more townships, the trustees shall be elected biennially at the general state election, two trustees at every such election; the term of office of one to commence August 1 in the year following his election, and that of the other August 1 in the second year following his election; the time of the commencement of the term of each to be indicated on the ballot. The vote shall be returned and canvassed, and the persons elected notified, in the same manner as in the election of county officers. But a separate ballot box shall be used, and the voters need not register." If that section is enforceable, then the defendant elected under it is entitled to the office; if it is not, then the plaintiff elected at the adjourned annual meeting (see section 1305), which had the power to "elect by ballot" officers of the district (subdivision 3, § 1308), is entitled to the office.

1. The relevant general principles of construction are clear. On the one hand, the court will not allow judicial interpretation to usurp the place of legislative enactment. A statute is not valid unless there be a competent and official expression of legislative will. [Citing cases.]

On the other hand, as Ryan, C. J., said in *Atty. Gen. v. Eau Claire*, 37 Wis. 438: "We owe great deference to the legislative authority. It is our duty to give effect to all its enactments, according to its intention, as far as we have constitutional right and power; and to that end it behooves us, as far as we are able, to place such a construction on statutes as will reconcile them to the Constitution, and to give them effective operation, under the Constitution, according to the intention with which they are passed. It would be palpable violation of judicial duty and propriety to seek in a statute a construction in conflict with the Constitution or with the object of its enactment, or to admit such a construction when the statute is fairly susceptible of another in accord with the Constitution and the legislative intention." . . .

This court has repeatedly announced this doctrine. It has held statutes void only when clearly necessary, and then generally because of their violation of some substantial constitutional requirement. Every reasonable effort has been made to so interpret an enactment as to hold it enforceable and to effectuate the legislative intent. The resulting rule is clearly formulated by Mr. Sutherland: "It is the bounden duty of courts to endeavor by every rule of construction to ascertain the meaning of, and to give full force and effect to, every enactment of the General Assembly not obnoxious to constitutional provisions. But if, after exhausting every rule of construction, no sensible meaning can be given to the statute, or if it is so incomplete that it cannot be carried into effect, it must be inoperative and void." *Stat.Cons.* pp. 140, 141.

2. It remains to apply this principle to the facts in this case. It is evident that the statute in itself is incomplete and inartistic. It is a good illustration of legislative crudity and imperfection. It does

not at all follow, however, that it is absolutely void. Plaintiff has urged before this court five respects in which "it gives no sufficient means whereby this act may be enforced." We will consider them successively, but with some change in their order.

(a) "Section 1311 makes no provision for nominating candidates." It is evident that the act must be construed in connection with the election law. This is in logical pursuance of the general requirement that statutes must be interpreted as a whole. Portions of the election law which can reasonably be incorporated into section 1311 are a necessary part of it. The only question is whether that law, construed with section 1311, is enforceable. So far as the provisions for nominating candidates is concerned, we think the result of the statute read as a whole is adequate. A number of provisions of that law may supply the deficiencies in section 1311. For example, section 213 provides for nomination by voters by means of certificates of nomination. We are at a loss to see why this section should not be adequate for nominating candidates for the office of trustee of the school district.

(b) "Section 1311 provides that the term of one trustee shall commence August 1st following the election, and the term of the other a year later. It makes no provision for designating which two trustees shall be so voted for. It does not designate which shall be chairman, treasurer, or clerk, or what terms shall be assigned to those officers. . . ." It is an obviously reasonable construction that, when candidates are nominated, the terms and office should be designated. If there is a failure in this respect, then the officers holding over would occupy the term until other provision be made for filling it.

(c) "How are the names of candidates placed on the ballot? Who provides the ballot boxes and other election supplies? Who names the judges of election and clerks? Who establishes precincts and polling places? These and many other vital questions at once suggest themselves." The general election fully supplies these deficiencies. See section 1311.

(d) "Section 1311 makes no provisions for the officers of newly organized districts containing ten or more townships. Nor is it aided by section 1313. This, however, need not be urged, in view of the otherwise unmistakably defective character of the act." It is plain that this criticism would merely limit the operation of section 1311, and leave the trustees of such newly organized districts to be elected otherwise than under section 1311.

(e) "Section 1311 provides for the election of two trustees biennially at the general state election. It makes no provision for the third trustee in the event of a first election in a common school district at the general state election under section 1311." We are at a loss to see why a law requiring two trustees for a certain time should not be as valid as a law requiring three trustees. It might be that the court would hold that the elected trustee had a right to fill the

vacancy. Without doubt courts would prove adequate to determine this question, if the proper occasion should arise. The controversy is, however, academical in view of the change in the law introduced by chapters 187 and 238, Laws 1909.

It follows that section 1311 was valid, and the demurrer improperly sustained.

Reversed.

PEOPLE v. PATTEN

Supreme Court of Illinois, 1930. 338 Ill. 385, 170 N.E. 280.

HEARD, J. Plaintiffs in error, James Patten, Bob Kurfirst, Paul A. Fischer, Frank Spinuzza, and Lloyd Fravel, were each separately charged in the municipal court of Chicago, by information, with operating a motor vehicle on the public highway in the city of Chicago without first procuring a license for the same, in violation of section 9 of the Motor Vehicle Act (Smith's Stat. 1927, p. 2388, c. 121, § 209). Each pleaded not guilty and waived trial by jury, and the cases were consolidated for trial. On a hearing before the court each defendant was found guilty and sentenced to pay a fine of \$10 and also the costs, and, in default of payment, stand committed to the house of correction until the fine and costs shall be worked out at the rate of \$1.50 a day or until paid. Upon writs of error from the Appellate Court for the First District, the judgments of the municipal court were severally affirmed. Writs of error were severally sued out of this court by plaintiffs in error, and the causes are here consolidated for hearing.

The question involved here is whether, upon a proper construction of section 9 of the act as it existed at the commencement of these prosecutions, a license fee is required for the use of a semitrailer on public highways.

By section 1 of the Act (section 201), the term "motor vehicle" includes "trailers, or semi-trailers pulled or towed by a motor vehicle." Section 2 (section 202) divides motor vehicles into two divisions, the second of which is "those vehicles which are designed and used for pulling or carrying freight." Section 3 (section 203) fixes the maximum gross weight to be permitted on the road surface through the axle of any vehicle and the number of pounds per inch of width of tire under one wheel, and paragraph 5 of said section provides that, "where trailers are used the length of any vehicle, or vehicles, combined with their trailers, shall not exceed 65 feet." Section 5 (section 205) provides that "all motor vehicles and all trailers or other vehicles in tow thereof, or thereunto attached, operating upon the improved public highways, shall have tires of rubber or some material of equal resiliency," and that defective tires shall not be permitted to be used if so worn or otherwise damaged as to cause undue vibration or undue concentration of the wheel load on the surface of the road.

It is the contention of plaintiffs in error that a license for semi-trailers is not provided for, required, or authorized under section 9 of the Motor Vehicle Act (Smith-Hurd Rev.St.1927, c. 121, § 209), for no license fee is fixed as to semitrailers. Section 9 in full is as follows:

"§ 9. All vehicles of the second division as described in section 2 of this Act, which are designed or equipped or used for carrying freight, goods, wares or merchandise, and all vehicles of said first division which have been remodeled and are being used for such purposes, and all vehicles of said second division which are used for carrying more than seven persons shall pay to the Secretary of State for each calendar year from and after January 1, 1924, license fees for the use of the public highways of this State at the following rates, to wit:

"(a) Vehicles having a gross weight of five thousand (5,000) pounds and less, including the weight of the vehicle and maximum load, \$12.00.

"(b) Vehicles having a gross weight of more than five thousand (5,000) pounds and not more than twelve thousand (12,000) pounds, including the weight of the vehicle and maximum load, \$22.50.

"(c) Vehicles having a gross weight of more than twelve thousand (12,000) pounds and not more than sixteen thousand (16,000) pounds, including the weight of the vehicle and maximum load, \$75.00.

"(d) Vehicles having a gross weight of more than sixteen thousand (16,000) pounds, and not more than twenty thousand (20,000) pounds, including the weight of the vehicle and maximum load, \$100.00.

"(e) Vehicles having a gross weight of over twenty thousand (20,000) pounds, including weight of vehicle and maximum load, \$150.00.

"(f) Tractors, traction engines or other similar vehicles used for hauling purposes, except as hereinafter provided, shall pay the same fees according to their weight as hereinbefore required in this section of other vehicles. All trailers and semi-trailers used with a motor vehicle shall pay to the Secretary of State for each calendar year from and after January 1st, 1924, license fees for the use of the public highways of this State at the following rates, to wit:

"(a) Trailers having a gross weight of 2,000 pounds, and less, including the weight of the trailer and maximum load, \$6.00.

"(b) Trailers having a gross weight of more than 2,000 pounds, and not more than 10,000 pounds, \$25.00.

"(c) Trailers having a gross weight of more than 10,000 pounds, including the weight of the trailer and maximum load, \$50.00."

The facts are not in controversy. All were practically stipulated. Each plaintiff in error operated a motor vehicle called a "semi-trailer" on the public highways, as charged, without being licensed so to do under the provisions of the Motor Vehicle Act, and without having applied for and obtained license to operate and without paying a license fee.

The undisputed evidence shows that there is a material difference between a trailer and a semitrailer. While both are classed as motor vehicles by the Motor Vehicle Act, this difference is recognized by the Legislature in the portions of the act above quoted. A trailer, as shown by the evidence, is a unit in itself, has four wheels, and can be propelled by any power, while a semitrailer is two-wheeled and is absolutely useless unless it is attached to a tractor truck. The frame of the semitrailer overlaps the frame of the truck, on the top of which frame is a horizontal turntable or fifth wheel, to which the front end of the semitrailer attaches, forming a six-wheeled unit. A semitrailer carries a much less load than a trailer, and its price is much less.

Defendant in error contends that all general provisions, terms, phrases, and expressions in a statute must be liberally construed in order that the true intent and meaning of the Legislature may be fully carried out, and cites many cases in support of this rule of construction, among them *People v. Fox*, 269 Ill. 300, 110 N.E. 26, 29, where this court said: "The rule is elementary that the primary object of construing a statute is to ascertain and give effect to the true intent and meaning of the Legislature in enacting it; that it is 'the intention of the lawmakers that makes the law.' *Hoyne v. Danisch*, 264 Ill. 467, 106 N.E. 341. For the purpose of ascertaining and giving effect to this intention of the lawmakers, it is proper to consider the occasion and necessity for the law. . . . Where the spirit and intention of the Legislature in adopting the act are clearly expressed, and its object and purposes are clearly set forth, the courts are not confined to the literal meaning of the words used, when to do so will defeat the obvious legislative intention and result in absurd consequences not contemplated or intended by it. In such cases the literal language of the statute may be departed from, and words may be changed, altered, modified, and supplied, or omitted entirely, if necessary to obviate any repugnancy or inconsistency between the language used and the intention of the Legislature as gathered from a consideration of the whole act and the previous condition of legislation upon that subject." This is undoubtedly the correct rule of construction, subject to the proviso of section 1 of chapter 131 of our statutes, "unless such construction would be inconsistent with the manifest intent of the Legislature or repugnant to the context of the same statute." The intention of the Legislature is manifested by, and must be ascertained from, what it has said in the act construed, and not from something the court might surmise the Legislature might have intended to say but which it for some reason failed to say.

From a perusal of the Motor Vehicle Act as it then existed, it is evident that the Legislature by that act intended to classify trailers and semitrailers as different motor vehicles, that by section 9 its intention is manifest that semitrailers should pay a license fee, and that by that section it intended to fix a license fee for semitrailers. It is, however, just as manifest that by that section the Legislature by some mistake or oversight failed to fix the amount of such fee, and that it

used therein no language which enables us to determine what amount it intended to fix as such license fee. This section was amended by the Legislature in 1929 (Laws 1929, p. 655, § 1), so as to fix license fees for semitrailers.

A law must be complete in all its terms and conditions when it leaves the Legislature, so that every one may know, by reading the law, what his rights are and how it will operate when put into execution. *People v. Board of Election Com'rs*, 221 Ill. 9, 77 N.E. 321, 5 Ann.Cas. 562. If the Legislature has accidentally or inadvertently failed to express its intention to declare that certain conduct shall constitute a crime or misdemeanor, the court is powerless to correct the error or supply the omission, no matter how plainly the conduct in question is within the mischief intended to be remedied by the statute. *State v. Trapp*, 140 La. 425, 73 So. 255; *State v. Palanque*, 133 La. 36, 62 So. 224. An act cannot be executed where the language appears on its face to have a meaning but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate. While it is the duty of the courts to ascertain the meaning of and give effect to every constitutional enactment of the General Assembly, they cannot supply omissions or remedy defects in matters committed to the Legislature. *People v. Sweitzer*, 266 Ill. 459, 107 N.E. 902, Ann.Cas.1916B, 586. The Legislature having in the act in question failed to fix a license fee for the operation of semitrailers, plaintiffs in error cannot rightfully be convicted of a misdemeanor in failing to pay a license fee therefor.

The several judgments of the Appellate Court and the municipal court of Chicago here reviewed are reversed.

Judgments reversed.

HAWORTH v. CHAPMAN

Supreme Court of Florida, 1934. 113 Fla. 501, 152 So. 663.

LOVE, CIRCUIT JUDGE. In response to a writ of habeas corpus issued by this court, the return shows the petitioner is held in custody under a conviction, for violating sections 1-3, chapter 8466, Acts of 1921, sections 7308-7310, Comp.Gen.Laws, and a judgment and sentence to "pay costs of prosecution and be imprisoned for seven years in the state penitentiary from the date of your delivery to the officers thereof, upon failure to pay costs an additional 6 months' sentence is imposed."

The statute under which the petitioner was convicted and sentenced is as follows:

"Chapter 8466—(No. 71).

"An Act Relating to Fraud or the Attempt to Defraud by Assuming to Have or be Able to Obtain Certain Information Whether the Same Exists or Not; To Prescribe Certain Evidence, and to Provide Penalties for the Violation of This Act.

"Be It Enacted by the Legislature of the State of Florida:

"Section 1. That on and after the passage and approval of this Act it shall be unlawful for any person or persons to defraud or attempt to defraud any individual or individuals out of any thing of value, by assuming to have or be able to obtain any secret, advance or inside information regarding, any person, transaction, act or thing, whether such person, transaction, act or thing exists or not.

"Sec. 2. Any person or persons guilty of violating the provisions of Section 1 of this Act shall be deemed guilty of a felony and, upon conviction thereof, shall be fined not more than Ten Thousand (\$10,000.00) Dollars and ten years in the State penitentiary.

"Sec. 3. All paraphernalia of whatsoever kind in possession of and used in defrauding or attempting to defraud as specified in Section 1 of this Act shall be held and accepted by any Court of Jurisdiction in this State as prima facie evidence of guilt.

"Sec. 4. This Act shall take effect upon its becoming a law. Approved June 14, 1921."

It is contended on behalf of the petitioner that the penalty provided in section 2 of the act for its violation, viz. that the offender "shall be fined not more than Ten Thousand (\$10,000.00) Dollars and ten years in the State penitentiary," is so indefinite and uncertain as to render the act void, in that, considered with its context, such quoted part of the act does not authorize the imposition of a fine as the sole penalty for its violation, and further, in that it does not authorize by express words, imprisonment in the state penitentiary, it fails to constitute its violation a felony; and further that said quoted part of section 2 is such an inseparable integral part of the interdependent provisions of the act that the quoted provision, being uncertain and indefinite, is in whole or in part unoperative, if it does not render the entire act ineffectual to authorize the imposition of any sentence either of fine or imprisonment.

. . . the fundamental principle in the judicial interpretation of a statute is that the object is to determine what intention is conveyed by the language used therein. The rule is well and aptly stated in *Orvil Tp. v. Borough of Woodcliff*, 64 N.J.Law, 286, 45 A. 686, 687, as follows: "When the intention is expressed, the question is one of verbal construction only; but, if the language be not express, and some intention must necessarily be imputed, then it must be determined by inference grounded on legal principles, one of which is that the legislature must have entertained some intention, and the interpreter must determine what it was, unless it be that the statute lacks the formal requisite needed in order to give it the effect of a law."

the true sense of the form of words which is used which is to be discovered by the interpretation or construction of the statute, taking all its parts into consideration, and, if fairly possible, giving them all effect. Speaking more concretely, when the intention can be ascertained with reasonable certainty, words may be altered or supplied in the statute so as to give it effect, and to avoid any repugnancy to or inconsistency with such intention."

Section 7105 (5006) provides that: "Any crime punishable by death, or imprisonment in the State Prison, is a felony, and no other crime shall be so considered. Every other offense is a misdemeanor."

In the Constitution, section 25, art. 16, appears the following provision: "The term felony, whenever it may occur in this Constitution or in the laws of the State, shall be construed to mean any criminal offense punishable with death or imprisonment in the State penitentiary."

If, therefore, the absence of the words "imprisonment for" from the above-quoted provision of the act restricts the penalty for its violation to a fine, the offense denounced is a misdemeanor, though in the every words of the penalty clause it is termed a felony, thus producing an obvious contradiction if not an absurd conclusion. There is a strong presumption against absurdity in a statutory provision; it being unreasonable to suppose that the Legislature intended their own stultification, so, when the language used is susceptible of two senses, the sense will be adopted which will not lead to absurd consequences. Considering then the act as a whole and all of its language, it cannot be successfully contended that the intent and purpose of the Legislature was to punish the violation of its provisions by a fine only, thus making the offense a misdemeanor, contrary to the expressed intent of the act.

The only remaining alternatives are either to hold the entire statute invalid for the indefiniteness of its penal provision or to give it life and effect by ascertaining and enforcing the intent and purpose of the legislature in enacting it, if this can be done with reasonable certainty from a consideration of its language and the purpose to be accomplished within constitutional limitations.

To hold that the statute is invalid requires us to decide that its penal clause is so uncertain that the court is unable to determine what the Legislature intended or is so incomplete that it can not be executed.

It is a familiar rule of statutory construction that in the interpretation of a statute that construction of the language employed is to be adopted, if possible, which will sustain the validity of a statute, in accordance with the maxim "*ut res magis valeat quam pereat*." Under this rule, the courts will correct evident mistakes and supply evident omissions, to prevent a law from becoming a nullity.

If the constitutional definition of a felony, section 25, art. 16, be substituted in section 2 of the act instead of the word "felony" appearing therein, the section would read as follows: Any person or persons guilty of violating the provisions of section 1 of this act shall

be deemed guilty of a "criminal offence punishable with death or imprisonment in the State penitentiary," and upon conviction thereof shall be fined not more than \$10,000 and ten years in the state penitentiary.

The express language used in this section, if sufficient to constitute the offense a felony, limits the punishment of its violation to imprisonment in the state penitentiary as distinguished from the punishment of death. Therefore, from the very words used, it seems obvious that the intent of the Legislature, in denominating the offense as a felony, was to prescribe the punishment for its violation by imprisonment in the state penitentiary in addition to a fine.

To supply the words "imprisonment for" before the words "ten years in the State penitentiary" is merely to supply words obviously intended to be used but inadvertently or accidentally omitted in transcribing the bill in the Legislature, and for this there is ample precedent.

The intention of the Legislature being apparent and easily gathered from the context of the act, the question then arises, What is the duty of the court in the premises?

It has been stated by an eminent law writer that "legislative enactments are not more than any other writings to be defeated on account of mistakes, errors or omissions, provided the intention of the Legislature can be gathered from the whole Statute. When one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied. This is but making the strict letter of the statute yield to the obvious intent." 2 Sutherland Stat.Const. § 410.

In 59 C. J. 992, in the discussion of the construction and operation of statutes, citing a large number of cases, it is stated: "Where it appears from the context that certain words have been inadvertently omitted from a statute, the Court may supply such words as are necessary to complete the sense and to express the legislative intent, but it cannot supply words purposely omitted and should supply an omission only when the omission is palpable and the omitted word plainly indicated by the context; and words will not be added except when necessary to make the statute conform to the obvious intent of the legislature, or to prevent the Act from being absurd; and where the legislative intent cannot be accurately determined because of the omission, the Court cannot add words to express what might or might not be intended."

See, also, *Kennedy v. Gibson*, 8 Wall. 498, 19 L.Ed. 476, where the word "by" was supplied in an act providing that "all suits against" certain corporations may be brought in proper courts, thus enabling suits to be brought by such corporations, the court, in supplying the word "by," saying: "The omission was doubtless accidental."

From an inspection of section 2 of the act under consideration, the omission of the words "imprisonment for" was doubtless accidental, and supplying them merely gives effect to that intent which is as-

certainable with reasonable certainty from the express words of the act, and thereby obviates repugnancy and inconsistency.

To go further and add the words "not more than" before the words "ten years in the State penitentiary" enters the realm of probability, and not that of reasonable certainty based upon the express language of the act itself; but, as stated in *U. S. v. Wiltberger*, 5 Wheat. 76, 105, 5 L.Ed. 37, "Probability is not a guide which a court, in construing a penal statute, can safely take," for, in construing a statute, the intention of the Legislature is to be ascertained from the words employed to express such intent, and in the stated act there are no words which authorize the addition of the words "not more than."

The rule that penal laws are to be construed strictly is as old perhaps as the construction of laws itself, yet it is to be applied in connection with the modification of this ancient maxim that penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the Legislature. *U. S. v. Wiltberger*, supra.

The petitioner should be remanded.

C. Constitutional Limitations on Indefinite Expression

(i) IN SELF-EXECUTING STATUTES

WILLIAM H. TAFT, THE LEGISLATURE AND THE EXECUTION OF THE LAWS

12 Rep Pa.Bar Assn. 239, 246-247 (1906).

There is probably no branch of legislation in which the practical question of the enforcement of it should be so fully considered as in the framing of much needed criminal laws denouncing new abuses and evil results in the business of the country, induced by the intense spirit of competition and desire to monopolize and made possible by highly developed organization. In no class of cases should offenses attempted to be denounced be described with more clearness and exactness because the line between what is to remain lawful, and what is intended to be declared unlawful, must be narrow and must depend largely on motive and result, rather than on the intrinsic nature of the act itself. But it is just exactly these cases in which the Legislature thunders in the index, denounces in general terms not so much the means taken or the acts done as the undoubtedly evil result, and leaves it to the executive and the judiciary to work out the meaning of the Legislature, and by judicial legislation to piece out the indefinite, uncertain and unsatisfactory declaration of the law. The reason for this often is that the Legislature itself has a most indefinite idea of the proper method of describing and reaching the unquestioned evil which it wishes to prevent, so that it is unable to use the legal exactness of description proper in a criminal or repressive statute. The Sherman Anti-Trust Act is one which might have been made much more definite, in justice

to the business community, in justice to the executive and to the courts required to enforce it, and a large part of the difficulty which has been experienced in attempted execution of that act is due, not at all to the lack of energy and courage on the part of the executive or courts in enforcing it, but to the indefiniteness of the act and the necessity for mending it or rendering it specific by judicial decision in such a way that it may become of practical use. The first section, against conspiracies in restraint of trade, is perhaps not so difficult to construe, but when it comes to the definition of what an unlawful monopoly is in interstate trade, it is no wonder that even at this late date, there has been no satisfactory judicial decision which can be used as a guide by those charged with the immediate execution of the law.

YU CONG ENG v. TRINIDAD

Supreme Court of the United States, 1926.
271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This case comes here on a writ of certiorari to review a decision of the Supreme Court of the Philippine Islands denying an original petition for prohibition against the enforcement by criminal prosecution of Act No. 1972 of the Philippine Legislature, known as the Chinese Bookkeeping Act, on the ground of its invalidity. The petitioner, Yu Cong Eng, was charged by information in the court of first instance of Manila, with its violation. He was arrested, his books were seized, and the trial was about to proceed, when he and the other petitioner, Co Liam, on their own behalf, and on behalf of all the other Chinese merchants in the Philippines, filed the petition against the fiscal, or prosecuting attorney of Manila, and the collector of internal revenue engaged in the prosecution, and against the judge presiding. . . .

Act No. 2972, the validity of which is attacked, was passed by the Philippine Legislature, and approved February 21, 1921. It reads as follows:

"No. 2972. An act to provide in what languages account books shall be kept, and to establish penalties for its violation.

"Be it enacted by the Senate and House of Representatives of the Philippines in Legislature assembled and by the authority of the same:

"Section 1. It shall be unlawful for any person, company, or partnership or corporation engaged in commerce, industry or any other activity for the purpose of profit in the Philippine Islands, in accordance with existing law, to keep its account books in any language other than English, Spanish or any local dialect.

"Sec. 2. Any person violating the provisions of this act shall, upon conviction, be punished by a fine of not more than ten thousand pesos, or by imprisonment for not more than two years, or both.

"Sec. 3. This act shall take effect on November 1st, nineteen hundred and twenty-one."

This was amended as to its date by a subsequent act and it did not take effect until January 1, 1923. Various efforts were made to repeal the act or amend it, but they were defeated.

The petition, after setting out the prosecution in the court of first instance, and the text of the act, avers that the petitioner Yu Cong Eng is a Chinese merchant engaged in the wholesale lumber business in Manila; that he neither reads, writes nor understands the English or Spanish language or any local dialect; that he keeps the books of account of his business in Chinese characters; that by reason of his ignorance of the English and Spanish languages and of all local dialects he is unable to keep his books in any other language than his own; that, even if he should employ a bookkeeper capable of keeping his books in the English or Spanish language, he would have no means of personally revising or ascertaining the contents or correctness of the books thus kept; that the employment of such a bookkeeper, unless he should be a linguist, would entail as a necessary consequence the employment of a translator or interpreter familiar with the Chinese language and the language or dialect in which such books might be kept, in order to enable the petitioner to ascertain by hearsay the contents thereof; that he would be completely at the mercy of such employees, who, if dishonest, might cheat and defraud him of the proceeds of his business, and involve him in criminal or civil liability in its conduct; that under the provisions of the act he is prohibited from even keeping a duplicate set of accounts in his own language, and would, in the event of the enforcement of the law, be compelled to remain in total ignorance of the status of his business; and that the enforcement of the act would drive the petitioner and many other Chinese merchants in the Philippines who do 60 per cent. of the business of the Islands and who are in like circumstance, out of business.

The petition avers that the other petitioner in this case, Co Liam, is a Chinese person and conducts a small general merchandise business in Manila, commonly known in the Philippines as a Chinese tienda; that he carries a stock of goods of about 10,000 pesos, or \$5,000; that his sales taxes amount to from 40 to 60 pesos per quarter; that he neither reads, writes, nor understands the English or Spanish language or any local dialect; that he keeps books of account of his small business in Chinese, the only language known to him, without the assistance of a bookkeeper; that he has been losing money for some time in the operation of his business, but that even in prosperous times his profits could never be sufficient to justify the employment of a Filipino bookkeeper, and that without the opportunity to keep Chinese books, he would be kept completely ignorant of the changing condition of his business, were he compelled to keep his books in English, Spanish, or a local dialect; and that the enforcement of the act would drive him and all the small merchants or tienda keepers in the Islands who are Chinese out of business.

The petitioners aver that the act, if enforced, will deprive the petitioners, and the 12,000 Chinese merchants whom they represent, of their liberty and property without due process of law, and deny them

the equal protection of the laws, in violation of the Philippine Autonomy Act of Congress of August 29, 1916, c. 416, § 3, 39 Stat. 546 (Comp.St. § 3810).

An answer was filed by the fiscal, which is a general denial of the averments of the petition as to the effect of the law. He avers that the law is valid and necessary, and is only the exercise of proper legislative power, because the government of the Philippine Islands depends upon the taxes and imposts which it may collect in order to carry out its functions, and the determination of whether the mercantile operations of the merchants are or are not subject to taxation, as well as the fixing of its amount, cannot and ought not to be left to the mercy of those who are to bear it; that due to the inability of the officials of the internal revenue to revise and check up properly the correctness of the books of account which the Chinese merchants keep in their own language, the public treasury loses every year very large sums.

Evidence was taken on the issues made. A majority of the Supreme Court held that, if the act were construed and enforced literally, it would probably be invalid, but by giving it an interpretation different from the usual meaning of the words employed it could stand. Two of the justices dissented, on the ground that the court had exceeded its powers and by legislation made it a different act.

The majority of the Philippine court in its opinion, after quoting a number of authorities showing the duty of a court in determining whether a law is unconstitutional or not, first to give every intendment possible to its validity, and second to reach a reasonable construction by which it may be preserved, said:

"We come to the last question suggested, a construction of Act No. 2972 which allows the court legally to approve it.

"A literal application of the law would make it unlawful for any Chinese merchant to keep his account books in any language other than English, Spanish, or a local dialect. The petitioners say the law is susceptible of that interpretation. But such interpretation might, and probably would, cause us to hold the law unconstitutional.

"A second interpretation is that the Chinese merchant, while permitted to keep his books of account in Chinese, must also keep another set of books in either English, Spanish, or a native dialect. The respondents claim the law is susceptible of such construction. It occurs to us, however, that this construction might prove as unsatisfactory as the first. Fraud is possible in any language. As approximation to governmental convenience and an approximation to equality in taxation is the most which may be expected.

"A third construction, which is permissible in view of the history of the legislation and the wording of the statute, is that the law only intended to require the keeping of such books as were necessary in order to facilitate governmental inspection for tax purposes. It has not escaped our notice that the law does not specify what books shall be kept. It is stated by competent witnesses that a cash book, a journal, and a ledger are indispensable books of account for an efficient sys-

tem of accounting, and that, in the smaller shops, even simpler entries showing merely the daily records of sales and record of purchases of merchandise would be sufficient. The keeping of records of sales, and possibly further records of purchases, in English, Spanish, or a native dialect, and the filling out of the necessary forms would serve the purpose of the government while not being oppressive. Actually, notations in English, Spanish, or a dialect of all sales in sales books, and of data in other specified forms are insisted upon by the Bureau of Internal Revenue, although as appears from Exhibit 2, it is doubtful if all Chinese merchants have complied with these regulations. The faithful observance of such rules by the Chinese is not far removed from the offer of co-operation oft made for them by the petitioners of the 'translation of the account books' oft mentioned and explained by the respondents.

"The law, in speaking of any person, company, partnership or corporation, makes use of the expression 'its account books.' Does the phrase 'its account books' mean that all the account books of the person, company, partnership or corporation must be kept exclusively in English, Spanish, or any local dialect? The petitioners argue that the law has this meaning. Or does the phrase 'its account books' mean that the persons, company, partnership, or corporation shall keep duplicate sets of account books, one set in Chinese and the other a translation into English, Spanish or any local dialect? Counsel for the respondents urge this construction of the law upon the court. Or does the phrase 'its account books' mean that the person, company, partnership, or corporation must keep such account books as are necessary for taxation purposes? This latter interpretation occurs to us as a reasonable one, and as best safeguarding the rights of the accused."

The court in effect concludes that what the Legislature meant to do was to require the keeping of such account books in English, Spanish, or the Filipino dialects as would be reasonably adapted to the needs of the taxing officers in preventing and detecting evasion of taxes, and that this might be determined from the statutes and regulations then in force. What the court really does is to change the law from one which by its plain terms forbids the Chinese merchants to keep their account books in any language except English, Spanish, or the Filipino dialects, and thus forbids them to keep account books in the Chinese, into a law requiring them to keep certain undefined books in the permitted languages. This is to change a penal prohibitive law to a mandatory law of great indefiniteness, to conform to what the court assumes was, or ought to have been, the purpose of the Legislature, and which in the change would avoid a conflict with constitutional restriction.

It would seem to us, from the history of the legislation and the efforts for its repeal or amendment, that the Philippine Legislature knew the meaning of the words it used, and intended that the act as passed should be prohibitory, and should forbid the Chinese merchants from keeping the account books of their business in Chinese. Had the Legislature intended only what the Supreme Court has con-

strued it to mean, why should it not have amended it accordingly? Apparently the Legislature thought the danger to the revenue was in the secrecy of the Chinese books, and additional books in the permitted languages would not solve the difficulty.

We fully concede that it is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation.

One of the strongest reasons for not making this law a nose of wax, to be changed from that which the plain language imports, is the fact that it is a highly penal statute authorizing sentence of one convicted under it to a fine of not more than 10,000 pesos, or by imprisonment for not more than two years, or both. If we change it to meet the needs suggested by other laws and fiscal regulations and by the supposed general purpose of the legislation, we are creating by construction a vague requirement, and one objectionable in a criminal statute. We are likely thus to trespass on the provision of the Bill of Rights that the accused is entitled to demand the nature and cause of the accusation against him, and to violate the principle that a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law. *Connally v. Construction Co.*, (decided January 4, 1926) 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; *United States v. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045; *International Harvester Co. v. Kentucky*, 234 U.S. 216, 34 S.Ct. 853, 58 L.Ed. 1284; *United States v. Reese*, 92 U.S. 214, 219, 23 L.Ed. 563.

The main objection to the construction given to the act by the court below is that in making the act indefinitely mandatory instead of broadly prohibitory it creates a restriction upon its operation to make it valid that is not in any way suggested by its language. In several cases this court has pointed out that such strained construction, in order to make a law conform to a constitutional limitation, cannot be sustained. In *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 563, the question for decision arose on a demurrer to an indictment against inspectors of municipal election for refusing to receive and count the vote of a colored man. The power of Congress to forbid such an act was confined under the Fifteenth Amendment to a refusal to receive such a vote from a colored man on account of his race, color, or previous condition of servitude, but the section under which the indictment was brought did not specifically confine the offense to a refusal for such a reason or to such discrimination, although in previous sections of the act there was a general purpose disclosed in the act to enforce the Fifteenth Amendment. The demurrer was sustained on the ground that the section was invalid.

Chief Justice Waite, in delivering the opinion of the court, said at page 221:

"We are therefore directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question then to be determined is whether we can introduce words of limitation into a penal statute, so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."

And again the Chief Justice said:

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

The same principle was laid down, and this language approved by this court in the Trade-Mark Cases, 100 U.S. 82, 25 L.Ed. 550, in which, to save the validity of a general statute providing for trade-marks, the court was asked to construe the statute to apply only to trade-marks in interstate commerce. . . .

We hold the law in question to be invalid.

Judgment reversed.

BOSHUIZEN v. THOMPSON & TAYLOR CO. .

Supreme Court of Illinois, 1935. 360 Ill. 160, 195 N.E. 625.

HERRICK, JUSTICE. Gertrude Boshuizen (hereinafter called the plaintiff) brought suit in the superior court of Cook county against the Thompson & Taylor Company (hereinafter called the defendant) to recover damages under the provisions of paragraph (a) of section 15 of the Occupational Diseases Act (Smith-Hurd Ann.St. c. 48, § 87(a) for violation of section 1 of that act (section 73).

The amended complaint in part charged that the defendant is a corporation engaged in Chicago in the business of jobber of teas, coffees, and spices and is a roaster and importer of teas, coffees, and spices, and as an incident to said business the defendant engaged in the business of canning and packing pepper and other spices and preparing the

same for market; that for a period of eleven months immediately prior to May 23, 1934, the plaintiff was in the employ of the defendant for hire, working in the defendant's plant in the canning and packing of pepper and other spices; that she was required in her employment to fill orders by pouring ground pepper and other spices into cans and other containers, to work in dust created by agencies used in the manufacturing process, to come into direct contact with dust created by such agencies, and to be exposed to irritating and injurious dusts; that the work and process carried on by the defendant was likely and liable to produce illness and disease peculiar to the process and work so carried on, and subjected the employees of the defendant, including the plaintiff, to the danger of illness and disease incident to such work and processes to which employees are ordinarily not exposed in other lines of employment, to wit, illness and disease caused by irritating and injurious dusts. The defendant filed a motion to dismiss the plaintiff's amended complaint, alleging, among other grounds, that section 1 of the Occupational Diseases Act violates, with other constitutional provisions, article 3 and section 2 of article 2 of the State Constitution and the Fourteenth Amendment to the Federal Constitution. The trial court found section 1 of the act unconstitutional and entered judgment in favor of the defendant and against the plaintiff for costs. From that judgment the plaintiff has taken an appeal direct to this court.

Section 1 of the Occupational Diseases Act is as follows: "That every employer of labor in this State, engaged in carrying on any work or process which may produce any illness or disease peculiar to the work or process carried on, or which subjects the employees to the danger of illness or disease incident to such work or process, to which employees are not ordinarily exposed in other lines of employment, shall, for the protection of all employees engaged in such work or process, adopt and provide reasonable and approved devices, means or methods for the prevention of such industrial or occupational diseases as are incident to such work or process." Smith-Hurd Ann. St. c. 48, § 73, Cahill's Rev.St. 1933, c. 48, par. 185, p. 1375.

For the purpose of passing upon the construction, validity, or constitutionality of a statute the court may resort to public official documents, public records, both state and national, and may take judicial notice of and consider the history of the legislation and the surrounding facts and circumstances in connection therewith. *Davis v. Farmers' Co-operative Equity Co.*, 262 U.S. 312, 43 S.Ct. 556, 67 L.Ed. 996; 23 Corpus Juris, §§ 2001, 2005. Applying this rule, we find that the Occupational Diseases Act is a specific statute passed in 1911 as a result of the report and recommendation of the Occupational Diseases Commission appointed by the Governor pursuant to a joint resolution adopted by both branches of the General Assembly in 1907 (Laws 1907, p. 586), and continued by a like resolution in 1909 (Laws 1909, p. 488). This type of legislation was a complete stranger to the common law, and section 1 under consideration here has no common-law origin or history. *First Nat. Bank v. Wedron Silica Co.*, 351 Ill. 560,

184 N.E. 897; *Arquin v. Industrial Comm.*, 349 Ill. 220, 181 N.E. 613; *Keeran v. Peoria, Bloomington & Champaign Traction Co.*, 277 Ill. 413, 115 N.E. 636; *Adams v. Acme White Lead & Colors Works*, 182 Mich. 157, 148 N.W. 485; *Pennsylvania Pulverizing Co. v. Butler (C.C.A.)* 61 F.(2d) 311. The section has no generally accepted body of precedents, no established standards of conduct, and no common knowledge or understanding on which it is bottomed. It therefore follows that the constitutionality of section 1 must be decided from an examination of the terms of that section alone. In determining the validity of section 1 we give due weight to the rule that where two divergent, reasonable meanings may be given a statute, the interpretation which supports the validity, rather than the one which strikes it down, is to be approved (*Hunt v. Rosenbaum Grain Corp.*, 355 Ill. 504, 189 N.E. 907; *People v. Anderson*, 355 Ill. 289, 189 N.E. 338; *People v. Dopp*, 343 Ill. 521, 175 N.E. 812), and that the burden of showing the unconstitutionality of the statute rests upon the party assailing its validity.

Section 1 does not include employees engaged in extrahazardous occupations especially dangerous to the health of the employee, but only those employees engaged in nonhazardous industries. . . .

It is contended by the plaintiff that section 1 has been the law for many years and its provisions enforced by judgments of this court; that thereby the court has recognized its validity; that the rule is, where a statute has been recognized as valid, indirectly or directly, in numerous decisions, then the maxim of *stare decisis* should be applied and the statute be declared constitutional. There is merit in this position, but the rule cited is not inflexible. While section 1 has been in force over twenty years, yet it is only within recent years that cases based upon its provisions have reached this court, and there is not a long line of decisions of this court upon the subject. In *People v. Bruner*, 343 Ill. 146, 175 N.E. 400, decided in 1931, there was presented to this court for decision the issue whether the statute originally enacted in 1827, providing that juries in criminal cases should be the judges of the law as well as of the facts, offended the provisions of article 3 and section 5 of article 2 of the State Constitution. That statute had theretofore been before this court in different and varying forms in a very large number of cases, yet the decision in the *Bruner Case* held the act unconstitutional. It was said in the *Bruner Case* that though a statute had been interpreted and in force over a considerable period, yet where its constitutionality on the grounds charged has never been determined the statute is subject to attack on constitutional grounds. The statute granting to a master in chancery the power to grant writs of injunction when no judge authorized to grant such writs was present in the county was in 1923 declared unconstitutional in *Bottom v. City of Edwardsville*, 308 Ill. 68, 139 N.E. 5. That statute had been in force since 1845 and the power purported to be conferred by it had been frequently and commonly exercised. The rule deducible from the authorities is that even though a statute may

be venerable, its old age does not render it immune against constitutional attacks.

Numerous cases are cited by the plaintiff wherein statutes speaking in general terms have been upheld. An examination of those cases will disclose that the employed words in those acts had acquired an intelligible and generally understood meaning at common law or had a definite, special, trade, or technical significance. The distinction between the two classes of statutes is aptly drawn in *People v. Mancuso*, 255 N.Y. 463, 175 N.E. 177, 76 A.L.R. 514. It is there pointed out that there are two types of legislative acts: (1) Those which prescribe a duty in terms sufficiently definite to guide those upon whom the duty is imposed, but such certainty must arise from words used having either a technical or special meaning sufficiently known and understandable to enable compliance therewith or which have acquired an established meaning through common law or established precedents. This class of statutes is valid. (2) Those wherein the statutory duty sought to be imposed is attempted to be defined in novel and unfamiliar terms which have not yet acquired any definiteness or certainty. This type of statutes is unconstitutional. The application of this rule of differentiation will readily harmonize what appears at first glance to be an irreconcilable conflict between the cases cited by the defendant and the plaintiff.

It is well to observe that section 1 does not attempt to state what "devices" the legislative mind contemplated—whether respirators, masks, a certain system of ventilation, or other mechanical devices. Did the Legislature by the words "means and methods" intend to prescribe stated medical examinations, limited hours of labor, construction of a type of building or structure to permit the maximum amount of sunshine and ventilation in the rooms or places where the labor was performed, or other different means or methods? The answer to this interrogatory, if the act is valid, must be found in section 1. To be valid the statute must prescribe a standard so definite, fixed, and understandable as to permit a compliance therewith by one who desires to meet its requirements. The statute need not specify and particularize the exact norm, but it must lay down a guide that has either a definite, fixed meaning at common law or by established and recognized precedents, or a trade, technical, or definite, specific meaning. *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 45 S.Ct. 295, 69 L.Ed. 589; *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1063, 86 A.L.R. 403. While the word "reasonable" has a fixed, definite meaning at common law as applied to a standard of degree and diligence, yet the word as used in section 1 cannot be given that sense, as it is employed as descriptive of the "devices, means or methods" commanded to be furnished and adopted by the employer. "Approved," as used in section 1, is not more intelligible than "reasonable" as employed in that same section. "Approved" has no definite, special, technical, trade, or common-law meaning or meaning by established precedents. By

whom the approval mentioned is to be made is left open to conjecture. Is the approval contemplated that of the employer using the particular device, or some other employer or employers engaged in the same industry, or the public generally, or a court or jury trying a cause arising out of an alleged violation of section 1? Even though an act on its face appears to have a meaning, yet if it is not possible to give it a precise and intelligible application under the conditions intended for it to operate it is void. *Mayhew v. Nelson*, 346 Ill. 381, 178 N.E. 921; *People v. Sholem*, 294 Ill. 204, 128 N.E. 377; *In re Di Torio* (D.C.) 8 F.(2d) 279.

In the present age, conditions and methods in the industrial world change rapidly and often somewhat radically. What is modern to-day may be obsolete to-morrow. Section 1, so far as employers and employees fall within the purview of that act, purports to be complete in itself. From the reading of that section the employer must decide whether his industry is included in the class thereby created and whether he must provide the "reasonable and approved devices, means or methods," and what they are, for the prevention of occupational diseases incident to the work of his undertaking and for the violation of the terms of which he must answer in damages and also be liable to prosecution for a penalty. The employer must on his own initiative determine for himself whether any disease suffered by his employee is one "to which employees are not ordinarily exposed in other lines of employment," and in that connection must determine the sense in which the word "ordinarily" is used in the section. The section furnishes him no guide for the solution of either problem.

Under section 1 the employer must be able to forecast accurately the devices, means, and methods required of him to avoid liability under the statute. In a legal proceeding under section 1, by reason of its vagueness and indefiniteness, the rights of the parties are left to a court or jury for determination without a definite, certain, settled, and intelligible rule of conduct determined by the law for their guidance. It necessarily follows that juries in that situation would be the judges of the law as well as the evidence, and in case of trial without a jury the presiding judge would have no stable, definite, and certain rule of law for his guidance in administering justice between the parties. It would be unjust to hold the employer liable in the exercise of his business knowledge for his failure to guess correctly as to his duty under section 1 where the statute itself creates no criterion for his safe and sure guidance. Its provisions are so vague, indefinite, uncertain, and incomplete that no sufficiently clear and intelligible standard of duty is defined thereby. A statute which requires the performance of an act in terms so indefinite, uncertain, and puzzling that men of ordinary intelligence must necessarily guess at its meaning and differ as to its application transcends due process of law. Section 1 does not afford due process of law. . . . [Citing cases.]

Neither is the constitutionality of section 1, as urged by the plaintiff, saved by sections 11 and 12 of the act (Smith-Hurd Ann.St. c. 48, §§ 83, 84). Section 11, after stating it is the duty of the State De-

partment of Factory Inspection to enforce the act and to prosecute violators thereof, proceeds as follows: "The Department of Factory Inspection shall give proper notice in regard to any violation of this act to any employer of labor in violating it, and directing the installment of any approved device, means or methods reasonably necessary, in his judgment, to protect the health of the employees therein, and such notice shall be written or printed," etc.

Section 12 is as follows: "If any occupation or industrial disease or illness or any disease or illness peculiar to the work or process carried on shall be found in any place of employment in this State by the inspectors of the State Department of Factory Inspection, or called to their attention by the State Board of Health, which disease or illness shall be caused in whole or in part, in the opinion of the inspector, by a disregard by the employer of the provisions of this act, or a failure on the part of the employer to adopt reasonable appliances, devices, means or methods which are known to be reasonably adequate and sufficient to prevent the contraction or continuation of any such disease or illness, it shall be the duty of the Department of Factory Inspection to immediately notify the employer in such place of employment, * * * to install adequate and approved appliances, devices, means or methods to prevent the contracting and continuance of any such disease or illness and to comply with all the provisions of this act." Smith-Hurd Ann.St. c. 48, § 84, Cahill's Rev.St.1933, c. 48, par. 196, p. 1376.

The term "any approved device, means or methods reasonably necessary," found in section 11, manifestly is no more definite than the words "reasonable and approved devices, means or methods" employed in section 1. It is urged by the plaintiff that the clause "reasonable appliances, devices, means or methods which are known to be reasonably adequate and sufficient to prevent the contraction or continuation of any such disease or illness" used in section 12 of the act, qualifies the word "reasonable" contained in section 1, and expresses the meaning of the word "reasonable" as used in section 1. Waiving for the moment the issue as to the constitutionality of sections 11 and 12 in conjunction with section 1, the latter section is not made sufficiently certain and specific by section 12 for the further reason it does not determine whose "knowledge" is a standard by which the determination of what devices, means, or methods are "known to be reasonably adequate and sufficient" is to be made. Whether the "knowledge" is that of the Department of Factory Inspection or its officers, a particular employer, employers generally, or the people generally, is left by the section to the conjecture and speculation of him who reads section 12. The question of whether a particular device, means, or method is "reasonably adequate and sufficient" is answered not by section 12 but is left to the opinion of experts whose judgments may materially differ one from the other, or as has often happened, the opinion of the same expert may change from time to time. It is apparent that the phrase "known to be reasonably adequate and sufficient" refers to the opinion of the factory inspector and no one else, for sec-

tion 11 provides that the employer is required to install the devices, means or methods which are reasonably necessary, in the judgment of the State Department of Factory Inspection, to protect the health of the employees. If we grant for the purpose of this aspect of the case that sections 11 and 12 apply to section 1 and not to section 2 alone and the three sections 1, 11, and 12 are to be read together, we then immediately meet the important issue raised that if so construed there is then an unlawful delegation of legislative power to an administrative body, in violation of article 3 of the State Constitution. Sections 11 and 12 purport to grant to the State Department of Factory Inspection the power to determine what, in its judgment, are devices, means, or methods which employers should adopt, authorize such department to direct employers to install such devices, means, or methods, and the employer is commanded to obey the order of the department in that respect under pain of a penalty for refusal. If sections 11 and 12 each fail to promulgate any standard by which the judgment of the administrative department is to be measured, controlled, or limited, the department may arbitrarily decide "what appliances, devices, means or methods," in its judgment, are "approved," "reasonably necessary," "reasonable" or "known to be reasonably adequate and sufficient," or "adequate and approved." Neither section contains within its provisions any definite, permanent, certain test or objective standard. It has often been held by this court that the legislative department cannot constitutionally vest in the discretion of an administrative body the power to determine standards of duty not definitely found within the legislative act itself. . . .

The plaintiff with great earnestness urges that the case of *Boll v. Condie-Bray Glass & Paint Co.*, 321 Mo. 92, 11 S.W.(2d) 48, 51, decides in accordance with her contention the very issues here involved. We have carefully examined that case but cannot accede to the plaintiff's claim that the case is determinative of the issues here presented. A distinction of material moment to be noted in the comparison of the Illinois and Missouri acts is that the Missouri act requires the furnishing of "adequate and approved means, methods or devices." The word "adequate" was apparently assumed as making the standard definite and certain. Moreover, the Missouri court in its opinion calls attention to the fact that the plaintiff there came within the provisions of a section of the act which required the employer to furnish "adequate and approved respirators." A respirator is a particular and specific device exacted by the Missouri act. Any employer knows what a respirator is. By eliminating the word "approved," as the court there did, the act required an "adequate . . . respirator." Again, the court there held that the defendant was in no position to urge the unconstitutionality of the statute requiring the employer to furnish "adequate means, methods, and devices," as he had never furnished any "means, methods, and devices" of any kind or character.

This court cannot cure the constitutional defects in a statute either by judicial amendment or construction, however beneficent the statute may be.

We are of the opinion that section 1 of the Occupational Diseases Act violates article 3 and section 2 of article 2 of the Constitution of this state and the Fourteenth Amendment to the Federal Constitution.

Judgment affirmed.

NOTE

Did the court in the principal case require the same degree of definiteness to the language both as a "guide to the employer" and as a standard for the State Department of Factory Inspection? Cf. *People v. Wilson Oil Co.*, *infra*.

STATE v. LANGLEY

Supreme Court of Wyoming, 1938. 53 Wyo. 332, 84 P.2d 767.

BLUME, CHIEF JUSTICE. An information was filed against the defendant in this case for unlawfully selling some merchandise at less than cost in violation of Section 2 of Chapter 73, Session Laws of Wyoming of 1937, which reads as follows:—

"It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale or advertise for sale any article or product, at less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product for the purpose of injuring competitors and destroying competition.

"The term cost as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution cost shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

"The cost of doing business or overhead expense is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor, including salaries of executives and officers, rent, legal rate of interest on capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising."

Section 5 of the Act excepts from its provisions (a) merchandise sold in liquidation, (b) sales of perishable merchandise and seasonal goods, (c) damaged merchandise or merchandise deteriorated in quality sold as such, (d) merchandise sold under order of court, (e) merchandise sold in meeting the legal prices of a competitor. Section 12 of the Act provides as follows:

"The Legislature declares that the purpose of this Act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This Act shall be literally construed that its beneficial purposes may be subserved."

The defendant entered a plea of guilty and thereafter filed a motion in arrest of judgment, claiming that the statute is unconstitutional as hereinafter mentioned. Thereupon, the court certified to us certain difficult constitutional questions, namely, whether Section 2, *supra*, is in violation of the 14th amendment of the Constitution of the United States, U.S.C.A.Const.Amend. 14, which provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law," or in violation of Section 6 of Article 1 of the Constitution of Wyoming, which provides: "No person shall be deprived of life, liberty or property without due process of law," or in violation of Section 7 of Article 1 of the Constitution of Wyoming, which provides that "absolute, arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority." . . .

It is claimed that the statute is void for uncertainty, because it is impossible under it to determine the cost of merchandise. It is a general and universally accepted rule that in creating an offense which was not a crime at common law, a statute must be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty. 16 C.J. 67. However, reasonable certainty is all that is required and liberal effect is always to be given to the legislative intent when possible. 16 C.J. 68. And if a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, it is the duty of the court to adopt that construction which, without doing violence to the fair meaning of the language, will render it valid. 12 C.J. 788. Let us examine the section of the statute under consideration in the light of these rules.

The first paragraph of Section 2 of the act does not attempt to define the cost of each article, but merely forbids, under the conditions named, the sale or giving away of merchandise below cost. The second paragraph attempts to define the cost of a stock of merchandise, fixing it at invoice price or replacement cost, plus cost of labor and overhead expenses. That is a general definition, and it would seem that no exceptions to such definition could be taken, unless it is too indefinite. The third paragraph attempts to define somewhat more accurately the cost of doing business, or overhead expenses, and requires to be included therein labor, salaries, rent, interest on capital, depreciation, selling cost, maintenance of equipment, delivery cost, etc. The court in *Balzer v. Caler*, *supra*, thought that these various items were, by this section, to be added to each item of merchandise—instead of the proper proportion thereof. There seems to be no justification for such construction. These items must be included in the cost of doing business—nothing more. The proportion to be added to each item of merchandise is not attempted to be stated, but that this must be done is implied in the language of the statute. *People v. Kahn*, *supra*. It can scarcely be doubted that each of these items are proper items to be taken into consideration. The extent thereof is not

stated, and the court in *Balzer v. Caler*, supra, thought that this should have been done. The court said on that point:

"Moreover, the statute fails to state what period of time is to be included in estimating overhead expenses which are to be added to the invoice price of the article to be sold so as to determine its cost for resale thereof. A merchant's stock of trade varies from time to time. Meats, bakery products and certain classes of groceries deteriorate rapidly. Is the merchant to take stock and hold an accounting every time he wishes to display for sale a few leader articles below normal price for the purpose of advertisement? For the purpose of such sales is he to estimate his average overhead expenses for the period of a year, or for a month, or is he to ascertain that sum on the very day on which he proposes to sell the forbidden article? By what standard is a merchant to determine such elements as depreciation of goods, selling cost, or credit losses? What is to be the measure of the value of his equipment? Is there to be no limit of expenditures for interest, insurance or advertising? The statute throws no light upon these perplexing problems. Every merchant is left to guess at the rules and standards to be applied and to determine for himself the period for which the overhead expenses are to be calculated. The section is therefore uncertain and void in that regard." 74 P.2d 845.

The argument at first blush seems formidable. But it would seem that, upon analysis, it will be found that if the legislature should attempt to do what that court intimates it should do, a greater interference with freedom of action would result than by the legislative act in question. Would it be feasible or advisable or consistent with inherent rights for the legislature to prescribe that a merchant shall not be permitted to spend more than a certain, limited amount for advertisement? Should it prescribe the amount for depreciation? If so, it would be required, in order to obviate constitutional objections, to make a multitude of classes, and be exceedingly careful in its classification, for the proper amount varies, as is pointed out in the above case, in the various classes of business. The proper period of time to be included in estimating overhead expenses may not be the same in the case of one merchant as in the case of another. Time may make little difference for a candy kitchen; three months time may be proper for a butcher; six months time for the clothier, for, by way of example, replacement cost may vary in the various classes of business. These illustrations suffice to show the obstacles in the way of the legislature to do what the California court above mentioned intimates should be done, and that these matters had better be left to general business methods. The legislature, doubtless, had such general business methods—reasonable standards of cost-accounting for the various classes of business—in mind and believed them to exist. If they do not exist—if cost cannot be ascertained—then the act in question should be held to be unconstitutional. If, on the other hand, the cost is ascertainable, under reasonable methods, then such cost is purely a question of fact, definite and certain, and the standard of conduct set by the legislature, too, is definite and certain. The non-

existence of such reasonable methods cannot be presumed by the court, and if that is so, then the burden of showing it, in order that we might act upon it, was on the defendant, for upon him lies the duty to show the statute to be unconstitutional (12 C.J. 791-794), but no evidence was introduced in this case. Cost-accounting has been in vogue for centuries, as shown in the article on that subject in Vol. 6 of the 14th Edition of the Encyclopedia Britannica, and, as there shown, many books on that subject have been published from time to time. It is stated in *Rieder v. Rogan*, D.C., 12 F.Supp. 307, 318, that courts take judicial notice of the fact that modern systems of accounting have become very accurate. However that may be, it was, in any event, not alone the right, but the duty of the legislature in framing the statute in question to take into consideration the manner in which business is being done in the state. *Nicol v. Ames*, 173 U.S. 509, 19 S.Ct. 522, 43 L.Ed. 786. We may presume that it did so. Hence, we should hardly be justified, in the absence of evidence to the contrary, in holding that it did not have in mind such reasonable accounting methods in the belief that they in fact exist. Of course, no two merchants adopt exactly the same method. One man may be more cautious than another. One may allow more for depreciation, advertisement, etc., than another. One man may think that the percentage to be added to his invoice price should be that based on the overhead expenses of the past year; another may think that the past six months, or three months, should be the criterion. If a man just starts up in business, he necessarily, in order not to face bankruptcy, must act upon the experience of others, and obtain his information the best way he can. The invoice price of goods which come into the store is known. All else is more or less proximate, for the expenses may increase or decrease; the rapidity of the turn-over may fluctuate. All of these facts are well known. We cannot hold that the legislature did not know them. Knowing them, and composed of rational beings, we should assume that it took them into consideration and acted upon them, when it passed the law. Courts presume that it meant the law to be reasonable and just. 12 C.J. 790. Hence, in the absence of provisions to the contrary, we must presume that the legislature did not intend to prescribe that the cost must be absolutely exact, and that it must be based upon the precise method of accounting which any one merchant might adopt, but meant, by "cost," what business men generally mean, namely, the approximate cost arrived at by a reasonable rule. Hence, if a particular method adopted by a merchant cannot, under the facts disclosed, be said to be unreasonable, and does not disclose an intentional evasion of the law, the method so adopted should be accepted as correct. In other words, all that a man is required to do under the statute is to act in good faith. *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402. In that view of the case, the standard set by the legislature is virtually reduced to one of "reasonableness." And it is held that "reasonableness" as "the standard of an act, which can be determined objectively from circumstances, is a common, widely-used, and constitutionally valid standard in law." *People v. Curtiss*, 116 Cal.App.Supp. 771, 300 P. 801, 805, and

cases cited. Construed as here mentioned, the statute may, in so far as here discussed, be upheld. There is ample authority for this conclusion. Some of them have gone much farther than it is necessary to go herein—perhaps too far. It appears in *State v. Atlantic Ice & Coal Co.*, 210 N.C. 742, 188 S.E. 412, 413, that the legislature made it unlawful to sell any article by lowering the price so as to leave an unreasonable or inadequate profit for a time, with the purpose of increasing the profit later. The court held the act sufficiently definite. In *Nash v. United States*, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232, the defendant was indicted for conspiracy in restraint of trade, by selling, among other acts, far below cost in order to compel competitors to meet prices ruinous to everybody, and by fixing the price of turpentine below the cost of production, for the purpose of driving competitors out of business. The charge was held sufficiently definite. The Federal Trade Act, 15 U.S.C.A. § 45, provides that "unfair methods of competition in commerce are declared unlawful." That, it may be noted, is a sweeping provision, fixing no standard at all. The provision was attacked in the case of *Sears, Roebuck & Co. v. Federal Trade Commission*, 7 Cir., 258 F. 307, 6 A.L.R. 358. The court, in holding it not void, stated [page 310]:

"Petitioner urges that the declaration of Sec. 5 must be held void for indefiniteness unless the words 'unfair methods of competition' be construed to embrace no more than acts which on September 26, 1914, when Congress spoke, were identifiable as acts of unfair trade then condemned by the common law as expressed in prior cases. But the phrase is no more indefinite than 'due process of law.' The general idea of that phrase as it appears in Constitutions and statutes is quite well known; but we have never encountered what purported to be an all-embracing schedule or found a specific definition that would bar the continuing processes of judicial inclusion and exclusion based upon accumulating experience. If the expression 'unfair methods of competition' is too uncertain for use, then under the same condemnation would fall the innumerable statutes which predicate rights and prohibitions upon 'unsound mind,' 'undue influence,' 'unfaithfulness,' 'unfair use,' 'unfit for cultivation,' 'unreasonable rate,' 'unjust discrimination,' and the like. This statute is remedial, and orders to desist are civil; but even in criminal law convictions are upheld on statutory prohibitions of 'rebates or concessions' or of 'schemes to defraud,' without any schedule of facts or specific definition of forbidden conduct, thus leaving the courts free to condemn new and ingenious ways that were unknown when the statutes were enacted." . . .

In *Omaechevarria v. Idaho*, 246 U.S. 343, 38 S.Ct. 323, 62 L.Ed. 763, it appears that the legislature made it unlawful to herd sheep on a range previously occupied by cattle. It was claimed that the statute was too indefinite because it failed to provide for the ascertainment of the boundaries of a range and for determining what length of time was necessary to constitute a prior occupation a usual one within the meaning of the act. The court held it sufficiently definite, and stated that [page 325] "furthermore, any danger to sheep men which might otherwise arise from indefiniteness is removed" by reason of the

fact that a criminal intent was necessary to constitute a crime under the act. The same point was mentioned in *People v. Kahn*, *supra*, and *Hygrade Provision Co. v. Sherman*, *supra*, and is applicable here, although it need not be determined how much importance should be attached to it. It may often be difficult to prove the intent required by the statute, particularly in criminal cases. . . . We are not concerned with that point in the case at bar in view of the plea of guilty herein. We should add, that the statute has a number of exceptions and provides that the law shall not be applicable under circumstances—or at least many or most circumstances—which make it impossible or improper for a merchant to sell goods at or above cost. The statute, then, should not prove to be a burden to anyone who acts in good faith.

The question of definiteness of the law has herein been fully considered by the writer hereof. It is his opinion that while the defendant by his plea of guilty admitted that he sold below cost with the intent mentioned in the statute, the question is whether these acts constitute a crime; that if they do not, because of the indefiniteness of the law, punishment for his acts in such case would not be due process of law . . . ; that the point should, accordingly be decided in this case. My learned associates, however, constituting the majority of the court, think that the point is not involved in this case. Their reasons, briefly stated, are these: The constitutional objection on the ground of indefiniteness is because the statute provides that the "cost of doing business," as therein defined, may be added to the invoice or replacement cost as a part of the "cost" of the article sold. The asserted defect is that the "cost of doing business" may not be known to the seller. The defendant, however, by his plea of guilty, admits making the sale below cost for the purposes denounced by the statute. It must be assumed that he knew the cost of the article, and it may be that the sale alleged in the information was for a price less than the invoice or replacement cost. Defendant's cost of doing business was not determined by the trial court, and may not have been estimated or considered by defendant in making his plea of guilty. In these circumstances a majority of the court are of opinion that it is unnecessary in this case to discuss those parts of the statute which undertake to define the cost of doing business; . . . that the contention that the statute is invalid for indefiniteness might not have been made if defendant had anticipated our holding that a sale for less than cost was criminal only when made "for the purpose of injuring competitors and destroying competition." See *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 501, 45 S.Ct. 141, 69 L.Ed. 402; *Omaechevarria v. Idaho*, *supra*.

With the reservation made by the majority of the court as above mentioned, the constitutional questions submitted to us are answered in the negative. We might add that no other sections of the statute except those herein mentioned have been considered.

RINER and KIMBALL, JJ., concur, with the reservations above mentioned.

NOTES

1. See discussion of the principal case and related cases in Thatcher, "The Constitutionality of the Unfair Practices Acts", 30 Minn.L.Rev. 559 (1946).

2. In *State v. Sears*, 4 Wash.2d 200, 103 P.2d 337 (1940), the court relied almost wholly on the principal case to hold a similar statute constitutional. There was a strong dissenting opinion.

3. In *State v. Lanesboro Produce & Hatching Co.*, 221 Minn. 246, 21 N.W.2d 792 (1946), a statute was held constitutional which omitted the element of intent to destroy competition.

GORIN v. UNITED STATES.

Supreme Court of the United States, 1941.
312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488.

MR. JUSTICE REED delivered the opinion of the Court.

This certiorari brings here a judgment of the Circuit Court of Appeals affirming the sentences of the two petitioners who were convicted of violation of the Espionage Act of June 15, 1917, 50 U.S.C.A. § 31 et seq., 9 Cir., 111 F.2d 712. As the affirmance turned upon a determination of the scope of the Act and its constitutionality as construed, the petition was allowed because of the questions, important in enforcing this criminal statute.

The joint indictment in three counts charged in the first count violation of section 1(b) by allegations in the words of the statute of obtaining documents "connected with the national defense"; in the second count violation of section 2(a) in delivering and inducing the delivery of these documents to the petitioner, Gorin, the agent of a foreign nation; and in the third count of section 4 by conspiracy to deliver them to a foreign government and its agent, just named. The pertinent statutory provisions appear below.¹ A third party, the wife of

¹ Espionage Act of June 15, 1917, c. 30, 40 Stat. 217:

"Title 1. Espionage. Section 1. That (a) whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, . . . or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored . . . ; or (b) whoever for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; . . . shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or both.

"Sec. 2. (a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate,

Gorin, was joined in and acquitted on all three counts. The petitioners were found guilty on each count and sentenced to various terms of imprisonment to run concurrently and fines of \$10,000 each. The longest term of Gorin is six years and of Salich four years.

The proof indicated that Gorin, a citizen of the Union of Soviet Socialist Republics, acted as its agent in gathering information. He sought and obtained from Salich for substantial pay the contents of over fifty reports relating chiefly to Japanese activities in the United States. These reports were in the files of the Naval Intelligence branch office at San Pedro, California. Salich, a naturalized, Russian-born citizen, had free access to the records as he was a civilian investigator for that office. Speaking broadly the reports detailed the coming and going on the west coast of Japanese military and civil officials as well as private citizens whose actions were deemed of possible interest to the Intelligence Office. Some statements appear as to the movements of fishing boats, suspected of espionage and as to the taking of photographs of American war vessels.

Petitioners object to the convictions principally on the grounds (1) that the prohibitions of the act are limited to obtaining and delivering information concerning the specifically described places and things set out in the act, such as a vessel, aircraft, fort, signal station, code or signal book; and (2) that an interpretation which put within the statute the furnishing of any other information connected with or relating to the national defense than that concerning these specifically described places and things would make the act unconstitutional as violative of due process because of indefiniteness.

The philosophy behind the insistence that the prohibitions of sections 1(b) and 2(a), upon which the indictment is based, are limited

deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided*, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years.

"Sec. 4. If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. . . ."

to the places and things which are specifically set out in section 1(a) relies upon the traditional freedom of discussion of matters connected with national defense which is permitted in this country. It would require, urge petitioners, the clearest sort of declaration by the Congress to bring under the statute the obtaining and delivering to a foreign government for its advantage of reports generally published and available which deal with food production, the advances of civil aeronautics, reserves of raw materials or other similar matters not directly connected with and yet of the greatest importance to national defense. The possibility of such an interpretation of the terms "connected with" or "relating to" national defense is to be avoided by construing the act so as "to make it a crime only to obtain information as to places and things specifically listed in section 1 as connected with or related to the national defense." Petitioners argue that the statute should not be construed so as to leave to a jury to determine whether an innocuous report on a crop yield is "connected" with the national defense. . . .

An examination of the words of the statute satisfies us that the meaning of national defense in sections 1(b) and 2(a) cannot be limited to the places and things specified in section 1(a). Certainly there is no such express limitation in the later sections. Section 1(a) lays down the test of purpose and intent and then defines the crime as going upon or otherwise obtaining information as to named things and places connected with the national defense. Section 1(b) adopts the same purpose and intent of 1(a) and then defines the crime as copying, taking or picturing certain articles such as models, appliances, documents, and so forth of anything connected with the national defense. None of the articles specified in 1(b) are the same as the things specified in 1(a). Apparently the draftsmen of the act first set out the places to be protected, and included in that connotation ships and planes and then in 1(b) covered much of the contents of such places in the nature of plans and documents. Section 2(a), it will be observed, covers in much the same way the delivery of these movable articles or information to a foreign nation or its agent. If a government model of a new weapon were obtained or delivered there seems to be little logic in making its transfer a crime only when it is connected in some undefined way with the places catalogued under 1(a). It is our view that it is a crime to obtain or deliver, in violation of the intent and purposes specified, the things described in sections 1(b) and 2(a) without regard to their connection with the places and things of 1(a).

In each of these sections the document or other thing protected is required also to be "connected with" or "relating to" the national defense. The sections are not simple prohibitions against obtaining or delivering to foreign powers information which a jury may consider relating to national defense. If this were the language, it would need to be tested by the inquiry as to whether it had double meaning or forced anyone, at his peril, to speculate as to whether certain actions violated the statute. This Court has frequently held criminal laws deemed to violate these tests invalid. *United States v. Cohen Grocery*

Company⁹, urged as a precedent by petitioners, points out that the statute there under consideration forbade no specific act,¹⁰ that it really punished acts "detrimental to the public interest when unjust and unreasonable" in a jury's view. In *Lanzetta v. New Jersey*¹¹ the statute was equally vague. "Any person not engaged in any lawful occupation, known to be a member of any gang . . . , who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or in any other state, is declared to be a gangster" We there said that the statute "condemns no act or omission"; that the vagueness is such as to violate due process.¹²

But we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law.¹³ The obvious delimiting words in the statute are those requiring "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." This requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established.¹⁴ Where there is no occasion for secrecy, as

[Footnotes 2 to 8 are omitted. Ed.]

⁹ 255 U.S. 81, 89, 41 S.Ct. 298, 300, 65 L.Ed. 516, 14 A.L.R. 1045.

¹⁰ "That it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities." Act of October 22, 1919, c. 80, § 2, 41 Stat. 297.

¹¹ 306 U.S. 451, 59 S.Ct. 618, 621, 83 L.Ed. 888.

¹² Criminal statutes deemed vague: *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221-224, 34 S.Ct. 853, 854-856, 58 L.Ed. 1284 (raising prices above "market value under fair competition, and under normal market conditions"); *Collins v. Kentucky*, 234 U.S. 634, 34 S.Ct. 924, 58 L.Ed. 1510 (same); *Weeds, Inc., v. United States*, 255 U.S. 109, 41 S.Ct. 306, 307, 65 L.Ed. 537 (exacting "excessive prices for necessities"); *Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484 (displaying any "symbol or emblem of opposition to organized government"); *Smith v. Cahoon*, 283 U.S. 553, 564, 565, 51 S.Ct. 582, 586, 75 L.Ed. 1264 (such provisions regulating common carriers as could constitutionally be applied to private carriers); *Herndon v. Lowry*, 301 U.S. 242, 261-264, 57 S.Ct. 732, 740-742, 81 L.Ed. 1066 (distribution of pamphlets intended at any time in the future to lead to forcible resistance to law).

¹³ Cf. Adequately definite criminal statutes: *State of Ohio ex rel. Lloyd v. Dollison*, 194 U.S. 445, 450, 24 S.Ct. 703, 705, 48 L.Ed. 1062 (liquor restrictions varying according to sale at "wholesale" or "retail"); *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 108-111, 29 S.Ct. 220, 225-227, 53 L.Ed. 417 (contracts "reasonably calculated" or which "tend" to fix prices); *Nash v. United States*, 229 U.S. 373, 376-378, 33 S.Ct. 780, 781, 782, 57 L.Ed. 1232 (unreasonable or undue restraints of trade); *Omachevarria v. Idaho*, 246 U.S. 343, 345, 348, 38 S.Ct. 323, 324, 325, 62 L.Ed. 763 ("any cattle range previously . . . or . . . usually occupied by any cattle grower"); *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 501-503, 45 S.Ct. 141, 142, 143, 69 L.Ed. 402 (meat represented to be "kosher"); *Miller v. Oregon*, 273 U.S. 657, 47 S.Ct. 344, 71 L.Ed. 825 (dangerous rate of speed; see *Cline v. Frink Dairy Co.*, 274 U.S. 445, at 464, 465, 47 S.Ct. 681, 687, 71 L.Ed. 1146); *United States v. Alford*, 274 U.S. 264, 267, 47 S.Ct. 597, 598, 71 L.Ed. 1040 (building fires "near" any forest or inflammable material); *United States v. Wurzbach*, 280 U.S. 396, 399, 50 S.Ct. 167, 168, 74 L.Ed. 508 (receiving contributions for "any political purpose whatever"); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 81, 82, 53 S.Ct. 42, 43, 77 L.Ed. 175 ("reasonable variations" in weight or measure); *Kay v. United States*, 303 U.S. 1, 8, 9, 58 S.Ct. 468, 472, 82 L.Ed. 607 ("ordinary fees . . . for services actually rendered").

¹⁴ Cf. *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 501, 45 S.Ct. 141, 142, 69 L.Ed. 402.

with reports relating to national defense, published by authority of Congress or the military departments there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government. Finally, we are of the view that the use of the words "national defense" has given them as here employed, a well understood connotation. They were used in the Defense Secrets Act of 1911.¹⁵ The traditional concept of war as a struggle between nations is not changed by the intensity of support given to the armed forces by civilians or the extension of the combat area. National defense, the Government maintains, "is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." We agree that the words "national defense" in the Espionage Act carry that meaning. Whether a document or report is covered by sections 1(b) or 2(a) depends upon their relation to the national defense, as so defined, not upon their connection with places specified in section 1(a). The language employed appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process.

At the conclusion of all the evidence petitioners sought a directed verdict of acquittal because (1) the innocuous character of the evidence forbade a conclusion that petitioners had intent or reason to believe that the information was to be used to the injury of the United States or the advantage of a foreign nation and (2) the evidence failed to disclose that any of the reports related to or was connected with the national defense. As a corollary to this second contention, reversal is sought on the ground that the trial court overruled the petitioners' objection that as a matter of law none of the reports dealt with national defense. That is, as the trial court stated the objection, that "the jury has no privilege in determining whether or no any of these reports have to do with the national defense, that that is a matter for the Court and not for the jury, as a matter of law."

An examination of the instructions convinces us that no injustice was done petitioners by their content. Weighed by the test previously outlined of relation to the military establishments, they are favorable to petitioners' contentions. A few excerpts will make this clear:

"You are instructed that the term 'national defense' includes all matters directly and reasonably connected with the defense of our nation against its enemies. . . . As you will note, the statute specifically mentions the places and things connected with or comprising the first line of defense when it mentions vessels, aircraft, works of defense, fort or battery and torpedo stations. You will note, also, that the statute specifically mentions by name certain other places or things relating to what we may call the secondary line of national defense.

¹⁵ 36 Stat. 1084: "That whoever, for the purpose of obtaining information respecting the national defense, to which he is not lawfully entitled, goes upon any vessel, or enters any navy-yard, naval station, fort, battery, torpedo station, arsenal, camp, factory, building, office, or other place connected with the national defense, owned or constructed or in process of construction by the United States"

Thus some at least of the storage of reserves of men and materials is ordinarily done at naval stations, submarine bases, coaling stations, dock yards, arsenals and camps; all of which are specifically designated in the statute. . . . You are instructed in the first place that for purposes of prosecution under these statutes, the information, documents, plans, maps, etc., connected with these places or things must directly relate to the efficiency and effectiveness of the operation of said places or things as instruments for defending our nation. . . . You are instructed that in the second place the information, documents or notes must relate to those angles or phases of the instrumentality, place or thing which relates to the defense of our nation; thus if a place or thing has one use in peace time and another use in wartime, you are to distinguish between information relating to the one or the other use. . . .

"The information, document or note might also relate to the possession of such information by another nation and as such might also come within the possible scope of this statute. . . . For from the standpoint of military or naval strategy it might not only be dangerous to us for a foreign power to know our weaknesses and our limitations, but it might also be dangerous to us when such a foreign power knows that we know that they know of our limitations.

"You are, then, to remember that the information, documents or notes, which are alleged to have been connected with the national defense, may relate or pertain to the usefulness, efficiency or availability of any of the above places, instrumentalities or things for the defense of the United States of America. The connection must not be a strained one nor an arbitrary one. The relationship must be reasonable and direct."

Petitioners' objection, however, is that after having given these instructions, the court instead of determining whether the reports were or were not connected with national defense, left this question to the jury in these words:

"Whether or not the information, obtained by any defendant in this case, concerned, regarded or was connected with the national defense is a question of fact solely for the determination of this jury, under these instructions."

These quotations show that the trial court undertook to give to the jury the tests by which they were to determine whether the acts of the petitioners were connected with or related to the national defense. We are of the opinion this was properly left to the jury. If we assume, as we must here after our earlier discussion as to the definiteness of the statute, that the words of the statute are sufficiently specific to advise the ordinary man of its scope, we think it follows that the words of the instructions give adequate definition to "connected with" or "relating to" national defense. The inquiry directed at the instructions is whether the jury is given sufficient guidance to enable it to determine whether the acts of the petitioners were within the prohibitions. These instructions set out the definition of national defense in a manner favorable and unobjectionable to petitioners. When they refer to facts

connected with or related to defense, however, petitioners urge that the connection should be determined by the court. Instructions can, of course, go no farther than to say the connection must be reasonable, direct and natural. Further elaboration would not clarify. The function of the court is to instruct as to the kind of information which is violative of the statute and of the jury to decide whether the information secured is of the defined kind. It is not the function of the court, where reasonable men may differ to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined.

In a trial under an indictment for violation of section 3¹⁷ of this same Espionage Act, this Court had occasion to consider a similar question as to the function of the jury. A pamphlet was introduced as evidence of making false statements with the intent to cause insubordination. To the objection that the pamphlet could not legitimately be construed as tending to produce the prohibited consequences this Court said: "What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it in the mode adopted, and what were defendants' motives in doing this, were questions for the jury, not the court, to decide. . . . Whether the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution."¹⁸

Viewing the instructions as a whole, we find no objection sufficient to justify reversal.

The Circuit Court of Appeals properly refused to consider the errors alleged with respect to the conspiracy count.¹⁹

Affirmed.

[Footnote 16 is omitted. Ed.]

¹⁷ 40 Stat. 217, 219, c. 30, 50 U.S.C.A. § 33:

"Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

¹⁸ *Pierce v. United States*, 252 U.S. 239, 250, 40 S.Ct. 205, 209, 64 L.Ed. 542. Justices Brandeis and Holmes dissented, largely on the ground that the jury should not be left to decide whether statements in the pamphlet were facts or conclusions. *Id.*, 252 U.S. page 269, 40 S.Ct. page 216, 64 L.Ed. 542.

¹⁹ *Brooks v. United States*, 267 U.S. 432, 441, 45 S.Ct. 345, 69 L.Ed. 699, 37 A.L.R. 1407.

NOTE

Commenting on *Gorin v. United States* in 29 Calif.L.Rev. 548, 551, the author says: "The facts of the case are significant in suggesting a phase of the void-for-vagueness doctrine which does not appear to have been raised as yet either in the cases or discussions of the doctrine. Does a defendant (or party, in a civil suit) always have standing to question the statute as vague? Suppose, for example, a statute makes it a crime to operate an automobile at a 'highly excessive rate of speed.' A defendant who drove 35 miles per hour in a suburban zone might well argue that the statute was too vague for him to know whether his conduct was a crime. But could one who drove 80 miles per hour in the same place seriously make this plea? There is abundant authority in other situations where due process is used to challenge a statute that the challenger must in fact be one against whom the statute operates without due process. It is not sufficient to show that the statute violates due process as to some other person included within its terms. So also, in cases involving the equal protection clause, he who attacks the statute must show himself to be a member of the class against whom the statute is arbitrarily discriminatory. Why, then, is this doctrine not equally applicable to the void-for-vagueness rule? Clearly, testing the vagueness of the statute with relation to the conduct of the defendant or litigant challenging it in the particular case would be in accord with fundamental procedure in constitutional law.

"In the *Gorin* case, though it was not mentioned in the opinion, probably the most impelling reason why the Court held the term definite was that any other result would have cast serious doubt on much of the recent legislation arising out of the present war. The decision could more safely have been rested on the constitutional ground suggested above, for however vague the penumbra of information 'concerned with' or 'relating to' national defense may be as an abstract question, certainly confidential reports in the Naval Intelligence office are well within the terms. Application of this approach to the void-for-vagueness cases seems eminently desirable. This would preclude the use of the doctrine as a shield for the obviously guilty, and yet would prevent application of a vague statute where injustice would result. E. S. W."

UNITED STATES v. PETRILLO

Supreme Court of the United States, 1947.

332 U.S. 1, 67 S.Ct. 1538, — L.Ed. —.

MR. JUSTICE BLACK delivered the opinion of the Court.

The District Court dismissed a criminal information filed against the respondent, James C. Petrillo, on the ground that the statute on which the information was founded was unconstitutional. 68 F.Supp. 845. The case is here on direct appeal by the Government as authorized by the Criminal Appeals Act. 18 U.S.C., Supp. V, § 682, 18 U.S.C.A. § 682. The information charged a violation of the Communications Act of 1934, 48 Stat. 1064, 1102, as amended by an Act of April 16, 1946. 60 Stat. 89. 47 U.S.C.A. § 506. The specific provisions of the Amendment charged to have been violated read:

"Sec. 506. (a) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel, or constrain a licensee—

"(1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services; or

"(d) Whoever willfully violates any provision of subsection (a) or (b) of this section shall, upon conviction thereof, be punished by imprisonment for not more than one year or by a fine of not more than \$1,000, or both." Pub.L.No.344, 79th Cong., 2d Sess.

The information alleged that a radio broadcasting company, holding a federal license, had, for several years immediately preceding, employed "certain persons who were sufficient and adequate in number to perform all of the actual services needed . . . in connection with the conduct of its broadcasting business." The information further charged that the respondent, Petrillo, "wilfully, by the use of force, intimidation, duress and by the use of other means, did attempt to coerce, compel and constrain said licensee to employ and agree to employ, in connection with the conduct of its radio broadcasting business, three additional persons not needed by said licensee to perform actual services"

The coercion was allegedly accomplished in the following manner:

"(1) By directing and causing three musicians, members of the Chicago Federation of Musicians, theretofore employed by the said licensee in connection with the conduct of its broadcasting business, to discontinue their employment with said licensee;

"(2) By directing and causing said three employees and other persons, members of the Chicago Federation of Musicians, not to accept employment by said licensee; and

"(3) By placing and causing to be placed a person as a picket in front of the place of business of said licensee."

The only challenge to the information was a motion to dismiss on the ground that the Act on which the information was based (a) abridges freedom of speech in contravention of the First Amendment; (b) is repugnant to the Fifth Amendment because it defines a crime in terms that are excessively vague, and denies equal protection of the law and liberty of contract; (c) imposes involuntary servitude in violation of the Thirteenth Amendment. The District Court dismissed the information, holding that the 1946 Amendment on which it was based violates the First, Fifth, and Thirteenth Amendments.

Two general principles which concern our disposition of appeals involving constitutional questions have special application to this case: We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity. The reasons underlying this principle and illustrations of the strictness with which it has been applied appear in the opinion of the Court in the *Rescue Army v. Municipal Court*, 331 U.S. —, 67 S.Ct. 130, and cases there collected. And in reviewing a direct appeal from a District Court

under the Criminal Appeals Act, *supra*, our review is limited to the validity or construction of the contested statute. For "The Government's appeal does not open the whole case." *United States v. Borden Co.*, 308 U.S. 188, 193, 60 S.Ct. 182, 186, 84 L.Ed. 181.

First. One holding of the District Court was that, as contended here, the statute is repugnant to the due process clause of the Fifth Amendment because its words, "number of employees needed by such licensee," are so vague, indefinite and uncertain that "persons of ordinary intelligence cannot in advance tell whether a certain action or course of action would be within its prohibition . . ." The information here, up to the place where it specifically charges the particular means used to coerce the licensee, substantially employs this statutory language. And the motion to dismiss on the ground of vagueness and indefiniteness squarely raises the question of whether the section invoked in the indictment is void in toto, barring all further actions under it, in this, and every other case. Cf. *United States v. Thompson*, 251 U.S. 407, 412, 40 S.Ct. 289, 291, 64 L.Ed. 333. Many questions of a statute's constitutionality as applied can best await the refinement of the issues by pleading, construction of the challenged statute and pleadings, and, sometimes, proof. *Rescue Army v. Municipal Court*, *supra*; *Watson v. Buck*, 313 U.S. 387, 402, 61 S.Ct. 962, 967, 85 L.Ed. 1416. *Borden's Farm Products Company v. Baldwin*, 293 U.S. 194, 204, 210, and concurring opinion at page 213, 55 S.Ct. 187, 189, 192, at page 193, 79 L.Ed. 281. But no refinement or clarification of issues which we can reasonably anticipate would bring into better focus the question of whether the contested section is written so vaguely and indefinitely that one whose conduct it affected could only guess what it meant. Consequently, since this phase of the appeal raises a question of validity of a statute within our jurisdiction under the Criminal Appeals Act, *supra*, and is ripe for our decision, we turn to the merits of the contention.

We could not sustain this provision of the Act if we agreed with the contention that persons of ordinary intelligence would be unable to know when their compulsive actions would force a person against his will to hire employees he did not need. *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322; *Lanzetta v. State of New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888. But we do not agree. Of course, as respondent points out, there are many factors that might be considered in determining how many employees are needed on a job. But the same thing may be said about most questions which must be submitted to a fact-finding tribunal in order to enforce statutes. Certainly, an employer's statements as to the number of employees "needed" is not conclusive as to that question. It, like the alleged wilfulness of a defendant, must be decided in the light of all the evidence.

Clearer and more precise language might have been framed by Congress to express what it meant by "number of employees needed." But none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional

purpose. The argument really seems to be that it is impossible for a jury or court ever to determine how many employees a business needs, and that, therefore, no statutory language could meet the problem Congress had in mind. If this argument should be accepted, the result would be that no legislature could make it an offense for a person to compel another to hire employees, no matter how unnecessary they were, and however desirable a legislature might consider suppression of the practice to be.

The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. *Robinson v. United States*, 324 U.S. 282, 285, 286, 65 S.Ct. 666, 668, 669, 89 L.Ed. 944. It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. See *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, 162 A.L.R. 1330; *United States v. Ragen*, 314 U.S. 513, 522, 524, 525, 62 S.Ct. 374, 377, 378, 379, 86 L.Ed. 383. The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more. . . .

Reversed and remanded.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, wrote a concurring opinion.

MR. JUSTICE REED, dissenting.

I dissent from the opinion and judgment of the Court. My reason for disagreement is that § 506(a) (1) of the Communications Act is too indefinite in its description of the prohibited acts to support an information or indictment for violation of its provisions. My objection is not the words in the first paragraph of § 506 that make unlawful in labor matters the use of threats, force, violence, intimidation or duress against an employer. There is a background of experience and common understanding that ordinarily gives such words, when used in criminal statutes, sufficient definiteness to acquaint the public with the limits of the proscribed acts. When such words are used, they place upon those affected the risk of estimating incorrectly the sort of action that may ultimately be held to violate the

statutes. *Nash v. United States*, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232.

My objection is to the indefiniteness of the statutory description of the thing for which force must not be used—this is, “to compel” a licensee under the Communications Act “to employ . . . any person or persons in excess of the number of employees needed by such licensee to perform actual services.”

This criminal statute is the product of legislation directed at the control of acts deemed evil by Congress. It is one of the many regulatory acts that legislative bodies have passed in recent years to make unlawful certain practices in the field of economics that seemed contrary to the public interest.¹ These statutes made new crimes. Deeds theretofore not subject to punishment fall within the general scope of their prohibition. Common experience has not created a general understanding of their criminality. Consequently, in order to adequately inform the public of the limitations on conduct, a more precise definition of the crime is necessary to meet constitutional requirements.²

Anglo-American law does not punish citizens for violations of vague and uncertain statutes. There is no place in our criminal law for acts defined as detrimental to the interests of the state. A statute is invalid when “so vague that men of common intelligence must necessarily guess at its meaning.” 269 U.S. 385, at page 391, 46 S.Ct. 126, at page 127, 70 L.Ed. 322. It seems to me that this vice exists in this section of the challenged act. How can a man or a jury possibly know how many men are “needed” “to perform actual services” in broadcasting? What must the quality of the program be? How skillful are the employees in the performance of their task? Does one weigh the capacity of the employee or the managerial ability of the employer? Is the desirability of short hours to spread the work to be evaluated? Or is the standard the advantage in take-home pay for overtime work?

The Government seeks to avoid the difficulty by interpreting the section. Their brief says, after considering the legislative history, “the bill was not intended to apply to mere differences of opinion as to whether men were overworked; it only fits deliberate demands for payment to additional employees made in complete disregard for the employer’s need and without any justification from the viewpoint of actually getting the employer’s business done. . . . If Paragraph (1) is read in its context, along with the succeeding paragraphs, it is clear what Congress was driving at when it characterized the Act

¹ Emergency Price Control Act, 56 Stat. 33, § 205(b), 50 U.S.C.App. § 925(b), 50 U.S.C.A. Appendix, § 925(b); Fair Labor Standards Act, 52 Stat. 1069, § 18(a), 29 U.S.C. § 216(a), 29 U.S.C.A. § 216(a); National Labor Relations Act, 49 Stat. 456, § 12, 29 U.S.C. § 162, 29 U.S.C.A. § 162; Federal Corrupt Practices Act, as amended, 57 Stat. 167, § 9, 50 U.S.C.A.App. § 1509, 50 U.S.C.A. Appendix, § 1509.

² *United States v. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045; *Cline v. Frink Dairy Co.*, 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146; *International Harvester Co. of America v. Commonwealth of Kentucky*, 234 U.S. 216, 34 S.Ct. 853, 58 L.Ed. 1284; *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322. See *Gorin v. United States*, 312 U.S. 19, 26, 61 S.Ct. 429, 433, 85 L.Ed. 488.

as one to prevent extortion, as distinct from bona fide demands relating to conditions of employment." This interpretation seems to me to fly in the face of § 506(1). There is another subsection to which the language might apply.³ This clearly defines the prohibited acts. If the Congress wishes to fix the maximum number of employees that a licensee may employ in stations of various sizes, it may, of course, be done. Or, if it is impractical for Congress to act because of the varying situations, the number may be left to regulations of the Federal Communications Commission or other regulatory body.

This is a criminal statute. The principle that such statutes must be so written that intelligent men may know what acts of theirs will jeopardize their life, liberty or property is of importance to all. That principle requires, I think, a determination that this section of the Communications Act is invalid.

MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join in this dissent.

STATE v. CHICAGO & N. W. RY. CO.

Supreme Court of Nebraska, 1947. 147 Neb. 970, 25 N.W.2d 824.

CARTER, JUSTICE. This is a suit brought by the Attorney General in the name of the state to obtain an order enjoining the defendant railroad company from continuing to operate certain main-line switch stands by the use of reflectorized equipment alleged to be in violation of section 74-581, R.S.1943. The trial court entered an order enjoining the use of reflectorized discs on switch stands leading from all main line tracks for the reason that they are in violation of the aforesaid statute. The railroad company appeals.

The record shows that the defendant operates a main-line railroad which passes through Whitney, Crawford, Fort Robinson, Glen, Andrews, Harrison, and Coffee Siding, all in Nebraska, at each of which points switch stands leading from the main track exist. In 1942, the railroad company replaced the then existing oil-burning switch lights with reflectorized lamps whose source of light was obtained from light beams thrown upon it, such as those thrown by the headlights on the railroad's locomotives. It is the position of the state that the new reflectorized lamps are unlawful equipment under the provisions of section 74-581, R.S.1943. This section is as follows: "Every person, firm, corporation, lessee or receiver of any railroad, engaged in the business of transportation in this state, shall equip with proper lights all switch stands to each and every switch leading from all main tracks of any such road, on which trains are generally operated at night, except lines fully equipped with automatic block signals. The lights upon such switch stands shall be in good condition constantly, and

³ Pub. No. 344, 79th Cong., 2d Sess., 47 U.S.C. § 506(a) (4), 47 U.S.C.A. § 506(a) (4): "to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of the broadcasting business of such licensee, which are not to be performed;"

shall be lighted and kept burning between the time of sundown and sunrise, and at such other times when, by reason of excessively foggy weather, the condition of such lights or signals would render it unsafe both for the employees of such railroad and for the general public."

Section 74-582, R.S.1943, provides for a penalty of \$5 against any railroad company permitting any violation of the foregoing section on the part of any employee.

It is first contended by the railroad company that section 74-581, R.S.1943, is so indefinite and uncertain of meaning as to be void as a penal statute under the due process clauses of the state and federal Constitutions. Art. 1, § 3; U.S.Const. Amend. 14. This contention is based upon the assertion that the statute provides for no fixed standard of guilt upon which the penalty can be assessed. It is a fundamental rule, and one upon which the railroad company relies, that no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed by reasonably explicit language what conduct on their part will render them liable to its penalties, and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ on its application, violates the essentials of constitutional provisions guaranteeing due process of law. It is urged by the railroad company that the requirement of the statute being considered that all switch stands leading from main tracks be equipped with "proper lights" does not fix an ascertainable standard of guilt and is inadequate to inform persons accused of a violation thereof of the nature of the accusation against them. . . . We think other portions of the statute sufficiently define the term "proper lights" so as to eliminate the contention that what is lawful or unlawful under it must be left to individual judgment or conjecture.

Construing section 74-581, R.S.1943, as a whole, it will be observed that the latter portion of the section limits and explains the words "proper lights" used in the fore part of the section. The requirement that the "proper lights" shall be lighted and kept burning between the times of sundown and sunrise, and at such other times when by reason of excessively foggy weather the condition of such lights or signals would render it unsafe both for the employees of such railroad and for the general public, clearly indicates that "proper lights" were intended to be any electric or combustion light. A reflectorized lamp certainly was not contemplated when it was stated in the act that they should be "lighted" and "kept burning" between sundown and sunrise. We think the act does define the type of light that is to constitute a "proper light" and clearly a reflectorized lamp does not come within the statute. The act is not void for indefiniteness and uncertainty.

It is worthy of note that in the latter part of the section it is provided that switch-stand lights shall be lighted and kept burning between sundown and sunrise, and at such other times when by reason of foggy weather the condition of such lights or signals would render it

unsafe for employees and the public. It is intimated that the use of the words "such lights or signals" supports the view advanced by the defendant. We think not. The words clearly refer to times other than between sundown and sunrise, and can only refer to daytime lights and signals not the subject of legislation in the act. It cannot be properly construed, therefore, as definitive of proper lights required between sundown and sunrise.

The defendant cites various definitions from a recognized dictionary of the words "burn" and "burning" to show that they are sometimes used to mean "aglow," "glow like fire," and "shining." But it is a fundamental rule of statutory construction that the usual and ordinary meaning of words will be used in construing the meaning of a statute. The words "and shall be lighted and kept burning between the time of sundown and sunrise" do not indicate any intent to adopt any meaning other than the usual and ordinary meaning of the terms used. Special or technical definitions of common words will not be applied as a basis for declaring legislative acts void for indefiniteness and uncertainty. . . .

Affirmed.

MARTIN v. UNITED STATES

Circuit Court of Appeals of the United States, 1939. 100 F.2d 490.

(Appeal from conviction of conspiring to violate the Motor Carrier Act of 1935, 49 U.S.C.A. § 301 et seq.)

BRATTON, CIRCUIT JUDGE. . . . It is . . . provided that no person shall for compensation sell or offer for sale transportation subject to the act or make any contract, agreement, or arrangement to provide, procure, furnish, or arrange for such transportation, or hold himself out by advertisement, solicitation, or otherwise as one who does such things unless he holds a broker's license issued by the Commission, § 211, 49 U.S.C.A. § 311.

Appellants did not transport passengers. They were unlicensed brokers engaged in the business of making arrangements for compensation for transportation of passengers by motor vehicle in interstate commerce. They, therefore, came within the purview of section 211 of the act. But it is argued that the statute fails to provide any standard or guide by which it could be determined whether the persons who transported such passengers were engaged in transportation of that kind as a regular occupation or business and were required to obtain certificates of public convenience and necessity, or were not engaged in such transportation as a regular occupation or business but merely carried such passengers as casual, occasional, or reciprocal transportation, and for that reason no certificate was required. The act brings within its provisions those regularly engaged in the occupation or business of transporting persons or property by motor vehicle in interstate or foreign commerce and excludes casual, occasional, or recipro-

cal transportation of that kind as a regular occupation or business, without undertaking to define textually either class or to fix a standard by which to determine in advance whether certain conduct is in one class or the other. Reasonable definiteness and certainty is required in the enactment of statutes, but in the very nature of things rules of conduct oftentimes must be stated in general language and depend for their application upon diversified circumstances. It frequently is impossible to state in detail rules or formulae which will meet different conditions or varying qualities. A penal statute must be sufficiently explicit to enable a person of ordinary intelligence to understand its provisions but the employment of terms ordinarily used to express ideas is not fatal. The words "casual", "occasional", "reciprocal", "regular", "occupation", and "business" are in common use, and each has a well understood meaning; and in the absence of anything indicating otherwise it is to be presumed that Congress used them in their generally accepted meaning. It manifestly is possible through the exercise of ordinary intelligence to determine with reasonable exactness and certainty whether given facts and circumstances constitute engaging in the transportation of passengers or property as a regular occupation or business, or merely casual, occasional, or reciprocal transportation by one not engaged in it as a regular occupation or business. Accordingly, the statute is not so vague and indefinite that it offends the due process clause. . . .

The judgments are severally affirmed.

ROSCOE POUND, WHAT OF STARE DECISIS?

10 *Fordham L.Rev.* 1, 10-11 (1941).

Due process of law is a standard. There is a precept in the Constitution prescribing that legislative and executive action shall not be arbitrary and unreasonable. It prescribes that standard. But there are no precepts anywhere defining reasonableness or prescribing in detail what is unreasonable. Nor can there be in the nature of things. The most that can be done is to measure action by its conformity or want of conformity to a received authoritative ideal, and that ideal itself must change with changes in the society of which it is a picture. Application of a standard in the light of a received ideal must be a matter of times and places and circumstances. What was a negligent speed in a horse drawn cart is not a negligent speed in an automobile. What was unreasonable in a rural agricultural society is not necessarily unreasonable in an urban industrial society. What was unreasonable under the circumstances of yesterday may or may not be under the circumstances of tomorrow. I repeat. It is the idea of law as no more than an aggregate of laws, and that a law is of necessity a rule of the type of a rule of property, that is at fault. If the difference between application of such a rule and application of a standard is seen and borne in mind, it will be apparent that decisions as to what was arbitrary and unreasonable under conditions of the

past are not binding under the doctrine of *stare decisis* unless the conditions of the time and place and the surrounding circumstances are the same.

(ii) IN ADMINISTRATIVELY EXECUTED STATUTES

MAHLER v. EBY

Supreme Court of the United States, 1924.
264 U.S. 32, 44 S.Ct. 283, 68 L.Ed. 549.

This is an appeal from a judgment of the District Court of the United States for Northern Illinois, dismissing five writs of habeas corpus and remanding the appellants, who are aliens, to the custody of the Immigration Inspector at Chicago for deportation, in pursuance to warrants issued by the Secretary of Labor. The cases were consolidated in the court below.

In 1918, all the appellants were tried and found guilty of violation of section 5 of the Selective Service Act of May 18, 1917 (chapter 15, 40 Stat. 76, 80 [Comp.St.1918, Comp.St.Ann.Supp.1919, § 2044e]), and of section 4 of the Espionage Act of June 15, 1917 (chapter 30, 40 Stat. 217, 222 [Comp.St.1918, Comp.St.Ann.Supp.1919, § 10212d]). All but Petro Nigra were sentenced to the United States penitentiary at Leavenworth, Kan., for a period of 5 years, and Nigra was sentenced to the same place for 18 months. Upon error to the Court of Appeals these sentences were affirmed and became final.

Pending the imprisonment of appellants, the Secretary of Labor issued warrants for arrest of the appellants under the Act of May 10, 1920, c. 174, 41 Stat. 593 (Comp.St.Ann.Supp.1923, §§ 4289¼b [4] to 4289¼b [6]). . . .

The Act of Congress enacted May 10, 1920 (chapter 174, 41 Stat. 593) provides that aliens of certain classes described in the act, in addition to those for whose expulsion authority already exists, shall, upon the warrant of the Secretary of Labor, be taken into his custody and deported in the manner provided in sections 19 and 20 of the Immigration Act of February 5, 1917 (39 Stat. p. 889 [Comp.St.1918, Comp.St.Ann.Supp.1919, §§ 4289¼jj, 4289¼k]), "if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States." The classes include all aliens interned as enemies by the President's proclamation under R.S. § 4067 (Comp.St. § 7615) and alien convicts under the Espionage Act, the Explosives Act, the act restricting foreign travel, the Sabotage Act, the Selective Draft Act, the act punishing threats against the President, the Trading with the Enemy Act, and certain sections of the Penal Code. Section 2 makes the decision of the Secretary of Labor in ordering expulsion of an alien under the act final.

The petitions for writs of habeas corpus charged that the warrant of deportation under which the petitioners were held were void because, at the time of the issue of the warrants, the Espionage Act (Comp.St.

1918, Comp.St. Ann. Supp. 1919, § 1012a et seq.) and the Selective Draft Act (Comp.St. 1918, Comp.St. Ann. Supp. 1919, § 2044a et seq.), for convictions under which they were about to be deported, had been repealed, that the Act of May 10, 1920, under which the warrant was issued, was an *ex post facto* law, because the convictions for which they were to be deported were for acts committed before its passage, that there was no legal evidence to establish that petitioners were aliens amenable to deportation under the act, that the hearing and proceedings were without due process of law, and that for these and other reasons the commitment was void.

Counsel for the appellants, in their brief and in their argument, attacked the constitutionality of the act of 1920, not only because it was an *ex post facto* law, but because it delegated legislative power to an executive officer, and because the criterion for his finding—i. e., that the persons to be deported should be “undesirable residents of the United States”—was so vague and uncertain that it left the liberty of the alien to the whim and caprice of an executive officer, in violation of due process required by the Fifth Amendment. They further attacked the validity of the warrants on the ground that they did not show a finding by the Secretary that the appellants were undesirable residents of the United States, a condition precedent to a legal deportation. They further alleged that as to all the petitioners there was no evidence to sustain such a finding, if it had been made, and that as to Petro Nigra there was also a fatal lack of evidence at his hearing to show that he had been convicted of the violations of the statutes charged in the warrant.

MR. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the Court. . . .

Nor is the act invalid in delegating legislative power to the Secretary of Labor. The sovereign power to expel aliens is political, and is vested in the political departments of the government. Even if the executive may not exercise it without congressional authority, Congress cannot exercise it effectively save through the executive. It cannot, in the nature of things, designate all the persons to be excluded. It must accomplish its purpose by classification and by conferring power of selection within classes upon an executive agency. *Tiaco v. Forbes*, 228 U.S. 549, 557, 33 S.Ct. 585, 57 L.Ed. 960. That is what it has done here. It has established classes of persons who in its judgment constitute an eligible list for deportation, of whom the Secretary is directed to deport those he finds to be undesirable residents of this country. With the background of a declared policy of Congress to exclude aliens classified in great detail by their undesirable qualities in the Immigration Act of 1917, and in previous legislation of a similar character, we think the expression “undesirable residents of the United States” is sufficiently definite to make the delegation quite within the power of Congress. As far back as 1802 the naturalization statute of that year (chapter 28, 2 Stat. 153) prescribed that no alien should be naturalized who did not appear to the court to have

behaved during his residence in this country "as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Our history has created a common understanding of the words "undesirable residents" which gives them the quality of a recognized standard. ✓

We do not think that the discretion vested in the Secretary under such circumstances is any more vague or uncertain or any less defined than that exercised in deciding whether aliens are likely to become a public charge, a discretion vested in the immigration executives for half a century and never questioned. Act Aug. 3, 1882, c. 376 (22 Stat. 214), and Act Feb. 5, 1917, c. 29 (39 Stat. 874 [Comp.St.1918, Comp.St.Ann.Supp.1919, § 4289¼a]). See *Buttfield v. Stranahan*, 192 U.S. 470, 496, 24 S.Ct. 349, 48 L.Ed. 525.

International Harvester Co. v. Kentucky, 234 U.S. 216, 34 S.Ct. 853, 58 L.Ed. 1284, and *United States v. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045, are cited on behalf of petitioners. In those cases, statutes were held invalid for vagueness. They were both criminal cases, in which the uncertain words of the statute encountered the limitation of the Fifth and Sixth Amendments. They did not inform the accused sufficiently of the nature and cause of the accusation. The rule as to a definite standard of action is not so strict in cases of the delegation of legislative power to executive boards and officers. Cases like the one before us were distinguished from the *Cohen Case* by Chief Justice White in his opinion in that case, when he said (page 92 [41 S.Ct. § 301]):

"The cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." . . .

Accordingly the judgment of the District Court is reversed with directions not to discharge the petitioners until the Secretary of Labor shall have reasonable time in which to correct and perfect his finding on the evidence produced at the original hearing, if he finds it adequate, or to initiate another proceeding against them.

PEOPLE ex rel. RICE v. WILSON OIL CO.

Supreme Court of Illinois, 1936. 364 Ill. 406, 4 N.E.2d 847.

STONE, JUSTICE. Appellant seeks to reverse a judgment of the circuit court of Cook county against it for \$2,000, the penalty on a bond executed by it as surety for the Wilson Oil Company, a corporation, executed under the provisions of section 3 of the Motor Fuel Tax Law of 1929, as amended (Smith-Hurd Ill.Stats. c. 120, § 419). The appeal is direct, as a constitutional question is raised. . . .

The grounds of the claimed invalidity of section 3 of the Motor Fuel Tax Law as amended in 1931 are that it does not provide sufficient standards to guide the Department of Finance in fixing the penalty

of the bond required of a distributor of motor fuel; that the phrase "amount of business reasonably expected" is not a sufficiently definite standard to guide the Department of Finance in fixing the penalty on the bond, but requires the Department of Finance to guess, conjecture, and speculate concerning future events; and that the Department of Finance need only "take into consideration," but is not compelled to act upon, its or another's expectation of the amount of business reasonably expected in fixing the amount of the bond, and so the act was incomplete when it left the Legislature, resulting in a delegation of legislative power to an administrative department or officer.

Section 3, after providing for the application for and issuance of a license to act as a distributor of motor fuels, also requires that "the applicant shall also file with the department a bond in an amount not to exceed \$5,000 on a form to be approved by and with a surety or sureties satisfactory to the department conditioned upon said applicant paying to the State of Illinois all moneys becoming due by reason of the sale or use of motor fuel by the applicant, together with all penalties and interest thereon. The department shall fix the penalty of such bond in each case taking into consideration the amount of business reasonably expected to be handled by him [the applicant], and the penalty fixed by the department shall be such, as in its opinion, will protect the State of Illinois against failure to pay the amount hereinafter provided on motor fuel sold and used." . . .

In considering whether section 3 was complete when it left the Legislature or incomplete, resulting in the delegation of legislative power, the test is whether the provision is sufficiently definite and certain to enable one reading it to know his rights and obligations. . . . If section 3 delegates to the Department of Finance power to make the law, which involves a discretion as to what the law shall be, it violates article 3 of the Constitution. If, on the other hand, it but confers authority or discretion on that department, to be exercised under the limits of the act, as to its execution, it is valid. . . .

The General Assembly cannot deal with the details of each particular case that may arise in the administration of an act, but must necessarily leave such to the reasonable discretion of administrative officers, and the exercise of such discretion does not constitute the exercise of legislative power. . . . An act which does not lay down rules and definitions by which the administrative officer may be guided in the exercise of the discretion vested in him is incomplete. . . . An administrative officer empowered to issue and revoke licenses to engage in a business or profession necessarily exercises quasi judicial powers in determining whether a license shall be issued or revoked, but such exercise of power is but incidental to the duty of administering the law relating to the regulation of a particular business or calling and does not constitute the exercise of judicial power within the prohibition of the Constitution. . . .

It is patent that the purpose of the Legislature in passing the Motor Fuel Tax Law and its amendments was to raise revenue and to provide a method of safeguarding the State in the collection of that reve-

nue by providing that those to whom a license was granted to sell motor fuel, and on whom the act placed the duty of collecting the tax, should execute a bond to safeguard the State from loss of that tax by the failure of a licensee to account for and pay the State the tax collected. The Legislature could not determine the amount of the bond required to safeguard the State from each distributor, for the amount of tax collected by the different distributors would, necessarily, not be the same. Nor can the amount of such bond be more than estimated, particularly on first application for license. To have directed the fixing of the bond at an arbitrary amount or by any more definite measure would be likely to result either in loss to the State or in placing on the distributor an unnecessary burden. The purpose of the act is to secure the payment of the tax collected and nothing more. By no human agency can the amount of a bond to secure the payment of such tax be more than estimated. The distributor is dealing directly with the State. The department must be allowed to exercise some discretion in determining the amount of the bond in such a case. The act provides inquiry into such facts as might aid in such determination. To obviate any inequality in the requirement of a bond and still safeguard the State, some method by which the Director of Finance may ascertain, as nearly as possible, the number of gallons each distributor would likely sell each month, is necessary. The provision that "the department shall fix the penalty of such bond in each case taking into consideration the amount of business reasonably expected to be handled by him [the applicant] and the penalty fixed by the department shall be such, as in its opinion, will protect the State of Illinois against failure to pay the amount hereinafter provided on motor fuel sold and used," must be held to be but the vesting of a necessary discretion in the department. It is required that the applicant furnish such information as the department deems necessary, and from this information, and the necessary estimate of the tax resulting from business to be done, the amount of the bond is determined.

Appellant's application appears in the record. It shows that it operated one bulk plant and four retail outlets. It is, under the law, required to settle with the State monthly. It cannot be said that the act is invalid as delegating legislative or judicial powers to the department, nor that the amount fixed in the bond was an unreasonable exercise of the administrative discretion vested in the department. . . .

Judgment affirmed.

NOTE

In *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 175 (1932), Sutherland, J., in upholding "reasonable variations" as an administrative standard, said "That the legislative power of Congress cannot be delegated is, of course, clear. But Congress may declare its will, and, after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations."

For a thorough discussion of the development of the law governing sufficiency of statutory administrative standards, see Jaffe, "An Essay on Delegation of Legislative Power", 47 Col.L.Rev. 359, 561 (1947). See also the critical analysis of the

standard enunciated in the federal renegotiation statutes, in Rosden, "The Legislative Standards of the Renegotiation Statutes," 31 A.B.A.J. 71 (1945).

YAKUS v. UNITED STATES.

Supreme Court of the United States, 1944.
321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834.

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

The questions for our decision are: (1) Whether the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 50 U.S.C.App.Supp. II, § 901 et seq., 50 U.S.C.A.Appendix, § 901 et seq., as amended by the Inflation Control Act of October 2, 1942, 56 Stat. 765, 50 U.S.C.App. Supp. II, § 961 et seq., 50 U.S.C.A. Appendix, § 961 et seq., involves an unconstitutional delegation to the Price Administrator of the legislative power of Congress to control prices; (2) whether § 204(d) of the Act was intended to preclude consideration by a district court of the validity of a maximum price regulation promulgated by the Administrator, as a defense to a criminal prosecution for its violation; (3) whether the exclusive statutory procedure set up by §§ 203 and 204 of the Act for administrative and judicial review of regulations, with the accompanying stay provisions, provide a sufficiently adequate means of determining the validity of a price regulation to meet the demands of due process; and (4) whether, in view of this available method of review, § 204(d) of the Act, if construed to preclude consideration of the validity of the regulation as a defense to a prosecution for violating it, contravenes the Sixth Amendment, or works an unconstitutional legislative interference with the judicial power.

Petitioners in both of these cases were tried and convicted by the District Court for Massachusetts upon several counts of indictments charging violation of §§ 4(a) and 205(b) of the Act by the willful sale of wholesale cuts of beef at prices above the maximum prices prescribed by §§ 1364.451-1364.455 of Revised Maximum Price Regulation No. 169, 7 Fed.Reg. 10381 et seq. . . .

The Circuit Court of Appeals for the First Circuit affirmed, 137 F.2d 850, and we granted certiorari, 320 U.S. 730, 64 S.Ct. 190.

I.

The Emergency Price Control Act provides for the establishment of the Office of Price Administration under the direction of a Price Administrator appointed by the President, and sets up a comprehensive scheme for the promulgation by the Administrator of regulations or orders fixing such maximum prices of commodities and rents as will effectuate the purposes of the Act and conform to the standards which it prescribes. The Act was adopted as a temporary wartime measure, and provides in § 1(b) for its termination on June 30, 1943, unless sooner terminated by Presidential proclamation or concurrent resolution of Congress. By the amendatory act of October 2, 1942, it was extended to June 30, 1944.

Section 1(a) declares that the Act is "in the interest of the national defense and security and necessary to the effective prosecution of the present war", and that its purposes are:

"to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, . . . and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values;"

The standards which are to guide the Administrator's exercise of his authority to fix prices, so far as now relevant, are prescribed by § 2(a) and by § 1 of the Amendatory Act of October 2, 1942, and Executive Order 9250, 50 U.S.C.A. Appendix, § 901 note, promulgated under it. 7 Fed.Reg. 7871. By § 2(a) the Administrator is authorized, after consultation with representative members of the industry so far as practicable, to promulgate regulations fixing prices of commodities which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" when, in his judgment, their prices "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act."

The section also directs that

"So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative) . . . and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including. . . . Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941."

By the Act of October 2, 1942, the President is directed to stabilize prices, wages and salaries "so far as practicable" on the basis of the levels which existed on September 15, 1942, except as otherwise provided in the Act. By Title I, § 4 of Executive Order No. 9250, he has

directed "all departments and agencies of the Government" "to stabilize the cost of living in accordance with the Act of October 2, 1942."¹

Revised Maximum Price Regulation No. 169 was issued December 10, 1942, under authority of the Emergency Price Control Act as amended and Executive Order No. 9250. The Regulation established specific maximum prices for the sale at wholesale of specified cuts of beef and veal. As is required by § 2(a) of the Act, it was accompanied by a "statement of the considerations involved" in prescribing it. From the preamble to the Regulation and from the Statement of Considerations accompanying it, it appears that the prices fixed for sales at wholesale were slightly in excess of those prevailing between March 16 and March 28, 1942,² and approximated those prevailing on September 15, 1942. Findings that the Regulation was necessary, that the prices which it fixed were fair and equitable, and that it otherwise conformed to the standards prescribed by the Act, appear in the Statement of Considerations.

That Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the Act was adopted by Congress in the exercise of that power, are not questioned here, and need not now be considered save as they have a bearing on the procedural features of the Act later to be considered which are challenged on constitutional grounds.

Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. The boundaries of the field of the Administrator's permissible action are marked by the statute. It directs that the prices fixed shall effectuate the declared policy of the Act to stabilize commodity prices so as to prevent war-time inflation and its enumerated disruptive causes and effects. In addition the prices established must be fair and equitable, and in fixing them the Administrator is directed

¹ The parties have not discussed in briefs or on argument, and we do not find it necessary to consider, the precise effect of this direction to stabilize prices "so far as practicable" at the levels obtaining on September 15, 1942, upon the standards laid down by Section 2(a) of the Act and the discretion which they confer on the Administrator.

² The use of the March 16-28, 1942, base period is explained by the fact that wholesale meat prices had already been stabilized at approximately that level by Maximum Price Regulation No. 169 as originally issued on June 19, 1942, 7 Fed. Reg. 4653, and by the General Maximum Price Regulation issued April 28, 1942, 7 Fed. Reg. 3153, which forbade the sale of most commodities at prices in excess of the highest price charged by the seller during March, 1942. The Statement of Considerations accompanying the latter, 2 C. C. H. War Law Service—Price Control, ¶ 42,081, explains in some detail the considerations impelling the Administrator to the conclusion that stabilization at the levels obtaining in March, 1942 would be fair and equitable and would effectuate the purposes of the Act; it considers the price levels prevailing during October 1-15, 1941, and gives reasons why price stabilization at those levels would not be practicable. The Statement of Considerations accompanying Maximum Price Regulation No. 169 as originally issued, 2 C. C. H. War Law Service—Price Control, ¶ 43,369A, refers to this discussion in explanation of the continuance of the use of March, 1942, levels as a base.

to give due consideration, so far as practicable, to prevailing prices during the designated base period, with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices. In short the purposes of the Act specified in § 1 denote the objective to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences. The standards set out in § 2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting.

The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price fixing—and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established. Compare *Field v. Clark*, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294; *Hampton Jr. & Co. v. United States*, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624; *Curran v. Wallace*, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441; *Mulford v. Smith*, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092; *United States v. Rock Royal Co-op.*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263; *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 657, 61 S.Ct. 524, 85 L.Ed. 624; *National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344; *Kiyoshi Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774.

The Act is unlike the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, considered in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, which proclaimed in the broadest terms its purpose "to rehabilitate industry and to conserve natural resources." It prescribed no method of attaining that end save by the establishment of codes of fair competition, the nature of whose permissible provisions was left undefined. It provided no standards to which those codes were to conform. The function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated. Compare *Sunshine Anthracite Coal Co. v. Adkins*, *supra*, 310 U.S. at page 399, 60 S.Ct. at page 915, 84 L.Ed. 1263.

The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its for-

mulation and promulgation as a defined and binding rule of conduct—here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. See *Opp Cotton Mills v. Administrator*, *supra*, 312 U.S. at pages 145, 146, 61 S.Ct. at pages 532, 533, 85 L.Ed. 624, and cases cited.

Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. Acting within its constitutional power to fix prices it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.

As we have said: "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function." *Currin v. Wallace*, *supra*, 306 U.S. at page 15, 59 S.Ct. at page 387, 83 L.Ed. 441. Hence it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed; for example, that all prices should be frozen at the levels obtaining during a certain period or on a certain date. See *Union Bridge Co. v. United States*, 204 U.S. 364, 386, 27 S.Ct. 367, 374, 51 L.Ed. 523. Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. Compare *McCulloch v. Maryland*, 4 Wheat. 316, 413 et seq., 4 L.Ed. 579. It is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards. Cf. *Hampton v. United States*, *supra*, 276 U.S. at pages 408, 409, 48 S.Ct. at pages 351, 352, 72 L.Ed. 624. Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified

in overriding its choice of means for effecting its declared purpose of preventing inflation.

The standards prescribed by the present Act, with the aid of the "statement of the considerations" required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. Compare *Kiyoshi Hirabayashi v. United States*, supra, 320 U.S. at page 104, 63 S. Ct. at page 1387, 87 L.Ed. 1774. Hence we are unable to find in them an unauthorized delegation of legislative power. The authority to fix prices only when prices have risen or threaten to rise to an extent or in a manner inconsistent with the purpose of the Act to prevent inflation is no broader than the authority to fix maximum prices when deemed necessary to protect consumers against unreasonably high prices, sustained in *Sunshine Anthracite Coal Co. v. Adkins*, supra, or the authority to take possession of and operate telegraph lines whenever deemed necessary for the national security or defense, upheld in *Dakota Cent. Tel. Co. v. State of South Dakota*, 250 U.S. 163, 39 S.Ct. 507, 63 L.Ed. 910, 4 A.L.R. 1623; or the authority to suspend tariff provisions upon findings that the duties imposed by a foreign state are "reciprocally unequal and unreasonable", held valid in *Field v. Clark*, supra [143 U.S. 649, 12 S.Ct. 504, 36 L.Ed. 294].

The directions that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purposes of the Act, and that in promulgating them consideration shall be given to prices prevailing in a stated base period, confer no greater reach for administrative determination than the power to fix just and reasonable rates, see *Sunshine Anthracite Coal Co. v. Adkins*, supra, and cases cited; or the power to approve consolidations in the "public interest", sustained in *New York Cent. Securities Corp. v. United States*, 287 U.S. 12, 24, 25, 53 S.Ct. 45, 48, 77 L.Ed. 138 (Compare *United States v. Lowden*, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208); or the power to regulate radio stations engaged in chain broadcasting "as public interest, convenience or necessity requires", upheld in *National Broadcasting Co. v. United States*, supra, 319 U.S. at page 225, 63 S.Ct. at pages 1013, 1014, 87 L.Ed. 1344; or the power to prohibit "unfair methods of competition" not defined or forbidden by the common law, *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U.S. 304, 54 S.Ct. 423, 426, 78 L.Ed. 814; or the direction that in allotting marketing quotas among states and producers due consideration be given to a variety of economic factors, sustained in *Mulford v. Smith*, supra, 307 U.S. at pages 48, 49, 59 S.Ct. at page 652, 653, 83 L.Ed. 1092; or the similar direction that in adjusting tariffs to meet differences in costs of production the President "take into consideration" "in so far as he finds it practicable" a variety of economic matters, sustained in *Hampton Jr. & Co. v. United States*, supra [276 U.S. 394, 48 S.Ct. 349, 36 L.Ed. 294]; or the similar authority, in making classifications within an industry, to consider various named and unnamed "relevant factors"

and determine the respective weights attributable to each, held valid in *Opp Cotton Mills v. Administrator*, supra. . . .

Affirmed.

MR. JUSTICE ROBERTS.

I dissent. I find it unnecessary to discuss certain of the questions treated in the opinion of the court. I am of opinion that the Act unconstitutionally delegates legislative power to the Administrator. As I read the opinion of the court it holds the Act valid on the ground that sufficiently precise standards are prescribed to confine the Administrator's regulations and orders within fixed limits, and that judicial review is provided effectively to prohibit his transgression of those limits. I believe that analysis demonstrates the contrary. I proceed, therefore, to examine the statute.

The Powers Conferred.

When, in his judgment, commodity prices have risen, or threaten to rise, "to an extent or in a manner inconsistent with the purposes" of the Act the Administrator may establish "such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes" of the Act.

"So far as practicable" in establishing any maximum price he is to ascertain the prices prevailing in a specified period in 1941 but may use another period nearest to that specified because necessary data for the period specified is not available; and may make adjustments "for such relevant factors as he may determine and deem to be of general applicability," including several factors mentioned. Before issuing any regulation he shall "so far as practicable" advise with representative members of the industry affected.

Any regulation may provide for adjustments and reasonable exceptions which, in the Administrator's judgment, are necessary and proper to effectuate the purposes of the Act. If, in his judgment, such action is necessary or proper to effectuate the purposes of the Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices or hoarding in connection with any commodity (50 U.S.C.Appendix § 902, 50 U.S.C.A.Appendix § 902).

It will be seen that whether, and, if so, when, the price of any commodity¹ shall be regulated depends on the judgment of the Administrator as to the necessity or propriety of such price regulation in effectuating the purposes of the Act.

The Supposed Standards for the Administrator's Guidance.

The Act provides that any regulation or order must be "generally fair and equitable" in the Administrator's judgment; but coupled with

¹ The Act gives the Administrator no power with respect to wages, and limits his powers as respects fishery commodities (50 U.S.C.Appendix, § 902(i)), 50 U.S.C.A. Appendix, § 902(i)), and agricultural commodities (50 U.S.C.Appendix, § 903, 50 U.S.C.A.Appendix, § 903).

this injunction is another that the order and regulation must be such as, in the judgment of the Administrator, is necessary or proper to effectuate the purposes of the Act.

I turn, therefore, to the stated purposes to ascertain what, if any, limits the statute places upon the Administrator's exercise of his powers.

Section 1(a), 50 U.S.C.Appendix, § 901(a), 50 U.S.C.A.Appendix, § 901(a), states seven purposes, which should be set forth separately as follows:

"to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents;"

In order to exercise his power anent this purpose the Administrator will have to form a judgment as to what stabilization means, and what are speculative, unwarranted and abnormal increases in price. It hardly need be said that men may differ radically as to the connotation of these terms and that it would be very difficult to convict anyone of error of judgment in so classifying a given economic phenomenon.

"to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency;"

To accomplish this purpose the Administrator must form a judgment as to what constitutes profiteering, hoarding, manipulation or speculation. As if the administrative discretion were not sufficiently broad there is added the phrase "other disruptive practices", which seems to leave the Administrator at large in the formation of opinion as to whether any practice is disruptive.

"to assure that defense appropriations are not dissipated by excessive prices;"

It is not clear—to me at least—what is the limit of this purpose. I can conceive that an honest Administrator might, without laying himself open to the charge of exceeding his powers, make any kind of order or regulation based upon the view that otherwise defense appropriations by Congress might be dissipated by what he considers excessive prices. How his exercise of judgment in connection with this purpose could be thought excessive it is impossible for me to say.

"to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living;"

The Administrator's judgment that any price policy will tend to affect the classes mentioned in this purpose from what he may decide to be "undue impairment of their standard of living" would seem to be so sweeping that it would be impossible to convict him of an error of judgment in any conclusion he might reach.

"to prevent hardships to persons engaged in business, to schools, uni-

versities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices;"

Of course Congress might have included in the catalogue of beneficiaries churches, hospitals, labor unions, banks and trust companies and other praiseworthy organizations, without rendering the "standard" any more vague.

"to assist in securing adequate production of commodities and facilities;"

Here is a purpose which seems, to some extent at least, to permit the easing of price restrictions; for it would appear that diminishment of price would hardly assist in promoting production. Thus the Administrator, and he alone, is to balance two competing policies and strike the happy mean between them. Who shall say his conclusion is so indubitably wrong as to be properly characterized as "arbitrary or capricious".

"to prevent a post emergency collapse of values;"

This purpose, or "standard", seems to permit adoption by the Administrator of any conceivable policy. I have difficulty in envisaging any price policy in support of which some economic data or opinion could not be cited to show that it would tend to prevent post emergency collapse of values.

These seven purposes must, I submit, be considered as separate and independent. Any action taken by the Administrator which, in his judgment, promotes any one or more of them is within the granted power. If, in his judgment, any action by him is necessary or appropriate to the accomplishment of one or more of them, the Act gives sanction to his order or regulation.

Reflection will demonstrate that in fact the Act sets no limits upon the discretion or judgment of the Administrator. His commission is to take any action with respect to prices which he believes will preserve what he deems a sound economy during the emergency and prevent what he considers to be a disruption of such a sound economy in the post war period. His judgment, founded as it may be, on his studies and investigations, as well as other economic data, even though contrary to the great weight of current opinion or authority, is the final touchstone of the validity of his action.

I shall not repeat what I have said in *Bowles v. Willingham*, 321 U.S. 503, 64 S.Ct. 641. I have there quoted the so-called standards prescribed in the National Industrial Recovery Act. Comparison of them with those of the present Act, and perusal of what was said concerning them in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, leaves no doubt that the decision is now overruled. There, as here, the "code" or regulation, to become effective, had to be found by the Executive to "tend to effectuate the policy" of the Act. (See footnote A, p. 521.)

[RUTLEDGE, J., also dissented, but on a different ground. Ed.]

LOUIS I. JAFFE, AN ESSAY ON DELEGATION OF LEGISLATIVE POWER

47 Colum.L.Rev. 561, 581, 583-592 (1947).

Delegation In The States

. . . Many state courts have been reluctant to remain consistently on the broad, generous ground taken by the United States Supreme Court. They have pursued a wavering course. The archaic, narrow formulation is sometimes taken seriously and is as frequently disregarded. The explanation is only in part a conservative disinclination to tolerate modern forms of administrative activity. State delegations are more varied in content; and some of them raise peculiar problems. . . .

In the early days the Illinois Supreme Court took a broadly understanding view of the need and uses of delegation.⁷⁹ Approval of the reasonable rate formula might have been thought a basis for lesser delegations. Even as late as 1909 in *Block v. Chicago*⁸⁰ the court knows how to take the high government line. The chiefs of police were authorized to refuse licenses to show "obscene and immoral" motion pictures. "The welfare of society demands that every effort of municipal authorities to afford such protection should be sustained, unless it is clear that some constitutional right is interfered with." The legislature may "authorize others to do those things which it might properly but cannot understandingly do." Otherwise "legislation would become oppressive and yet imbecile."⁸¹ The court relied on earlier cases approving power to determine the number and location of dramshops⁸²; the number, location, material and construction of fire escapes.⁸³ But then comes a series of cases holding acts unconstitutional. The best known is *People ex rel. Gomber v. Snolem*.⁸⁴ The fire marshals were given power to order demolition or repair of a building "especially liable to fire and which is so situated as to endanger other

⁷⁹ See *People v. Reynolds* [10 Ill. 1 (1848)] suggesting that any delegation is constitutional as long as the legislature remains to repeal it.

⁸⁰ 239 Ill. 251, 87 N.E. 1011 (1909).

⁸¹ Quoting *People v. Reynolds*, 10 Ill. 1 (1848); *accord*, *Mutual Film Corp. v. Ohio Indust. Comm'n*, 236 U.S. 230 (1915) ("moral, educational or amusing and harmless" film to be passed—the lower court judge commented that "it would be next to impossible to devise language that would be at once comprehensive and automatic").

⁸² *People v. Cregier*, 138 Ill. 401, 28 N.E. 812 (1891).

⁸³ *Arms v. Ayer*, 192 Ill. 601, 61 N.E. 851 (1901).

⁸⁴ 294 Ill. 204, 128 N.E. 377 (1920). The court relied on a whole series of cases declaring certain powers to grant exemptions invalid: *Board of Adm. v. Miles*, 278 Ill. 174, 115 N.E. 841 (1917) (to forgive or release claims); *Sheldon v. Hoyne*, 231 Ill. 222, 103 N.E. 1021 (1914) (to exempt certain cases from installing safety appliances); *Noel v. People*, 187 Ill. 587, 58 N.E. 616 (1900) (discretion to allow village stores to sell proprietary drugs); *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 51 N.E. 758 (1898) (discretion to allow heavy vehicles on pleasure drives). These cases all reveal a fear of discrimination and favoritism.

buildings." No hearing was provided prior to the marshal's decision. Violations were punishable by fines of \$10 to \$50 per day. This, said the court, was "arbitrary power." No standard was given as to what was a fire hazard. Judgments might vary from city to city. In distinguishing the Block case, the court said "the average person of healthy and wholesome mind knows what the words 'immoral' and 'obscene' mean"! In 1929 a statute authorizing the secretary of state to require a broker to post a bond up to \$50,000 was held bad.⁸⁵ The legislature amended the Act to provide that the amount was to be determined by the broker's (1) method of business, (2) financial standing, (3) experience, ability, and reputation. Again the act was held bad: it did not specify *how* much ability or *what* financial standing!⁸⁶

In all of the cases there was, in the more illuminating phrase of Taft, "an intelligible principle"; in none of them is there the latitude of ends and means denounced in the Schechter case. The judicial uncertainty and subjectivism shown by these cases is not restricted to Illinois, and is an undoubted weakness of the delegation doctrine as presently interpreted in the states.

Judicial antipathy to social legislation is not the only factor contributing to this interpretation. The state courts are troubled by the spectre of discriminatory administration. In the field of general business regulation state decisions are not notably different from the federal decisions. Rate regulation has been uniformly upheld. . . .

It is when delegated power affects the use of real property or the practice of a profession that the judicial nerve tingles. The doctrine of delegation is then likely to be invoked against delegations which because of an uncertainty of standards (in phrase or in fact) encourage undetectable discrimination⁸⁷ or subjective notions of policy. The Sholem case⁸⁸ is a prime instance of this sensitivity. A power given to a local fire chief to condemn or order repair of buildings "especially liable to fire" is capable of a species of abuse not present, for example, in a rate regulation. The common law is particularly tender toward the owner of real property, and such legislation allows action drastically modifying his position. Unless the fire chief announces specifications, the incidence of his action may be most capricious. One can sense in these and similar cases a concern that arises from due process scruples. Yet surely some form of law against fire hazards

⁸⁵ *People v. Federal Surety Co.*, 330 Ill. 472, 168 N.E. 401 (1928).

⁸⁶ *People v. Beekman & Co.*, 347 Ill. 92, 179 N.E. 435 (1932). *Contra*: *Leach v. Daugherty*, 73 Cal.App. 83, 238 P. 160 (1925); *State ex rel. Beek v. Wagener*, 77 Minn. 483, 80 N.W. 633 (1899) ("necessary to lodge discretion somewhere").

[Footnotes 87 to 96 are omitted. Ed.]

⁸⁷ See Note, *Remedies for Discrimination by State and Local Administrative Bodies*, 60 Harv.L.Rev. 271 (1947) indicating how difficult it is to secure remedies against discrimination.

⁸⁸ *People ex rel. Gomber v. Sholem*, 294 Ill. 204, 128 N.E. 377 (1920); *accord*, *Lux v. Ins. Co.*, 322 Mo. 342, 15 S.W.2d 343 (1929) (ordinance should have specified various conditions of hazard unless impossible or impracticable).

must be allowed. In a brace of cases the Maryland Court of Appeals revealed the dilemma in which the state courts have placed themselves. Building permits were not to be allowed where to do so would create "hazards from fire or disease" or menace "public welfare, security, health, or morals." Over the dissent of three judges, this delegation was held void.⁹⁹ The following year, this time over the dissent of two, the vice was held cured by substituting for the offending words "public welfare," the words "public security."¹⁰⁰ In the absence of precisely developed modern standards many courts are apt to be governed by the static "nuisance" concept. It has recently been pointed out that the administrator's case will be enormously strengthened if he has devised general rules which have run the gauntlet of opposition prior to summary action in particular cases.¹⁰¹

Powers to license the use of real property have produced a welter of decisions, sometimes in conflict even within a single jurisdiction. Many of the statutes are old. A number of them contain no express standard at all, yet until this century it probably did not occur to anyone to question these ancient and humble grants of power. When the licensed use may promote immorality, *e.g.*, a pool hall, no standard will be required or one will be implied. It is a "nuisance per se"¹⁰²; or permission to engage in it is a "privilege."¹⁰³ The Illinois courts' righteous distinction between a power to ban "immoral or obscene" motion pictures and a power to demolish fire hazards illustrates the operation of this moral factor. Courts do not, however, agree as to the presence of this factor: the power to license junk dealers without any avowed standard has been held good and bad.¹⁰⁴ The point should be made that in this type of case the court may imply a standard where none is stated. Particularly is this true where the delegation is of long standing. In the leading case of *Lieberman v. Van De Carr*¹⁰⁵

⁹⁹ *Tighe v. Osborne*, 149 Md. 349, 131 Atl. 801 (1925); *cf.* *Continental Oil Co. v. Wichita Falls*, 42 S.W.2d 236 (Tex. 1931); *Archbishops of Oregon v. Baker*, 140 Ore. 600, 15 P.2d 391 (1932). *But cf.* *Marquis v. Waterloo*, 210 Iowa 439, 228 N.W. 870 (1930).

¹⁰⁰ *Tighe v. Osborne*, 150 Md. 452, 133 Atl. 465 (1926).

¹⁰¹ *Parratt, Administrative-Legal Methodologies in Elimination of Sub-Standard Housing*, 12 Law & Contemp. Prob. 111, 119 (1947).

¹⁰² *Brunswick-Balke Co. v. Mecklenburg*, 181 N.C. 386, 107 S.E. 317 (1921); *Dwyer v. People*, 82 Colo. 574, 261 P. 858 (1927) (greater power over noxious than neutral pursuits).

¹⁰³ When a license may be granted or denied at will, *e.g.*, to mine under navigable waters, no standard is necessary. *Port Royal Mining Co. v. Hagood*, 30 S.C. 519, 9 S.E. 686 (1888).

¹⁰⁴ *Valid*: *In re Holmes*, 187 Cal. 640, 203 P. 398 (1921); *Lerner v. Delavan*, 203 Wis. 32, 233 N.W. 608 (1930). *Invalid*: *Village of St. Johnsbury v. Aron*, 103 Vt. 22, 151 A. 650 (1930).

¹⁰⁵ 175 N.Y. 440, 67 N.E. 913 (1903). Upheld as not against due process: *Lieberman v. Van De Carr*, 199 U.S. 552, 26 S.Ct. 144, 50 L.Ed. 305 (1905). Other well-known cases to the effect that the lack or apparent lack of standard for guiding discretion does not violate due process: *Wilson v. Eureka City*, 173 U.S. 32, 19 S.Ct. 317, 43 L.Ed. 603 (1899); *Fischer v. St. Louis*, 194 U.S. 361, 24 S.Ct. 673, 48 L.Ed. 1018 (1904); *Bradley v. Richmond*, 227 U.S. 477, 33 S.Ct. 318, 57 L.Ed. 603 (1913). The reasons given in such cases vary: (a) a matter of privilege, (b) standard implied, (c) will not assume that action will be "arbitrary." *Davis v. Massachusetts*

the sanitary code provided for milk licensing. The lack of standard was attacked on delegation and due process grounds. The court quite legitimately held that the licensing power appearing in a sanitary code was concerned solely with hygiene. The New York court, particularly, has drawn one paradoxical but sound conclusion in these cases. In the absence of a stated standard, the implied standard will be severely limited to the most immediately obvious reason for the grant of power.¹⁰⁶ Otherwise the power would be in danger of failing for uncertainty of standard. Thus, in exercising a power to license building operations, the only consideration is whether the existing building laws have been satisfied; traffic factors are excluded.¹⁰⁷ In the licensing of junk dealers fitness alone is relevant; the licensing authority may not adopt a policy of limiting licenses to a number deemed sufficient.¹⁰⁸

Some courts, recently more conscious of the delegation problem, have become less disposed to imply standards, even where the context would allow it.¹⁰⁹ The Missouri Supreme Court in the leading case of *St. Louis v. Fischer*,¹¹⁰ upheld a statute forbidding a dairy or cow stable within city limits unless permission was given. No doubt, the decision was influenced by the notion that such a use was a *prima facie* nuisance, somewhat like a pool hall or a saloon. But later cases have overruled or distinguished it. The court, expressly overruling the *Fischer* case, has held bad a prohibition of wooden buildings within fire limits of the city unless licensed;¹¹¹ a stable with more than 10 horses unless

[167 U.S. 43, 17 S.Ct. 731, 42 L.Ed. 71 (1897)], allowing unarticulated discretion in use of public places for meetings, is probably qualified now by free speech concepts. *E.g.*, *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396 (1941).

¹⁰⁶ Freund in *Administrative Power Over Persons and Property* 89, 90 (1928) has observed this phenomenon. He notes that the absence of an express standard may be due to a belief that that standard is obvious.

¹⁰⁷ *Matter of Small v. Moss*, 279 N.Y. 288, 18 N.E.2d 281 (1938). "The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination. . . ." *Id.* at 290, 18 N.E.2d at 285.

¹⁰⁸ *Picone v. Commissioner of Licenses*, 241 N.Y. 157, 149 N.E. 336 (1925).

¹⁰⁹ *Juneau v. Badger Co-op. Oil Co.*, 227 Wis. 473, 279 N.W. 666 (1938); *Connecticut Baptist Conv. v. McCarthy*, 128 Conn. 701, 25 A.2d 656 (1942); *Slaughter v. Post*, 214 Ky. 175, 282 S.W. 1091 (1926) [to locate gasoline installations might have implied safety as criterion as was done in *State ex rel. Lane v. Fleming*, 129 Wash. 646, 225 P. 647 (1924)]; *Vincent v. Seattle*, 115 Wash. 475, 197 P. 618 (1921) (motion picture theatre license); *Seattle v. Gibson*, 96 Wash. 425, 165 P. 109 (1917) (drug license); *Samuels v. Couzens*, 222 Mich. 604, 193 N.W. 212 (1923) (jewelry store license); *State ex rel. Haddad v. Charleston*, 92 W.Va. 57, 114 S.E. 378 (1922) (restaurant might imply sanitation, morality etc. though administration indicated standards of application were ill-defined).

¹¹⁰ 167 Mo. 654, 67 S.W. 872 (1902), *aff'd*, 194 U.S. 361, 24 S.Ct. 673, 48 L.Ed. 1018 (1904).

¹¹¹ *Hays v. Poplar Bluff*, 263 Mo. 516, 173 S.W. 676 (1915); *cf. Crossman v. Galveston*, 112 Tex. 303, 247 S.W. 810 (1923) (ordinance held invalid requiring permission to repair a wooden building within fire limits). The court argued that what is not a nuisance cannot be made one. This restrictive "nuisance" theory underlies many of these decisions and is independent to some extent of the delegation issue.

licensed.¹¹² In neither of these cases, indeed, is it as easy to imply a standard as it would be in the milk or junk dealer cases. This increased or new emphasis on a standard in licensing may be a response to the modern proliferation of the licensing function and the greater variety of purposes to which administration may put it. The solution is not only greater care in drafting but the formal adoption in rule or decision of precisely articulated administrative policies which, indeed, if of long enough standing, may save an otherwise unconditional delegation.

One delegation previously mentioned as denied by the Illinois court¹¹³ was the power to grant exemptions from zoning restrictions in cases of practical difficulty or unnecessary hardship. Here to be sure is a fertile ground for discrimination in reverse, for more favorable treatment of the successful applicant. What is more, it is a field where the operation of local political favoritism is notorious. But due process itself is thought to require exemptions in cases where zoning renders a parcel nearly valueless; it would seem unquestionable that the legislature may provide for exemptions from the limits which it itself imposes. The basis for this exemption is clearly "unnecessary hardship." Such statutes have usually been upheld.¹¹⁴ In New York the Court of Appeals has severely limited the exercise of the power, lest the zoning law be riddled by exemptions. It has required a showing that the use to which the property was limited would be overwhelmingly uneconomic.¹¹⁵ No doubt some such words might be written into the statute, but again we must question the propriety of such judicial tutelage of the legislature.

It is not only in zoning laws that the power to grant exceptions is found. State courts generally look with hostility on these "suspending" or "dispensing" powers as involving some peculiar power to make or to set aside the law.¹¹⁶ There is, no doubt, a reasonable fear of favoritism. But essentially these powers are no different than the discretion which is inevitably committed to most agencies whether or

¹¹² *St. Louis v. Polar Wave Ice & Fuel Co.*, 317 Mo. 907, 296 S.W. 993 (1927), 54 A.L.R. 1082 (1928) (nothing, says court, to show what would or would not qualify applicant).

¹¹³ *Welton v. Hamilton*, 344 Ill. 82, 176 N.E. 333 (1931); *accord*, *Lewis v. Baltimore*, 164 Md. 146, 164 A. 220 (1933), appeal dismissed, 290 U.S. 585, 54 S.Ct. 56, 78 L.Ed. 517 (1933).

¹¹⁴ *Spencer-Sturla Co. v. Memphis*, 155 Tenn. 70, 290 S.W. 608 (1927); *Colorado Springs v. Street*, 81 Colo. 181, 254 P. 440 (1927); *McCord v. Ed. Bond & Condon Co.*, 175 Ga. 667, 165 S.E. 590 (1932); *In re Dawson*, 136 Okl. 113, 277 P. 226 (1928); *L. & M. Investment v. Cutler*, 125 Ohio St. 12, 180 N.E. 379 (1932).

¹¹⁵ *Y. W. H. A. v. Board of Standards & Appeals*, 266 N.Y. 270, 194 N.E. 751 (1935), appeal dismissed, 296 U.S. 537, 56 S.Ct. 109, 80 L.Ed. 382 (1935); *Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851 (1939). These cases illustrate how little inclined is the Court of Appeals to sustain the action of the administrator when he grants a variation and *per contra* how difficult it will be to upset him when he denies it.

¹¹⁶ An excellent treatment is found in Note, *The Power of Dispensation in Administrative Law—A Critical Survey*, 87 U. of Pa.L.Rev. 201 (1938).

A power to "alter" or "modify" a statute or to "suspend" its operation seems in terms to be a power to make or break law in a way that mere delegation is not. But, if such powers are controlled by a standard, they are essentially no different

not to proceed with enforcement or whether or not to adopt a rule or order. The power to act pursuant to a complex standard ordinarily involves the power not to act.¹¹⁷ For this reason a power to grant exemptions is ordinarily unnecessary. But the legislature may desire to enact a fairly precise and detailed regulation. If the regulation is not to produce hardship, administrative power to exempt may be advisable; and the usual discretion to overlook justifiable violation does not provide adequate protection since it is unsafe to rely on a promise of non-prosecution. If the power is equipped with an "intelligible principle" it should be as valid as any other. The courts may scrutinize its use as they do in zoning to prevent indiscriminate or corrupt variations from the general rule of the statute.

The licensing of trades and professions is another field in which understandably the courts have been sensitive to the absence of adequate standards. Refusal of a license to practice is a heavy blow; revocation almost fatal. Furthermore, it has been customary to entrust the licensing function to the profession. The licensing authority, whether it be the professional association itself, or persons sworn as public officials, will normally represent dominant influences. The medical profession has shown hostility to unorthodox methods of treatment such as the Sister Kenny paralysis treatment and the systems of homeopathy, osteopathy, and the like. It has shown even greater hostility toward practices labelled "unethical": advertising, fee-splitting, "running," and toward such innovations as group medicine. To entrust the profession with the power to discipline its fellows under general standards of "fitness" and "good character" undoubtedly gives a wide opening to prejudice and self-interest. Yet what, it may be asked, is the practical alternative?

The licensing power has been more readily sustained than the power of revocation. It is true that in *Replogle v. Little Rock*¹¹⁸ an Arkansas

from any other delegation. They are in a sense just a further elaboration by way of qualification of the basic standard to which they are appended.

The Committee on Ministers Powers, Report Cmd. 4060 (1936) 36, 61 regarded powers of this sort as exceptional and dangerous, particularly the so-called Henry VIII clause enabling the administrator to modify the act or even some other act where necessary. In form, indeed, such a power does seem dangerously unlimited and rather to make the whole business of legislation superfluous. But in their contexts most such powers have been relatively modest and probably little more than the usually upheld powers of administration. Thus it has ordinarily been conferred to enable a Minister "to modify the provision of the Act so far as may appear to him to be necessary for the purpose of bringing the Act into operation." Such a clause is understood as having reference to administrative detail. The Committee would limit it to a power incident to bringing an act into operation and subject to lapse in one year. See comment by Willis, *Parliamentary Powers of English Government Departments* 185 (1933) who admits that such a power potentially entrenches on parliamentary sovereignty but believes that its limited use should not be a cause for concern.

¹¹⁷ Cf. *International Brotherhood of Teamsters v. International Brewery Workers*, 106 F.2d 1871 (C.C.A.9th 1939) discussed in Jaffe, *The Individual Right to Initiate Administrative Process*, 25 Iowa L. Rev. 485, 486 (1940); *Bethlehem Steel Co. v. New York State Labor Relations Board*, 67 S.Ct. 1026, 1031, 1037 n. 1 (1947); *United States v. Wabash R. R.*, 321 U.S. 403, 414, 64 S.Ct. 752, 88 L.Ed. 827 (1944).

¹¹⁸ 166 Ark. 617, 267 S.W. 353 (1924); cf. *Harmon v. State*, 66 Ohio St. 249, 64 N.E. 117 (1902).

court held that a power to examine plumbers as to their knowledge of plumbing was void because the legislature had not prescribed the requisites of the examination! Perhaps these august juris consults were unaware that plumbing as well as law has its curriculum. Even Illinois holds to the contrary and joins in the great weight of authority which upholds the licensing power for plumbing and for other skills and professions.¹¹⁹ The licensing authority may be empowered to determine skill and moral qualification. In setting an examination, the administrator is in a sense prescribing ad hoc a uniform treatment which sets limits to discretion. The requirement for rules in a field where the general standard is difficult to formulate is a wise one, and might save a delegation otherwise questionable.

In *Seignious v. Rice*¹²⁰ the New York Court of Appeals considered a power to refuse to renew a license. A refusal to renew is, of course, nearly equivalent to revocation of a license.¹²¹ The statute said that the licensing authority "may require as a condition of renewal of any plumber's license issued after January first, nineteen hundred twenty, that the holder of such license qualify for such renewal by successfully passing an examination. . . ." Judge Lehman writing for a unanimous court held the statute unconstitutional. The legislature had not indicated "a standard or measure" by which the authority could determine who was and was not to be examined. "The Legislature is free to choose among conflicting considerations. . . . It cannot delegate the same freedom of choice. . . ." ¹²² The judge does not allude to the background of this curious statute, but the record shows it. An investigation had revealed administrative corruption since 1920. The legislative remedy was not easy to discover. Must all well-established master plumbers be subjected to the hazards of re-examination? Should the statute speak out hard and clear, precisely stipulating that any one who had corruptly secured his license should be re-examined? Think of the difficult, exacerbated, scandalous hearings! In this dilemma the legislature may have hoped that the court recognizing the difficulty would accept any tolerable solu-

¹¹⁹ *Douglas v. People ex rel. Ruddy*, 225 Ill. 536, 80 N.E. 341 (1907). See Note, 36 A.L.R. 1342 (1925).

In two of the best known cases, it was unsuccessfully claimed that the discretion granted was so arbitrary as to deny due process. *Dent v. West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889) (appeal from state court decision upholding medical licensing); *Douglas v. Noble*, 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590 (1923) (reversing holding of lower federal court that failure of statute to prescribe terms of dental examination was contrary to due process; delegation problem as such raised no federal question). In the recent *Kotch v. Board of River Port Pilots* [67 S.Ct. 910 (1947)] a majority of the Court refused to invalidate a system of licensing pilots which operated on a tradition of limiting candidates to relatives and friends of the licensees.

¹²⁰ 273 N.Y. 44, 6 N.E.2d 91 (1936).

¹²¹ Section 5(c) of the Administrative Procedure Act [Pub. L. No. 404, 79th Cong., 2d Sess. (June 11, 1946)], for example, prescribing a separation of prosecuting and judging functions, by specifically exempting from its coverage applications for initial licenses, impliedly covers renewals, thus treating the latter proceedings as equivalent to revocation proceedings.

¹²² *Seignious v. Rice*, 273 N.Y. 44, 50, 6 N.E.2d 91, 93 (1936).

tion evolved by the commissioner: the commissioner's ruling was to require examination of *all* who had been licensed since 1930. The Court perhaps thought it a sufficient protection of the public interest that if a corrupt plumber was in fact a bad one, his license could be revoked.

Early decisions were hostile to the power of revocation. In 1906 the Supreme Court of California¹²³ disallowed a power to revoke a medical license for advertising "grossly improbable statements"; no rule provided what was improbable, no moral standard was in question, the injunction was too "vague." Yet this standard seems precise compared to a power to revoke for "unprofessional conduct," which is now quite generally upheld. The legislature, Judge Lehman has said recently, could not delegate "unfettered discretion" in the power to revoke for "conduct not defined in advance" but "the standards of conduct generally accepted by practitioners . . . are not so indefinite that they cannot be determined by qualified persons."¹²⁴ In a case shortly following this, a dentist had paid a "runner" for bringing in sailors' business from the waterfront. The majority upheld¹²⁵ a finding of unprofessional conduct. Two judges dissented: "If one is to be deprived of his professional livelihood he is entitled to be warned in advance (*i.e.*, by rule) that conduct which is neither reprehensible nor prohibited by law may have such consequences."¹²⁶ Both majority and minority relied heavily on Lehman's remarks in the earlier case.

Such a power when lodged in the officialdom of a profession is dangerous. The legislatures and courts should consider certain safeguards. In New York a committee of the profession is subordinate to the Board of Regents, a non-professional body of great dignity and notable standing. The Board exercises the final power. This admirable device should be universally adopted. To be sure the Board must ordinarily accept the views of its professional committees, but it may temper their fanaticism. Where a specific issue of "ethics"—advertising, fee-splitting—is acute, the legislature should settle it. Rule making by the Board should be encouraged. The courts should not permit the use of the general phrase to impose upon professional minorities conceptions of ethics which have not more general recognition.

¹²³ *Hewitt v. Board of Medical Examiners*, 148 Cal. 590, 84 P. 39 (1906). This case is usually distinguished as in *State Board of Medical Examiners v. Macy*, 92 Wash. 614, 159 P. 801 (1916) ("Advertising having a tendency to deceive or impose on credulous or ignorant persons"); *Glass v. State Board of Medical Examiners*, 50 Cal.App. 389, 195 P. 73 (1920).

¹²⁴ *Matter of Cherry v. Board of Regents*, 289 N.Y. 148, 154, 158, 44 N.E.2d 405, 408, 412 (1942).

¹²⁵ *Matter of Bell v. Board of Regents*, 295 N.Y. 101, 65 N.E.2d 184 (1946).

¹²⁶ *Id.* at 112, 65 N.E.2d at 189.

SECTION 3. ARRANGEMENT OF LANGUAGE AND SOME OTHER MECHANICS OF DRAFTING

A. Establishment of Policy and Substance of the Bill

ORDRONAUX, CONSTITUTIONAL LEGISLATION IN THE UNITED STATES

Philadelphia: 1891. T. & J. W. Johnson & Co., pp. 578-586.

Every law being in the nature either of a command or a prohibition, is a displacement of existing civil relations, in which society, as well as individuals, have acquired rights; and its possibilities to work harm must be duly estimated as well as its power to do good. How, it may be asked, can these things be known even inferentially, without a preceding knowledge of the legal nature and consequences of such civil relations? Society is an arch built of legal and moral rights. The moment we displace one of these rights we threaten the stability of the whole structure, unless we at the same time carefully re-adjust their points of inter-dependence. Can such dangers be comprehended intuitively? Or do they not require the same degree of learning to provide for their consequences, as was necessary to erect the original structure?

No writer upon law has failed to perceive the disadvantages to legislation arising from want of preparation in legislators, and no one has more emphatically expressed himself upon this subject than Sir William Blackstone. This is his language:—

“Indeed, it is perfectly amazing that there should be no other state of life, no other occupation, art or science in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical; a long course of reading and study must form the divine, the physician and the practical professor of the laws; but every man of superior fortune thinks himself born a legislator. Yet Tully was of a different opinion, ‘it is necessary,’ says he, ‘for a senator to be thoroughly acquainted with the Constitution; and this,’ he declares, ‘is a knowledge of the most extensive nature; a matter of science, of diligence of reflection; without which no senator can possibly be fit for his office.’”

But if the difficulty of correctly framing laws be even conceded, when the matter of a new law is the question at hand, how much greater will that difficulty not become when the question deals with amendments to existing laws, many of which may have already been the subject of legal contention possibly not yet settled, and under whose operation large moneyed interests, or municipal privileges may have long been exercised. Here again Blackstone exclaims with just indignation: “And how unbecoming must it appear in a member of the Legislature to vote for a new law, who is utterly ignorant of the old!

What kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!"

No one, for instance, who intelligently examines a statute like the Statute of Frauds, can fail to see why, after having been in operation over 200 years, it should still give rise to the necessity of fresh judicial interpretations, under the varying conditions of human society requiring it at times to be regarded, now as a rule of substance, and then again as a rule of procedure. No modern statute has ever been subjected to such frequent and conflicting interpretations. It has been overwhelmed by commentaries and decisions, and has filled our reports with legal adjudications to the number of many thousands. One section alone, comprising but eighty-six words, has required 171 pages for its elucidation in Mr. Benjamin's Treatise on Sales; and the cases cited in support of the distinctions noted, may be numbered by hundreds. These distinctions largely dependent upon phraseology, have been a source of ceaseless discussion by Courts and text-writers, in both England and the United States. To undertake now to amend some of its provisions without a previous knowledge of their judicial history, would be tantamount to throwing aside the labors of hundreds of Courts, which have had occasion to adjudicate upon them in some particular litigation. Yet any Legislature may, at its pleasure, alter and revise this, or any other similarly important statute, bringing to the work as little special knowledge, as it would to a statute to lay out a county highway, or to regulate the method of calling a town meeting.

It is evident therefore, that the function of lawmaking being always in the nature of a tentative effort to create new civil relations, or to re-adjust old ones, renders it necessary, before framing any statute, that the following facts as fundamental propositions should be kept constantly in view:—

- 1st. The necessity of such a law in order to prevent some present mischief, or remedy some outstanding defect in legislation.
- 2d. The constitutional power to pass it.
- 3d. The means by which it is to be operated.
- 4th. The rights it is to bestow or restrict.

NOTE

To the same effect, see Moore, "A Foreword to the Office of Legislative Counsel", 29 Colum.L.Rev. 380 (1929).

DUNCAN L. KENNEDY. LEGISLATIVE BILL DRAFTING

31 Minn.L.Rev. 103-105 (1946).

Bill drafting involves the drawing up of bills, resolutions, memorials, and amendments for introduction in the legislature. The general directions set forth in the laws creating bill drafting agencies usually state that the draftsmen, in preparing bills, shall consider, in addition to technical form, the constitutionality of the proposal, its consistency with existing laws, whether it is necessary or already substantially covered by an existing law, and its structural relationship with the body of law.

As a practical matter legislative research is an essential part of legislative bill drafting. The problem to be solved or the situation to be remedied by a proposed statute must be clearly understood, and the method of remedying it clearly thought out before a statute to remedy it can be drafted.

The problem of drafting relates to the formal side of legislation. The draftsman should not be called upon until after social and economic issues have been disposed of and a policy has been agreed upon. It then becomes a distinct function to translate the legislative policy into the terms of a statute.

Before beginning to prepare a bill it is essential to master the subject matter. Before devising a remedy it is needful to know the existing law and practice and to have a clear conception of the mischief or defects for which the remedy is required.

The law is to be found in acts of the legislature, in judicial decisions and in legal textbooks. The way in which the law actually works is less easily learned. Information is not always available in a written form. It must often be derived from personal experience or supplied by persons having such experience.

For the purpose of studying the acts the most convenient plan is to obtain and fasten together copies of the several acts and then to strike out those portions which have been repealed by subsequent legislation, adding marginal notes to show how they have been repealed.

Lists of relevant judicial decisions, arranged in chronological order, showing the point decided in each case, will often be useful.

So also will be a short bibliography of the textbooks, etc., bearing on the subject of the measure.

It will save much trouble if the results of the information collected are embodied in a memorandum. Several documents of this kind may be required. It may be necessary to trace historically the course of previous legislation, and of discussions in the legislature and elsewhere, and to show how the existing statute law has been interpreted by judicial decisions and has been construed in practice. A memorandum stating the leading features of the proposed legislation and raising clearly the question of principle to be decided will usually be required.

EXPLANATORY NOTE

Determination of the purpose, policy and substantive and other effects of the proposed new law is an absolute prerequisite for successfully writing a bill or any other type of legislative measure. This requires careful research, the result of which should be embodied in a memorandum. The following questionnaire is designed as a guide for that research.

After completion of the memorandum, the first step in drafting is to express the result in writing, concentrating upon substance. The measure should then be rewritten as many times as necessary to:

- (1) attain utmost clarity, with careful regard for choice and arrangement of language;
- (2) comply with formal requirements (see Chapter 5 *supra*);
- (3) take into account judicial techniques of applying statutes; (see Chapter 7, *infra*.)
- (4) ensure constitutionality as far as possible; and
- (5) guard against the exigencies of passage through the legislature.

QUESTIONNAIRE TO BE ANSWERED IN PREPARING A MEMORANDUM AS THE BASIS FOR DRAFTING A BILL.

(The purpose of this questionnaire is to enable you to determine whether or not there ought to be a new law on the matter before you, and, if so, what its scope and effect should and would likely be. Before answering any of the following questions read all of them, treat them as constituting a unit, and answer each in its relation to the others.)

1. What is the subject matter of the proposed new law, i. e. with exactly what phases of human affairs, economic, social, or political is the proposed law concerned?
2. What reliable data, literature, expert opinion and advice on the present problem in its economic, social, and political aspects are available? What is their accumulative effect?
3. What is the present law of this state (or country) on the subject?
4. What is the broad objective of the proposed new law?
5. What are the specific fact situations for which the present law is alleged to provide an inadequate or undesirable solution?
6. Does the alleged defect actually exist?
7. If so, is the situation unique to this state (or country), or has the same or a similar defect in the law been dealt with by the legislature of any other state or country?
8. If another state or country has dealt with such a defect, what statutory remedy did it devise?
9. What has been the experience of such other state or country in applying its statute judicially and administratively? Have any-

- theoretical and practical difficulties been encountered? If so, what means have been taken to overcome them?
10. Have the above mentioned statutes of other states or countries been judicially or administratively construed?
 11. Have the governmental officers charged with the administration of such statutes any criticism or suggestion for improving them?
 12. Has the legislature of this state (or the Congress) ever considered or enacted legislation in any phase of human affairs essentially related to the subject now under consideration? If so, what has been its general policy? Would any statutes be in *pari materia* with the proposed new law? If so, how would they interplay? Adapt and answer questions 9 to 11 to any statutes included in question 12.
 13. What specific solution do you recommend to remedy the defect you are now considering?
 14. Does your solution involve legislative administration or law making in the sense of laying down rules of general application?
 15. If the latter, what is the immediate and specific object or purpose of the new law that you propose?
 16. What are the likely economic, social, and political results and implications of your proposed solution?
 17. What are the various sanctions and other devices available for use in obtaining the objects of your proposed law?
 18. With particular reference to question 17, does the subject matter of your proposed law indicate that it will be self-executory, or must administrative machinery be utilized?
 19. What modifying effect, express or implied, will your new law have on presently existing law, both common and statutory?
 20. Is there any question concerning the constitutionality of your proposed law:
 - (a) under the federal constitution;
 - (b) under the constitution of this state?
 21. In the light of careful appraisal of your answers to the foregoing questions, do you recommend the enactment of a new law? If so, draft the necessary bill.

NOTE

Assistance in discovering some of the answers to the above questionnaire is derivable from: Brandt, "How to Find the Law", (3rd ed. 1940); Hicks, "Materials and Methods of Legal Research", (3rd ed. 1942); Dwyer, Ness and Beutel, "Brief Guide to Federal Legal Bibliography", 31 Fed.Bar Jour. 170 (1945); Doubles and Farmer, "Manual of Legal Bibliography", (1947); "New York State Legislative Annual", (First volume issued in 1946).

Questions 9 to 12 will often necessitate inquiry directed to the governmental officers concerned.

B. Style and Arrangement of Language

DUNCAN L. KENNEDY,* DRAFTING BILLS FOR THE MINNESOTA LEGISLATURE

St. Paul: 1946. West Pub. Co., p. 7.

Legislative drafting requires more definite, more exacting qualities of language, and demands greater skill in composition than other writing. There is no language of sonorous phrases or rhetorical flourishes; it is the language of the exact word and clear sentences, driven home with swift, direct, accurate, inescapable, incisive strokes. Simple English, but exact simple English; certain English, but powerful or delicate as occasion requires; common words, but precise common words; brevity, but the brevity of completeness, definiteness, and clarity. Bill drafting must have the accuracy of engineering, for it is law engineering; it must have the detail and the consistency of architecture, for it is law architecture.

NOTES

1. The same author in "Legislative Bill Drafting", 31 Minn.L.Rev. 103, 104 (1946), says: "It may be said that the rules of good drafting are simply the rules of literary composition, as applied to cases where precision of language is required, and that accordingly anyone who is competent to draw in apt and precise terms a conveyance, a commercial contract, or a pleading is competent to draw a bill; but this is a superficial view."

2. See Lavery, "The Language of the Law," 7 A.B.A.Jour. 277 (1921); 8 A.B.A.Jour. 269 (1922).

ALFRED F. CONARD, NEW WAYS TO WRITE LAWS

56 Yale L.J. 458 (1947).

This article is written in the belief that there are definite and positive goals to be attained by simpler statute-writing. There are definite techniques which will help in attaining these goals. When the goals and techniques are known to the profession, better laws will be written.

The Law and the Law-Maker

A law should be clear, first of all, to the law-makers who are called on to vote it into the statute books. This objective has naturally escaped notice in the past because of the assumption that the law is the word of the legislator. The assumption is daily reasserted in references to the "intent of the legislature."

As most people know when they stop to think about it, the man who actually writes the law is not usually a Senator or a Representative. He is a lawyer employed either by a government department or by a politically influential group of citizens which is trying to get the law

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READ & MACDONALD U.C.B.Les.

passed. After it leaves the draftsman's hands, it passes through a hierarchy of officials (if government-sponsored) or of clients (if privately pushed) before it ever reaches the legislative chambers. The officials and clients are the people who know what the law is supposed to say, and in whose minds is born the "intention" behind the original choice of words. Only then does it reach a Congressional committee which is told what it later will be said to have "intended." ⁷

Recently the writer attended a conference of government executives who argued gravely for half an hour about what Congress "intended" by a particular phrase. "Let's quit kidding," one of the conferees finally remarked. "This law was written around this very table, and most of us were here writing it." ⁸

This fiction of legislative authorship is one of the principal obstacles to better drafting. For a draftsman seldom dares to think about how he would write the law if he had a free hand. He adopts the style in which earlier laws have been written, lest the words should fail to sound like the words of a legislature. This practice insures that laws will be written in a style as ancient as the draftsman's learning permits. It is like the habit which made lawyers write pleadings in French and Latin long after these languages had ceased to be current.⁹

The jargon which results is not of course the language of present day Congressmen. Most of them probably feel more like Maury Maverick, who in his famous attack on "gobbledygook" threatened to shoot at sunrise any federal employee who should give him any more of it.¹⁰

⁷ Sec, e.g., Hearings before House Committee on the Judiciary on H.R. 4840, 78th Cong., 2d Sess. (1944) 16:

Congressman Celler (in reference to a provision of a proposed bill): "That would include nationals of Italy, wouldn't it?"

Mr. Cutler (then Assistant General Counsel for the Allen Property Custodian, sponsor of the bill): "It would."

Congressman Celler: "Would it include nationals of Finland?"

Mr. Cutler: "No; the United States has not been at war with Finland." [Reads a passage referring to residents of enemy countries.]

Congressman Celler (interposing): "That is, whether they are a national or a resident?"

Mr. Cutler: "It refers only to citizens or subjects of enemy states in this subsection. To have no right to return, he must have been a citizen of an enemy country and have resided at some time since Pearl Harbor in enemy territory."

Congressman Celler: When you say "Within any [enemy] territory," does that mean territory, for example, that the Nazis have acquired, like Bulgaria and so on?"

⁸ In the days of Edward I, authorship was more openly avowed. "Do not gloss the statute," Justice Hengham admonished counsel, "for we know better than you, we made it." *Auymeye v. Anon*, Y. B. 33-35 Ed. 1 82 (1305), as quoted in 2 Sutherland, *Statutory Construction* (Horack's 3d ed. 1943) 202.

⁹ See 2 Holdsworth, *History of English Law* (3d ed. 1923) 477-84. Holdsworth quotes an English statute of 1362 which complained that "the laws, customs, and statutes of this realm are not commonly known in the same realm, for that they be pleaded, shewed, and judged in the French tongue, which is much unknown in the said realm, so that the people which do implead, or be impleaded in the king's court, and in the courts of others, have no knowledge nor understanding of that which is said for them or against them by their serjeants and other pleaders."

¹⁰ *Maverick, Gobbledygook* (1944) 4 Pub. Adm. Rev. 151.

The jargon has to be translated to Congressmen so that they can vote understandingly on the bills. Accordingly, a well-drawn committee report contains a full paraphrase of the statute, in shorter sentences and simpler terms, for the Congressmen to read.

A good example of the translation procedure can be found in the House Report on the recent Administrative Procedure Act. Since this Act is one of the more readable works of the Seventy-Ninth Congress, the difference between the official text and the paraphrase is not vast. It is just enough to indicate the difference between something meant to be read by lawmakers and something to be read by Supreme Court judges. A paragraph of the bill is given below on the left with its paraphrase on the right:¹¹

The Act

There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner.

The Paraphrase

The hearing must be held either by the agency, a member or members of the board which comprises it, one or more examiners, or other officers specially provided for in or designated pursuant to other statutes.

All presiding and deciding officers are to operate impartially.

Because of the system of obscure bills accompanied by simpler committee reports, there are usually two versions of each law that passes Congress. The draftsman likes to imagine that when the statute gets into court, the obscure official version will be applied by the judges, and the simpler paraphrase disregarded. But modern judges show a great inclination to disregard the official language and apply the version that Congress consciously agreed to.¹²

So the draftsman's subtlety ends by defeating itself. Instead of controlling judicial rulings by his artfully drawn clauses, he simply causes the judges to rely on the legislative record, over which he has less control. Opposing factions pack the legislative record with conflicting statements, each favoring a particular interpretation.¹³

¹¹ H.R.Rep.No. 1980, 79th Cong., 2d Sess. (1946) 4, 34.

¹² See Radin, *Statutory Interpretation* (1930) 43 Harv.L.Rev. 863. Some examples of judicial reference to legislative intention are given *infra* notes 32, 34, 36.

¹³ A recent example of conflicting legislative history is furnished by the Administrative Procedure Act, Pub.L.No. 404, 79th Cong., 2d Sess. (June 11, 1946). The

A better way for the draftsman to approach his objectives would be to write the statute itself in language he expects a Congressman to read. There would then be no reason for committees to prepare a different text for law-makers to read, nor for judges to suppose that Congressmen really understood the law to mean something it does not say. The statute itself should be as detailed, concrete, and simple as the writer would want to be if he were explaining the law personally to the men who are to vote on it.

So far, we have been discussing cases where the draftsman has been obscure because he was thinking of the judge who would interpret the law, and overlooked the Congressmen who must vote on it. There are also cases where the draftsman is thinking very much about the Congressmen and wants to prevent their discovering what is involved. Sir Courtenay Ilbert, former legislative counsel to the British Parliament, tells without embarrassment of an instance where he used this method in order to sidestep a stormy issue that was being saved for a later date.¹⁴

Examination of a 1941 amendment to the Trading with the Enemy Act¹⁵ suggests that an American draftsman was there trying the same thing. This was an amendment to section 5 of the Act, which had been used by the Treasury for control of foreign exchange transactions. Almost hidden in it was a long sentence giving the President powers to

Attorney General, anxious to show that the Act did not expand the right to judicial review, declared that the section on right to review "reflects existing law." His statement was printed in the Senate Report (Sen.Rep.No. 752, 79th Cong., 1st Sess. (1945) 44), and read by Senator McCarran, sponsor of the bill, on the floor of the Senate (92 Cong.Rec., Mar. 12, 1946, at 2195).

Senator Austin, anxious to show that the Act broadened the right of review, induced Senator McCarran to assent to statements which were substantially contradictory, in this colloquy:

Senator Austin. Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review?

Senator McCarran. That is correct.

Senator Austin. And is it not also true that . . . this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?

Senator McCarran. That is true; the Senator is entirely correct in his statement. (92 Cong.Rec., Mar. 12, 1946, at 2195.)

In this passage, Senator Austin's statements are not directed to the question of whether the bill should be passed, but to building a legislative history to influence its interpretation after it should become law.

A less direct conflict exists between statements of the Attorney General and of Congressman Walter on statutes precluding judicial review. The former emphasized that a statute which does not in terms preclude review may "be interpreted as manifesting a congressional intention to preclude review." (Sen. Rep. No. 752, 79th Cong., 1st Sess. (1945) 44). The latter contended that, "Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable. . . . The mere fact that Congress has not expressly provided for judicial review would be completely immaterial. . . ." (92 Cong.Rec., May 24, 1946, at 5759). Again, both the Attorney General and the Congressmen were packing the record of "legislative intent" rather than telling legislators how to vote.

¹⁴ Ilbert, *The Mechanics of Law Making* (1914) 19-22.

¹⁵ 55 Stat. 839 (1941), 50 U.S.C.App. § 5 (Supp.1943).

"vest" foreign property—a subject previously dealt with in another section of the Act, and under the more revealing term, "seize."¹⁶ Four years later, the government contended that this amendment had repealed by implication other sections of the Act that gave remedies to American citizens. The argument was plausible enough on the face of the statute, but the Supreme Court overruled it.¹⁷ Mr. Justice Burton, who had been a member of the Senate when the law was passed, wrote a long concurring opinion to explain that Congress meant to leave untouched the rights of citizens which other sections of the law protected.

The Law and the Citizen

The citizens who have to obey the laws—or possibly go to prison for their violations—have been even more neglected by draftsmen than have the legislators. A cursory examination of most laws is enough to persuade a reader that they can hardly be understood by the laymen who are bound by them. To this there may now be added a virtual demonstration.

A series of experiments by Dr. Rudolph Flesch has made it possible to determine quite definitely the readability of various kinds of writing.¹⁸ Through tests of a large number of adult readers, he devised a scale for grading passages with scores running from zero upward. From 0 to 1, for example, is the level of comic strips, which can be easily read by people with a fifth grade education. From 3 to 4, which Dr. Flesch calls "standard," can be easily read by high school students. This is the level of *Readers' Digest* and *Time*. From 5 to 6 is the level of academic journals and quarterlies, which can be easily read by college graduates. Anything above 6, according to these observations, can be easily read by practically no one, and cannot be understood, even with effort, by most people who lack a college education.

On Dr. Flesch's scale, most statutes register a score over 10—several degrees above the comprehension of average college graduates. Since only about five percent of the population have a college education, laws are unintelligible to a large proportion of the people who are supposed to obey them. In fact, they are probably beyond the understanding of nearly everyone except the lawyers who make their living by interpreting them.

This state of affairs is not hard to explain. Bentham thought it arose because jurists would rather hang a man for his misdeeds than warn

¹⁶ Trading with the Enemy Act, § 7, 40 Stat. 411 (1917), 50 U.S.C.App. § 7 (1940). The precise effect of the amendment in question is ably debated by Dulles, *Vesting Powers of the Alien Property Custodian* (1943) 28 *Corn.L.Q.* 245, and Carlston, *Foreign Funds Control and Alien Property Custodian* (1945) 31 *Corn.L.Q.* 1.

¹⁷ *Markham v. Cabell*, 326 U.S. 404, 66 S.Ct. 103, 90 L.Ed. 165 (1945).

¹⁸ Flesch, *The Art of Plain Talk* (1946) 135-6. Dr. Flesch's observations were first reported in his *Marks of Readable Style*, *Contributions to Education* No. 897 (Teachers' College, 1943).

him in advance against committing them.¹⁹ But no such sinister explanation is necessary. The fact is that legal science has consisted in studying the effect of laws on the decision of appellate cases. Draftsmen schooled in this system naturally fix their eyes on the judge of the highest court.

It seems evident that there are tremendous advantages to be gained from writing laws so that citizens can understand them. We know that it would be impossible to police all the business enterprises in the country. The state cannot, for example, fine or enjoin each enterprise that follows any of the practices supposed to constitute "restraint of trade." If illegal practices are to cease, business men must be able to understand which of their practices are illegal. But the language of the Clayton Act is quite inadequate to inform the average business man that he must, for example, abandon basing-point pricing.²⁰

The advantages of making laws understandable was brought home most effectively to the Office of Price Administration, which started out to write its regulations in the strictest tradition of legalistic obscurity.²¹ It was soon embarrassed by a Supreme Court decision refusing to enjoin violations by a Washington department store which showed that it was employing twenty-eight clerks in an effort to apply the price regulations.²² Fortunately, Professor David F. Cavers had already persuaded the agency to try writing its regulations in a down-to-

¹⁹ 3 Bentham, Works (Bowring's ed. 1843) 237. A portion of one of Bentham's sentences on this point deserves reproduction: ". . . whosoever they be to whom it is a matter of satisfaction that men should be put to death in due course of law (and these, more especially among English judges and other English lawyers, are many), the greater the extent to which they can keep from each man's mind the knowledge of such portions of law to which, on pain of being put to death for disobedience, they are called upon to pay obedience, the greater the extent to which they can administer this satisfaction to their minds. . . ."

²⁰ The Robinson-Patman amendment to the Clayton Act provides that "it shall be unlawful . . . to discriminate in price between different purchasers of commodities of like grade and quality. . . ." 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1940). In 1945, the Supreme Court decided that this language prohibits pricing on the basing point system. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726, 65 S.Ct. 961, 89 L.Ed. 1320 (1945). The facts of the case indicate that the industry had continued to use basing point systems after passage of the Robinson-Patman Act in the honest belief that the statute did not forbid them. Compare Commissioner Lowell Mason, in *Manhattan Brewing Co.*, 3 C. C. H. 1946 Trade Reg. Rep. 12793, 12794: "Business men are entitled to know why Commissioners decide cases the way they do. . . . I shall try to write my opinions in plain English devoid of legal jargon."

²¹ Price Section Memorandum No. 3, Feb. 16, 1942, directed all lawyers to follow this model for the first section of each regulation:

"On and after February 16, 1942, regardless of any contract, agreement, lease or other obligation, no person shall sell or deliver second-hand bags, and no person shall buy or receive second-hand bags in the course of trade or business, at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as Section 16; and no person shall agree, whether on condition that this Maximum Price Regulation No. — is thereafter amended or is thereafter determined by any court to be invalid or on any other condition or otherwise to do any of the foregoing; and no person shall offer, solicit or attempt to do any of the foregoing."

²² *Hecht Co. v. Bowles*, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944).

earth style²³ which some commentators called "pidgin English."²⁴ A large number of merchants, OPA concluded, were willing to obey the law if they knew what it was. But if they could not understand the regulations, they would run their businesses to suit themselves. What was true for OPA regulations is equally true for a great many statutes.

To the argument for intelligible laws, it is sometimes answered that citizens do not read laws anyway. Chicken thieves, for example, do not steal from ignorance of the larceny statutes. That argument is perfectly good for the class of common law crimes which merely codify the Ten Commandments. It is not true for the great mass of legislation which is on the statute books today. The immense business done by the loose leaf services shows how eager business men are to know what rules they must live by. A popular weekly, the *United States News*, has a regular feature called "News-Lines," telling readers what "you can" and what "you cannot" do under Washington's latest rulings.

It is also argued that citizens can go to lawyers to have laws interpreted.²⁵ To this contention, it should be enough to reply that in fact many citizens do not. What is more important, they can not. A business man must make hundreds of decisions about competitive practice without waiting for opinions of his general counsel. If he cannot grasp the rule he is meant to follow, he will follow the rule that appeals to him and hope it is right.

Moreover, if a business man's lawyer can translate a law into terms that a business man can understand, a draftsman should be able to do the same. He will save time and expense for citizens when he does.

The Law and the Public Official

Laws must also be read and understood by the public officials who have to apply them and enforce them. These are the only people concerned with a considerable portion of the statutory law—the portion that tells how the various departments of government shall be run, who shall appoint their employees, and what they shall be paid.

Public officials are also some of the most important readers of the other kinds of laws, which tell citizens what they must do and refrain from doing to keep out of court. Police, detectives, and inspectors have to know what conduct has been forbidden before they can crack down on violators. Officials who issue licenses and assess taxes have to understand the categories in which licenses should be granted and taxes imposed.

²³ Professor Cavers' memorandum on simplification was also circulated in the War Production Board, and in the Canadian Wartime Prices and Trade Board, but has unfortunately never been published.

²⁴ See Beuscher, *Law-Taught Attitudes and Consumer Rationing* [1945] *Wis.L. Rev.* 63.

²⁵ See Carter, *The Provinces of the Written and the Unwritten Law* (1890) 24 *Am.L.Rev.* 1.

Many public officials have just as hard a time understanding statutes as do many citizens. That is one reason why they are bound to fasten on mechanical interpretations that irk the citizen or provoke needless litigation. It is also a reason why they apply their personal standards of justice instead of applying the law. Not infrequently, the results are better than if they tried to follow the letter of the law as they understand it.

It is only a partial solution to fill public offices with lawyers, or with men who have taken a night law course. Often the job needs a good accountant, an engineer, or a social worker. But if it gets the specialist it needs, it gets a man who has trouble understanding the laws. More often it gets a poorer specialist than it needs, or no specialist at all, in order to get a man who can make out the law or is willing to ignore it.

Neither is it a solution to provide every official with a legal adviser. The man who makes the decisions should not only be told the law; he should understand it.

The Law and the Judges

At last we reach the men for whom most laws are consciously written—the judges. When a draftsman labors over a nascent bill, it is the judge who is nearly always in his mind. Treatises and casebooks are filled with examples of how judges construed ill-fated laws in the past. These are the precedents which guide draftsmen in conceiving the ill-fated laws of the future.

The draftsman's preoccupation with the judge is evidenced in a hundred ways. Sometimes it appears in the form of the law, which says that taking money from the employer's coffer "shall be deemed" (by the judge, obviously) to be embezzlement, and that the malefactor "shall be punishable" (by the judge) with one to ten years' imprisonment. A draftsman who was thinking about influencing the conduct of citizens would tell them that "employees must not" take money from the coffer, and that if they do they "will be punished."

In other laws, concentration on the judge is evidenced more subtly, but just as surely. A sentence a page long, winding up in a string of provisos, is no tool for telling either citizens or officials what has been forbidden. It is tool, the draftsman hopes, for putting the judge in a box where he can rule only one way.²⁶

One of the lesser reasons why this kind of drafting is bad is that the judge is the last man to read any statute. It must first be read by the

²⁶ Some of the advocates of codification have urged it principally as a means of controlling the judge, and making his actions more predictable. See Morrow, *Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation* (1943) 17 *Tul.L.Rev.* 351, 537; Samuel, *The Codification of Law* (1943) 5 *U. of Toronto-L.J.* 148. This is a reaction against the belief of Napoleonic times that codification would make professional interpretation unnecessary. But the objective of making judicial conduct more predictable is perfectly consistent with the objective of making law more available to laymen and lawyers alike. See Field, *Codification* (1886) 20 *Am.L.Rev.* 1.

legislators, and accepted by them. It must then be read, or exposed for reading, by citizens. If the law is understood and obeyed by the citizens, it need never be re-read by anyone else. If it is disobeyed, the public official has his turn at reading the law, deciding whether the citizen has disobeyed it, and catching him in the infraction.

Only after all these other stages have been passed does the law ordinarily come to the judge.²⁷ This alone is a reason for writing so that some of the earlier parties may comprehend.

To this argument, the traditional draftsman will respond that it does no good for legislators, citizens, and officials to comprehend if judges, in the end, will misconstrue. This response reveals the crux of the whole question, which is the peculiar views about judges that underlie traditional drafting. The judge, according to a widely held superstition, is a man determined to thwart the intention of legislators by twisting every sentence from its normal meaning. But if you tie each word firmly enough to the next one, according to this bit of scribes' lore, the judge cannot get out of the trap and must sentence the defendant.

Cases of a past century furnish some apparent examples of this kind of judicial conduct. There is the case of the English statute which prescribed a penalty—"if any person or persons shall wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle." A defendant was charged under this law with conducting a bull-fight. The judge let him off, ostensibly because "bull" was not in the list of animals, and the judge would not construe "other cattle" to include something not listed.²⁸

Then there is the judge who reversed a conviction for rape because the indictment concluded "against the peace and dignity of State," instead of "against the peace and dignity of *the* State." The constitution, the judge pointed out, required indictments to conclude in a certain form, and he was bound by the constitution.²⁹

A trial lawyer who lost an argument in a case like this would probably conclude that the judge had a bad breakfast, or that he enjoyed bull-fighting. But office lawyers prefer the conclusion that if lists were more complete and exceptions more explicit, the judges' conduct would become more predictable. So statutory style becomes (to paraphrase Lord Thring)³⁰ a wordy cairn, on which each practitioner must from time to time throw a new word, until the whole becomes a huge heap of unintelligibility.

In the battle of wits between apparently whimsical judges and ever more diligent draftsmen, victory went always to the judges. They had

²⁷ Declaratory judgment actions may bring the law up for interpretation before an infraction, but only if citizens have found its meaning doubtful.

²⁸ *Ex parte Hill*, 3 C. & P. 225, 172 Eng.Rep.R. 397 (K. B. 1827).

²⁹ *State v. Warner*, 220 Mo. 23, 119 S.W. 399 (1909); *State v. Campbell*, 210 Mo. 202, 109 S.W. 706 (1908); *State v. Skillman*, 209 Mo. 408, 107 S.W. 1071 (1908).

³⁰ Thring, *Practical Legislation* (1902) 2.

the last word. When *exclusio unius* would not work, *noscitur a sociis* could always be brought to play. Today, it is clear that judges are not prisoners of language and do not even pretend to be.³¹ . . .

Today, judges do not even pretend to make a mechanical application of the words of statutes. They much prefer to discover and apply the purposes of statutes.* Under these circumstances, the concatenations of words which delighted old time draftsmen are worse than lost labor.

They oblige the judges to guess at the main purpose of the law, instead of finding it clearly stated. They insure that the judges will look outside, instead of inside, the law to find the rules they should apply to particular situations.

A Restatement of Objectives

The tricks that make a law easy to understand are countless. Many of them are as subtle as the touches that make good style in essays, short stories, and every other kind of literary creation. What is essential is that the writer should really want his readers to understand what is commanded and what is forbidden by the law. His object is different from that treated in books on composition, which seek an appeal to the cultivated literary taste; they strive for a certain sophistication and subtlety which may mystify while it charms.

The law-writer's object is more like that of the man who writes directions on how to use a Kodak or how to operate a Burroughs calculator. He may be addressing a very alert and eager audience, but he wants to be understood with as little effort as possible. And he wants above all to prevent his reader from throwing down the directions in disgust.

How technical he will be should depend on his audience. A statute on judicial procedure may properly use phrases that lawyers alone can comprehend, and sentences as complex as those in legal treatises and law reviews.³² But there is no excuse for using sentences which he would be ashamed to put in a bar association committee report, addressed to the same audience.

Postal regulations should be a good deal simpler. Here is an essentially good sentence from a recent law on what can be mailed:

"Pistols, revolvers, and other firearms capable of being concealed on the person . . . shall not be deposited in or carried by the mails. . . ." ³³

³¹ Modern judges do not like to think of themselves as mechanically applying rules of law. ". . . my plea," writes Judge Clark in a recent complaint against Erie v. Tompkins, "is for freedom for the federal judicial process to be judicial." Clark, *State Law in the Federal Courts* (1946) 55 Yale L.J. 267, 295.

[Footnotes 32-37 are omitted. Ed.]

[* For the extent to which this statement is true, see *infra*, Chapter 7. Ed.]

³² This article is not intended to be as simple as most statutes should be. It is meant for lawyers, while most laws are to be read by laymen.

³³ 44 Stat. 1059 (1927), 18 U.S.C. § 361 (Supp.1946).

Laws on restraint of trade should be pitched to the reading level of average business men. The draftsman of a law like the Robinson-Patman Act should ask himself whether it would make a good circular to the buyers of a large merchandising organization like Sears Roebuck. If it would not, it is a poor device for inducing business men to change their ways of buying and selling.

Internal Revenue laws and regulations may be pitched to several different levels. Those which apply to small individual incomes need to be on a very simple level. The excess profits tax law, on the other hand, had every reason to be more complex; it would be used almost exclusively by accountants. But there was no excuse for writing it in such terms that a bulletin of several hundred pages had to be issued to tell the accountants how to apply it.⁴⁰ The text which the accountants could read should have been the text of the law.

While many of any draftsman's problems are unique, he has others which have confronted scores of draftsmen before him. For these, standard techniques can be evolved and copied from one law to another. Some of these problems are discussed in the paragraphs that follow.

What the Act is About

The first thing that any law-reader wants to know is what the law is about. Does it affect him or doesn't it? Most laws fail so utterly to answer this question that they are likely to be thrown in the waste basket before the reader even tries to decipher them.

A typical example is the Trading with the Enemy Act,⁴¹ which in time of war suddenly applies to tens of thousands of Americans. But if it came in the mail to an American who was about to send some money to a foreign creditor, he would have to parse two or three pages before he found out whether he was likely to be affected by it.

The first thing the citizen would notice is that the Act begins with section 2 (maybe section 1 got lost, he thinks).⁴² Section 2, which has

⁴⁰ The document on which lawyers and accountants relied to calculate excess profits tax was the Bulletin on Section 722 of the Internal Revenue Code (Bureau of Internal Revenue, November 1944). It was prefaced with this caveat (p. ii): "This bulletin is issued primarily for the use of employees of the Bureau of Internal Revenue engaged in the administration of the provisions of section 722 of the Internal Revenue Code. It contains information from which taxpayers and their counsel may obtain the best indication of the current trend of official opinion in the administration of that section. Although it does not have the force or effect of a published ruling or of a Treasury decision, its provisions will guide the administrative officers engaged in the consideration of excess profits tax cases."

⁴¹ 40 Stat. 411 (1917), 50 U.S.C.App. §§ 1-31 (1940).

⁴² Draftsmen of current bills are divided about evenly on whether or not the first section of a statute should be marked "section 1." Pub.L.No. 454, 79th Cong., 2d Sess. (June 26, 1946) begins like this:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the 'Republic of the Philippines Military Assistance Act.'"

"Sec. 2. Notwithstanding the provisions of any other law. . . ."

On the other hand, Pub.L.No. 485, 79th Cong., 2d Sess. (July 3, 1946) begins *this* way:

no subtitle, contains a long list of definitions, starting with a half-page definition of "enemy."

Somewhere in the middle of the second page begins section 3, also with no subtitle. If the citizen is still looking, he will see—

That it shall be unlawful—

- (a) For any person in the United States, except with a license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act, to trade, either directly or indirectly, with, to, or from, or for, on account of, or on behalf of, or for the benefit of any other person. . . .

If he keeps on for a few lines more, and understands what he reads, he will at last find out what the law is about.

A better way to start a statute is suggested by the way OPA finally learned to open its price regulations. It learned by experience ⁴³ to start them this way:

"This regulation fixes ceiling prices for sales by retailers of certain commodities." ⁴⁴

The same approach could have been used in the Trading with the Enemy Act:

"This law applies to everyone in the United States who has any dealings with foreigners."

It could then have proceeded to explain what foreigners and what dealings were specifically affected.

Where an act is addressed chiefly to public officials, rather than to citizens, the important thing is to set out the moving purpose behind the statute. The Employment Act of 1946⁴⁵ (originally proposed as the *Full* Employment Act of 1945) starts with a declaration of the national "policy and responsibility" to provide for employment through free enterprise. This tells the purposes with which the later sections (which can never provide for all eventualities) should be carried out.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

"Section 1. This Act may be cited as the 'Philippine Property Act of 1946.'

"Sec. 2. There shall remain vested in the Government of the United States.
. . . ."

Apparently the statutes which get more drafting attention usually have a separate section 1, as do the Administrative Procedure Act and the Employment Act of 1946 passed by the last session. But both of these acts had earlier drafts in which the first section was unmarked.

When the statute is edited for the United States Code, its first section is always given a section number; e.g., 50 U.S.C.App. § 1 (1940). But the statutes at large, and the official government reprints circulated for information of the public, are in the original form.

⁴³ See notes 21-3 *supra*.

⁴⁴ Maximum Price Regulation 580, Retail Ceiling Prices for Certain Apparel and House Furnishings § 1a, 10 Fed.Reg. 3015 (1945).

⁴⁵ Pub.L.No. 304, 79th Cong., 2d Sess. (Feb. 20, 1946).

Guide Lines

Another simple means of enticing the reading public into the heart of a statute is to put headings on the various subdivisions. A citizen who tackles an official print of the Trading with the Enemy Act to find out which if any of its provisions affects him finds twenty-five pages of closely printed text unadorned by a single guide line.⁴⁶ If he runs over the introductory words of a series of sections, he finds these beginnings for the various paragraphs:

"Be it enacted by the Senate and House of Representatives . . .

"Sec. 2. That the word 'enemy,' as used herein, shall be deemed . . .

"Sec. 3. That it shall be unlawful . . .

"Sec. 4. (a) Every enemy or ally of enemy insurance or reinsurance company, and every enemy or ally of enemy, doing business within the United States . . .

"Sec. 5. (a) That the President, if he shall find it compatible with the safety of the United States and with the successful prosecution of the war. . . ."

This sort of thing is so obviously unenlightening that no compilation of laws is ever published without the compiler adding boldface titles to the various sections in order to guide the reader around. The official United States Code⁴⁷ provides the following guideposts:

"Sec. 1. *Designation of Act.*

2. *Definitions*

3. *Acts prohibited.*

4. *Licenses to enemy or ally or enemy insurance or reinsurance companies; change of name; doing business in United States.*

5. *Suspension of provisions relating to ally, of enemy; regulation of transactions in foreign exchange of gold or silver."*

Compilers' headings are seldom carried below the main section headings, but occasional statutes carry useful captions down through the subsections and paragraphs. Internal Revenue legislation has been particularly forward in this direction, as in the following example:⁴⁸

"Tax on transportation of persons, etc.—

(a) *Transportation.*

(f) *Exemptions.*

(1) *Governmental exemption.*

(2) *Exemption of members of military and naval service."*

⁴⁶ 40 Stat. 411 (1917), 50 U.S.C.App. § 1 et seq. (1940).

⁴⁷ 50 U.S.C.App. §§ 1-5 (1940).

⁴⁸ 26 U.S.C. § 3469 (Supp.1946).

The technique to which the Bureau of Internal Revenue has been driven by its thousands of statutory sections would be no less useful in a great many smaller legislative masses. Yet the great majority of bills entering the legislative hopper, and of statutes leaving it, are as devoid of subdivision headings as the Trading with the Enemy Act of 1917.

Cutting Out the Jargon

One of the things that annoys readers in legal writing is the tireless repetition of words that do not need to be repeated. "Such," "afore-said," and "hereinbefore" are the most familiar offenders.⁴⁹

The argument for them is that they eliminate any possible doubt that the person meant is the same one who was meant before. But it is quite certain that people read stories, articles, and even legal treatises which are not filled with "such," "aforesaid," and "hereinbefore." They do not misunderstand. Laymen find legal documents hard to read precisely because of this strenuous struggle against ambiguity. The only justification for these terms is the myth about the perverse judge who will misinterpret the law by pretending to misunderstand it. Once we have decided that we have to trust the judge anyway, we can do away with these backward-looking modifiers. When we mean the same person as before, we can simply say "*the person*."⁵⁰

"Such" and its companions can be got rid of simply by dropping them. A slightly harder problem is presented when the law-writer has to use two or three different terms, and finds himself repeating them again and again like leit-motifs in a Wagnerian opera. Here is an example of this fault, with one of the recurrent themes put in italics, and the other in capitals:

"Any requirement made pursuant to this Act, or a duly certified copy thereof, may be *filed, registered, or recorded* in any office for the *filing, registering, or recording* of CONVEYANCES, TRANSFERS, OR ASSIGNMENTS of any such property or rights as may be covered by such requirement (including the proper office for *filing, registering, or recording* CONVEYANCES, TRANSFERS, OR ASSIGNMENTS of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so *filed, registered, or recorded* shall import the same notice and have the same force and effect as a duly executed CONVEYANCE, TRANSFER, OR ASSIGNMENT to the Alien Property Custodian so *filed, registered, or recorded*."⁵¹

⁴⁹ An interesting British attack on "word-fetishism" in legal drafting is Williams, *Language and the Law* (1945) 61 L.Q.Rev. 71, 179, 293. See also Editorial, "Said" (1946) 32 A.B.A.J. 344; Armstrong, Book Review (1946) 32 A.B.A.J. 472.

⁵⁰ Very few of these legalisms are found in carefully drafted contemporary statutes like the Administrative Procedure Act and the Employment Act of 1946. But they abound in the routine bills of minor importance. The same is true of the habit of starting every section of a bill with the word "that." The "thats" are carefully stricken out of the sections when edited for the United States Code.

⁵¹ Trading with the Enemy Act, 40 Stat. 1020 (1918), 50 U.S.C., App. § 7c (1940).

This paragraph could have been written as follows:

"Any order under this Act, or a certified copy of it, may be filed in any office for the filing of other transfers of the same kind of property. The effect will be the same as for any other transfer. 'Filing' includes registering and recording; 'transfers' include conveyances and assignments; 'property' includes patents, copyrights and trademarks."

Short Sentences

One of the hardest things for a lawyer to do is to write short sentences. Here is an example of a lawyer-like sentence, from an OPA regulation on work clothing:

"Any tax upon, and incident to, the sale or delivery of staple work clothing, imposed by any statute of the United States or statute or ordinance of any state or subdivision thereof, shall be treated as follows in determining the seller's maximum prices for staple work clothing, and in preparing the records of such seller with respect thereto: . . .

"(2) In all other cases, if, at the time the seller determines his maximum price, the statute or ordinance imposing such tax does not prohibit the seller from stating and collecting the tax separately from the purchase price, and the seller does state it separately, the seller may collect, in addition to the maximum price, the amount of the tax actually paid by him or an amount equal to the amount of tax paid by any prior vendor and separately stated and collected from the seller by the vendor from whom he purchased and in such case the seller shall not include such amount in determining the maximum price under this Maximum Price Regulation No. 208."⁵²

Here is how OPA wrote a similar provision after it had decided it wanted citizens to understand:

"The ceiling prices determined under the pricing rules in section 7 are your ceiling prices exclusive of tax. If the tax law permits the tax to be separately stated, you may charge or collect the tax on the sale or delivery of the article in addition to the ceiling price fixed under the pricing rules: *Provided*, that you state the tax separately. This applies, however, only to a tax on a particular sale or delivery such as a sales tax or compensating use tax. You may separately state the tax by any method you choose, except that the Retail Federal Excise Tax on fur-trimmed articles and certain items of leather goods and other articles imposed by the Revenue Act of 1943 must be stated as provided in Supplementary Order 85."⁵³

Some of the explanation for the failings of the earlier draftsman lies in the same old story. He was thinking of some judge who might let off a chiseler if there were any break between the idea that the tax could be added and the restriction to special kinds of taxes. He was

⁵² Maximum Price Regulation 208, § 1389. 209, 7 Fed.Reg. 6652 (1942).

⁵³ Maximum Price Regulation 580, § 14, 10 Fed.Reg. 3019 (1945).

not thinking at all about the country storekeeper who would have to make sense out of the whole provision.

But the principal explanation for lawyers' labyrinthian sentences is more ironic. It is their passion for brevity. Most sentences start short, and grow longer as each member of a legislative committee adds ideas. After a couple of additions, the sentence needs to be split into two. Any draftsman would split it in a letter, but not in a statute, because that would make him repeat the subject and verb. The statute appears to take less space in one sentence than in two.

What the draftsman forgets is that the reason for brevity is to avoid tiring the reader. Most readers find one sentence of eighty words more tiring than five with twenty each. The thing to keep down is not the number of lines of type, but the reading time. The easier the style, as *Readers' Digest* knows, the shorter the reading time.

Giving Examples

Another tradition which discourages citizens from reading laws is the draftsman's habit of describing his subject in the least specific terms he can find. An example of this approach is furnished by a bill in the last Congress which provided,

"That hereafter, except as otherwise specially provided by Act of Congress, no action for the recovery of wages, penalties or other damages, actual or exemplary, pursuant to any law of the United States shall be maintained in any court unless the same was commenced within one year after such cause of action accrued: . . ." ⁵⁴

The only way a lawyer can know whether the one-year limitation of this law applies is to search the United States Code from stem to stern. If he can't find a limitation anywhere else, then this is it.

A catch-all limitation may be a good thing, just to cover the unknown and forgotten cases. But this wasn't that kind of a law. The draftsman knew precisely what actions he wanted to limit, and he listed them, with citation, in the Committee report. If he had listed them in the statute, he would have saved hours of research for thousands of lawyers. Why didn't he? Possibly he prided himself on the brevity of his product, occupying a minimum of space in the Statutes-at-Large, but consuming a maximum of other lawyers' time and making it likely that some would be misled until, on an appeal, a more resourceful opponent produced the Committee Report and showed what the legislators really "intended." More likely, he did not think at all. He simply followed the legal tradition of using vague, general terms instead of specific ones. If the draftsman had wanted to enlighten his reader, he would have written—

"The following actions must be brought within one year after the cause of action accrued:

"(1) Suits for treble damages based on infringement of a registered trademark (17 U.S.C., § 25);

⁵⁴ H.R.Rep.No. 1141, 79th Cong., 1st Sess. (1945).

"(2) Suits based on infringement of copyrights (17 U.S.C., § 25);" and so on down the list.

Later in the same bill occurs another provision of unenlightening vagueness:

"Provided further, That no liability shall be predicated in any case on any act done or omitted in good faith in accord with any regulation, order, or administrative interpretation or practice, notwithstanding that such regulation, order, interpretation, or practice may, after such act or omission, be amended, rescinded, or be determined by judicial authority to be invalid or of no effect."

No doubt a lawyer can sit down and figure out some of the situations to which this provision might apply, but they are not immediately evident. A layman would be unlikely to figure them out at all.

The reason for leaving the reader in the dark is not the difficulty in explaining the situations, for they were very lucidly set forth in the Committee Report:

"A good illustration arises from the operation of the Fair Labor Standards Act. An employer who violates the provisions of this law relating to wages or hours may be subjected to suit for twice the amount involved together with costs and attorney fees. The application of this law has been greatly extended by administrative regulations. As a result an employer who may have, in good faith, relied upon a certain ruling, regulation, or practice, suddenly finds himself confronted with many suits, when a change is made either by the Administrator or by the courts. The enforcement of this new liability dating back to the enactment of the law would in many cases bankrupt the employer."⁵⁵

This problem cannot be solved, like the preceding one, by listing the situations where the law applies, because they are innumerable. If the draftsman were to say "no liability shall be predicated in the following situations—," and list only some of them, he would run the danger of implying that it does exist in the other situations.

But there is a simple solution. Give an example and call it an example. Below is a passage from an OPA regulation where a hard-to-read legal provision is given concreteness by an illustration of how it works:

"Rule 3: . . . If the article you are pricing has a net cost lower than the lowest net cost listed for that category in column 2 of your chart, you figure your maximum price by applying to the net cost of the article the percentage markup listed in column 4 for the lowest net cost shown for that category.

Example 6: You wish to price a girl's sweater costing \$1.94 net. The lowest net cost which you have listed for category 208 is \$2.07, for which you have a listed percentage markup of 55.6%. Therefore your maximum price is \$3.02. ($1.94 \times 0.556 = \1.079; $1.94 + \$1.079 = \3.019 .)"⁵⁶

⁵⁵ Id. at 4.

⁵⁶ Maximum Price Regulation 580, § 7c, 10 Fed.Reg. 2017 (1945).

The rule of law is hard reading; with the example, a merchant can see what it means. If examples can be used in regulations, which have the force of law, they can also be used in statutes. When they are, many more citizens will understand the law.

Giving Directions

Law-writers are usually talking about who shall go to jail, and what epithet shall be applied to him. "Every person who shall do such and such shall be deemed guilty of a misdemeanor and shall be punishable. . . ." Or else they seem to be engaged in making preposterous predictions like "No person shall make any agreement. . . ."

What the citizen wants to know is not how to get in jail but how to stay out. It seems more logical to him to say "Persons must not do such and such." This is the style of the Ten Commandments, which are good examples of direct speech to the common citizen.

In complex laws, this oblique approach of the law-writer is a real obstacle to understanding. Consider, for example, the confusion of the ordinary taxpayer if he had to figure out his income tax by reading the Internal Revenue Code and regulations. Fortunately, he does not even attempt it. He reads the form and the instructions. And this is all the Bureau of Internal Revenue expects him to do.⁵⁷

Since that is what the Bureau expects, a sensible internal revenue law would ask him to do just that: "Every person who received more than \$500 in a year, and not more than \$3000, must fill out form 1041 A, according to the instructions that go with it. He must also pay the tax which is shown by the form, when properly completed. Form 1041 A for 1947 is as follows. . . ."

Any criminal code contains examples of both types of laws—those which tell the judge what he should think about it if a man is brought before him charged with certain acts, and those which tell the citizen what acts he must refrain from doing.

Here is an example of the first method:

"Whoever shall enter, remain in, leave, or commit any act in any military area or military zone . . . shall, . . . be guilty of a misdemeanor and upon conviction shall be liable to a fine. . . ." ⁵⁸

This tells what a law lecturer would presumably want to know about a crime—what it is called, and when a man is guilty of it.

"Pistols, revolvers, and other firearms capable of being concealed on the person . . . shall not be deposited in or carried by the mails. . . ." ⁵⁹

⁵⁷ The writer was refused copies of the Treasury Regulations until he persuaded the clerk that he was a lawyer or accountant.

⁵⁸ 56 Stat. 173 (1942), 18 U.S.C. § 97a (Supp. 1946).

⁵⁹ 44 Stat. 1059 (1927) 18 U.S.C. § 361 (Supp. 1946).

This tells the citizen what he is not to do.

The former approach illustrates another habit of draftsmanship which reveals the workings of the draftsman's mind. He is not thinking about telling the citizen what not to do, but about telling the judge what to do with the offending citizen.

Mathematics in Law

Speaking the reader's language does not always mean using a primer style. It means using the style that will be best understood, considering the kind of readers and the kind of ideas which must be presented.

So far, we have been talking about kinds of sentences. But sometimes sentences are not the best way to present the kind of material at hand. When material is largely mathematical, it should be presented in tables and formulas.

Consider, for example, two ways of setting out the tax rates. Before 1942, surtax rates were stated in this cumbersome way:

"\$80 upon surtax net incomes of \$6,000; and upon surtax net incomes in excess of \$6,000 and not in excess of \$8,000, 5 per centum in addition of such excess.

"\$180 upon surtax net incomes of \$8,000; and upon surtax net incomes in excess of \$8,000 and not in excess of \$10,000, 6 per centum in addition of such excess."⁶⁰

Obviously this is the kind of information which anybody but a law-writer would have put in a table. In 1942, when the Bureau first went in seriously for tax simplification, it adopted a semi-tabular presentation, far easier to follow, like this:

IF THE SURTAX NET INCOME IS:	THE SURTAX SHALL BE:
Over \$4,000 but not over \$6,000 . .	\$580, plus 20% of excess over \$4,000.
Over \$6,000 but not over \$8,000 . .	\$980, plus 24% of excess over \$6,000. ⁶¹

⁶⁰ Revenue Act of 1938, 52 Stat. 447 (1938), 26 U.S.C. § 12b (1940).

⁶¹ Revenue Act of 1942, 56 Stat. 798 (1942), 26 U.S.C. § 12b (Supp. 1943).

In the same year, a completely tabular presentation was adopted for the new optional tax on incomes of \$3000 and under, in this manner:

IF THE GROSS INCOME IS OVER—	BUT NOT OVER—	THE TAX SHALL BE—		
		SINGLE PERSON (NOT HEAD OF A FAMILY)	MARRIED PERSON MAK- ING SEPARATE RETURN	(1) MARRIED PERSON WHOSE SPOUSE HAS NO GROSS IN- COME OR (2) MARRIED PERSON MAK- ING JOINT RETURN OR (3) HEAD OF A FAMILY
\$600	\$625	\$11	\$0	\$0
\$625	650	15	0	0
\$650	675	20	3	0 ⁶²

Although the Bureau of Internal Revenue has outdistanced other law-writing departments in adapting its technique to its problems, many of its opportunities for improvement have remained untouched. It continues to use sentences to describe mathematical calculations which anyone else would describe by formula. For example, it provides that a shareholder in a holding company must include in his gross income

“ . . . the amount he would have received as a dividend if on such last day there had been distributed by the company, and received by the shareholders, an amount which bears the same ratio to the undistributed Supplement P net income of the company for the taxable year as the portion of such taxable year up to and including such last day bears to the entire taxable year.”⁶³

This passage requires a calculation which no one but a statutory draftsman would ever think of writing out in this way. This is hard reading for anybody. It can be handled in a number of ways, depending on who is the reading class.

If the readers are miscellaneous laymen, like those who file individual income tax returns, the only thing to do is to make a form with directions like this:

- Line 11. Enter the number of days from the beginning of the taxable year to the “last day” named above
- Line 12. Divide the number in line 11 by 365, and enter the result here

and so on.

⁶² 56 Stat. 802 (1942) § 104(a), 26 U.S.C. § 400 (Supp. 1943).

⁶³ 53 Stat. 96 (1939), 26 U.S.C. § 337b (1940).

But this particular section will be used only by bookkeepers and accountants, so the draftsman could have said more briefly:

The taxpayer must include in his gross income an amount A which he calculates as follows:

- (1) Find the fraction of the entire taxable year which had elapsed on the "last day" described above, and call it f .
- (2) Find the undistributed supplement P net income of the company for the entire taxable year, and call it P .
- (3) Multiply f times P . The product is the amount A .

The Rest of the Job

Knowing how to write readable laws will not make citizens read laws. It will only open the way for other changes which must be made before the goal is reached.

For one thing, the job of law-writing must be delegated. It is a specialty, as good journalism is a specialty. The effect of a group of legislators amending a law around a table is the same as the effect of a lot of executives amending an advertising slogan around a table. They should make their suggestions, but the job of working them into the product should be left to the specialist.⁶⁴

This does not mean that law-making must be delegated. The same thing happens in administrative agencies as in legislatures when policy-making officials take over the writer's pen. It means that amendments by law-makers should be directions to the draftsman, and the draftsman should knit them into the law or regulation.

After laws are written, they must be publicized. It is not enough to put laws in a statute book where a diligent attorney, aided (when the law is months or years old) by a compiler's index, may discover them. Ways must be found of bringing them to the attention of the people who are supposed to obey them.

Administrative agencies usually recognize this need. They send out bulletins to all the classes of citizens who are supposed to be affected. But laws of Congress and of state legislatures are left to the caprices of newspaper editors, where their chance of presentation depends on the amount of competition offered by the day's more exciting headlines.

Laws also need to be made in separable parts. The citizen does not need to know all about the make-up of an administrative commission

⁶⁴ Ibert, *The Mechanics of Law Making* (1913) 14 quotes the following from Sir Frederick Pollock: "Many an Act of Parliament, originally prepared with the greatest care and skill, and introduced under the most favourable circumstances, does not become law till it has been made a thing of shreds and patches hardly recognizable by its author, and to any one with an eye for the clothing of ideas in comely words no less ludicrous an object than the ragged pilgrims described by Bunyan: 'They go not uprightly, but all awry with their feet; one shoe goes inward, another outward, and their hosen out behind; there a rag and there a rent, to the disparagement of their Lord.'"

or the frequency with which reports must be submitted to Congress. He needs to know what is compelled and what is forbidden. If he has to sort this out from all the rest, he will probably never read it at all. OPA made some useful experiments in separating what the citizen needs to have at hand and what he does not.⁶⁵ The same thing should be tried with laws of Congress.

At the same time, laws need to be consolidated. Related laws should be combined, duplications eliminated, and all put in better order.⁶⁶ The present mass of statutes is almost as forbidding as the mass of cases which, a century ago, awoke the drive for codification of the unwritten law. Today it is the written law itself that needs to be codified.

Conclusion

Laws should be written with more emphasis on making readers understand what the law commands, and with less emphasis on controlling the judges by rigid grammatical constructions. Judges are more likely to be controlled by clear statements of purpose.

Many ways of making laws more readable are already in use. They should be brought into the open, to be more widely adopted if valid and abandoned if unsound. The law needs a literature on how to write laws that is not contained in present treatises on statutory interpretation.

NOTE

A draftsman should always consult the applicable general interpretation act for definitions of words and phrases, and for legislatively prescribed rules of construction. The Kansas act, like several others, provides that: "In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute: . . ." Concerning the effect of this provision, Huxman, J. in *Dwyer v. Matson*, 163 F.2d 299, 301 (1947), remarked: "This definition (in the general construction act) defines legal residence and makes residence the equivalent of domicile. In the end, this statute is not very helpful because it expressly provides that the definitions contained therein shall not control if such definitions are inconsistent with the manifest intention of the Legislature or repugnant to the context of the statute. We are therefore forced to look to the legislation in question to determine the sense in which the word 'residence' was used when the Legislature provided that a married person could convey real estate without the signature of the spouse when such spouse was not and had not during the marriage been a resident of Kansas."

⁶⁵ See Diekerson, FPR No. 1, an Experiment in Standardized and Prefabricated Law (1945) 13 U. of Chi.L.Rev. 90.

⁶⁶ See Wright, Revision of Federal Criminal Laws (1945) 33 Geo.L.J. 194, 199-200.

DRAFTING RULES AND SUGGESTIONS

Prepared by the Committee on Legislative Drafting of the National Conference of Commissioners on Uniform State Laws in Accordance with Resolutions Adopted by the Conference at Saratoga, in 1917, and Amended by the Conference at Cleveland, in 1918, and Further Amended by the Conference at Washington, in 1932.

1. *Title.*—The title of the uniform acts shall be: An act concerning (or relating to) . . . and to make uniform the law with reference thereto.

2. *Numbering of Sections.*—Sections shall be numbered by arabic figures, consecutively or progressively throughout the act. Schedules shall be numbered as sections.

3. *Length of Sections.*—(1) Long sections should be avoided. (2) Each proposition that is separable from other propositions should be placed in a separate section.

4. *Detaching of Clauses.*—Where a section covers a number of contingencies, alternatives, requirements or conditions, or is too long to be written as a single paragraph, the section should be broken into sub-sections designated by figures. Sub-sections may be broken into paragraphs designated by letters. A section should not be further subdivided. (Amended, 1937).

Illustration.—Section 1 of Uniform Negotiable Instruments Act:

An instrument to be negotiable must conform to the following requirements:

- (1) It must be in writing and signed by the maker and drawer;
- (2) Must contain an unconditional promise or order to pay a sum certain in money;
- (3) Must be payable on demand, or at a fixed or determinable future time;
- (4) Must be payable to order or bearer; and
- (5) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

5. *Definitions.*—Definitions should be placed at the beginning of the act, not at the end.

6. *Language.*—a. *Present tense.* The present tense should be used for descriptive matter, or matter stating a legal effect; the word "shall" should be reserved for requirements or prohibitions. b. *Unnecessary words.* The words "said," "such," "aforesaid," "whatever," etc., should as far as possible be avoided. c. *Provided.* The term "provided that" should be avoided.

7. *Severability Clause.*—In uniform acts in which a constitutional severability clause is deemed desirable the following form should ordinarily be used.

If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other

provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable

8. *Use of the Form "and/or."*—The use of this form or expression in uniform acts is not desirable.

ASHTON R. WILLARD, A LEGISLATIVE HANDBOOK

(Published in 1890. Now out of print.)

(Sec. 278.)—It is desirable to cut up the matter of enactment into short sections for several reasons: 1. The person preparing the statute will compel himself to detach and lay out clearly his ideas and finish up one thing at a time. 2. The sense of the statute will be more easily grasped if it is made easy to proceed step by step than if it is seemingly or actually made necessary to assimilate much matter at once. 3. Parts of the statute will be more easily referred to and designated in discussion. 4. The statute can be more easily amended in parts which may need amendment without disturbing other parts or reprinting long paragraphs.

(Sec. 285.)—There is a difficulty in the way of making sentences short in statutory expression which arises from the necessity of joining many predicates to one subject or many subjects to one predicate or many dependent clauses of co-ordinate value to one leading statement. In such cases European statute-writers have resorted to the expedient of detaching these co-ordinate expressions by the manner of setting out the law on the written or printed page. The attempt is made by a system of paragraphing to more clearly indicate the equivalent value of what is co-ordinate, also to indicate what is dependent and upon what it depends, when the same end could not be reached by any system of mere punctuation, and when the matter could not be broken up into a number of separate sentences without much repetition.

(Sec. 324.)—There is a fashion of introducing nouns, verbs, adjectives, and even conjunctions by pairs in statutory expression. The practice of using these combinations originally arose in part from a wish to be more elegant, and in part from imitation of the practice in drawing legal instruments where it was an object of the draftsman to multiply words. Where they now occur, they are used in general without deliberate choice. Their employment does not indicate that the person using them wishes to discriminate between the compound and the simple expression, but indicates that he is obeying precedent or instinctively adopting forms which have become traditional. One word may be made to do duty for two or three in the case of many of these expressions.

(Sec. 352.)—The legislator is tempted to make an extravagant use of broadsounding words, multiplying the word "any" and adding "whatsoever" and "wheresoever" where a simpler expression would answer the purpose. The multiplication of these words serves in many cases only to give to the statute a pretentiousness.

out increasing the breadth of its application. There need be no forced avoidance of the use of the word "any" where it is the natural expression, or of the other words where their use is needed to show a sweeping intent in a statute liable to receive strict construction. But it is a good plan after a statute is put in its first form to look it over and prune out the extravagances when they are perceived to be clearly such.

WILLIAM B. HENDERSON, REPORT OF REVISOR OF
STATUTES TO THE MINNESOTA LEGIS-
LATURE, 1941, p. 60.

Appendix B. Revision Manual.

(5) Couplets and phrases which should be avoided:

Avoid	Use
ordered, adjudged and decreed	(adjudged)
final and conclusive	(conclusive)
sole and exclusive	(exclusive)
fail, refuse and neglect	(fail)
constitute and appoint	(appoint)
matter transmitted through the mail	(mail)
member of a partnership	(partner)
null and void, and of no effect	(void)
bonds, notes, checks, drafts and other evidences of indebtedness	(evidences of indebtedness)
trustees of trust estates created by will, or by contract, or by declaration of trust, or by implication of law	(trustees)
attorney and counselor at law	(attorney)
person of suitable age and discretion	(adult)
absolutely null and void	(void)
is defined and shall be construed and means	(means)
is hereby authorized and it shall be his duty	(shall)
is hereby authorized and empowered	(may)
claims for certain losses	(named claims)
is hereby vested with power and au- thority and it shall be its duty as it may deem necessary to carry out the provisions of this act to	(shall)
be and the same is hereby	(is)
it shall be lawful	(may)
antecedent and pre-existing	(pre-existing)
it is the duty	(shall)
are hereby required	(shall)
the place of his abode	(his abode)
examine witnesses and hear testimony	(take testimony)
shall also be considered	(shall be)

REPORT OF COMMITTEE ON LEGISLATIVE DRAFTING

Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, 1919, pp. 9-11, 14-15; 1942, pp. 90-94, 96, 98. (Quoting Coode, *Legislative Expression*, Pub. 1848; now out of print.)

Formation of a Legislative Sentence

The arrangement of sentences in detached or tabular form and the use of mechanical devices for graphic presentation of enactments are common in English and Canadian Statutes. Clearness is materially increased by these expedients. They enable the reader to readily distinguish between the main and the dependent clauses, and to see the relation of the subject to its various predicates.

Coode in his analysis of a legislative expression considers it as consisting of four elements: First, the description of *the legal subject*; second, the enunciation of *the legal action*; third, the description of *the case* to which the legal action is confined; and, fourth, *the conditions* on performance of which the legal action operates. (Coode, p. 6.)

The analysis presented by this writer and the rules which he develops from that analysis are strikingly clear and logical. The following brief extracts only can be presented here, but his entire book will well repay a careful study by every draftsman:—

"The purpose of the law in all cases is to secure some benefit to some person or persons. . . .

"It is only possible to confer a Right, or Privilege, or Power, on one set of persons, by imposing corresponding Liabilities or Obligations on other persons, compelling these to afford the benefit conferred, or to abstain from invading it. . . .

"Now no Right, Privilege, or Power can be conferred, and no Obligation or Liability imposed, otherwise than on some person.

"The person who may or may not or shall or shall not do something or submit to something is *the legal subject* of the legal action.

"The importance of a just discrimination and correct expression of the legal subject cannot easily be exaggerated. The description of the *legal subject* determines the *extent* of the law. On this portion of every legal sentence it depends whether a right or privilege shall be limited to too few persons or extended to too many; whether an obligation is imposed on more persons than is necessary or is not extended to sufficient persons in order to secure the correlative right; whether powers are reposed in right or wrong persons; whether sanctions are or are not made to fall on the proper subjects." (Coode, pp. 7, 9.)

"The *legal action* is that part of every legislative sentence in which the Right, Privilege, or Power, or the Obligation or Liability, is defined, wherein it is said that a person *may* or *may not* or *shall* or *shall not* do any act, or *shall* submit to some act.

"As the *legal subject* defines the *extent* of the law, so the description of the *legal action* expresses the *nature* of the law. It expresses

all that the law effects, as law. The selection of the legal subject is important; but it is on the description of the *legal action* that the whole function of legislation exercises and exhausts itself." (Coode, pp. 9, 10).

"The rules of most effect as to the expression of the legal subject are:—

"First, to keep the *legal subject* distinct in form and in place from other parts of the legal sentence.

"Secondly, not to permit it to be withdrawn from view, or disguised by the non-description of *persons*, or by the substitution of *things* instead of persons, or by the use of impersonal forms of expression." (Coode, p. 14).

"Not one case can be imagined in which it is necessary or convenient to use any other than permissible or imperative language in the enacting verb; and these two rules, therefore, ought never to be allowed to be infringed:—

"1st. That the copula, which joins the *legal subject* and the *legal action*, is to be *may*, or *may not*, or *shall*, or *shall not*, as, 'any person *may*,' 'no person *may*,' 'every person *shall*,' or 'no person *shall*.'

"2nd. That the whole of the enacting verb is always to be an active verb, excepting only where the legal subject is to submit or suffer, as where executory force, or punishment (sanctions), are directed to be submitted to by the person described in the legal subject. . . .

"There could arise no difficulty if these rules were observed:—

"Whenever an act is allowed as a *right*, or as a *privilege*, that is to all the members of the community, or to certain persons for their own benefit, the proper *copula* is '*may*.'

"Whenever the act is authorized as a *power*, that is to certain persons to perform, not for their own benefit, but for the benefit of others on whose behalf the power is given, the proper *copula* is '*shall*.'" (Coode, pp. 16, 17).

"As on the due expression of the *legal subject* the *extent* of the law depends, and as on that of the *legal action* the *nature* of the law depends; so on the expression of *the case*, and of *the conditions*, do the clearness, precision, and form of our statute law mainly depend.

"The rule to be observed is of such simplicity as to make its utterance appear almost an absurdity; but, simple as it is, it is the most frequently neglected of any rule of composition.

"It is, that *wherever the law is intended to operate only in certain circumstances, those circumstances should be invariably described BEFORE any other part of the enactment is expressed.*

"If this rule were observed, nine-tenths of the wretched provisos and after-limitations and qualifications with which the law is disfigured and confused would be avoided, and no doubt could ever possibly arise, except through the bad choice of terms, as to the occasions in which the law applied, and those in which it did not. . . .

"It would add much to the facility of discovering *the case* immediately in every legal sentence, if it invariably commenced with the words 'when' or 'where' or 'in case'." (Coode, pp. 22, 24).

"A law universal as to its *subjects*, and restricted or not restricted to certain occasions (*cases*), may still operate only upon the performance by some person of certain *conditions*. It is not till something has been done that the right can be enjoyed, or that compliance with the obligation can be enforced, or that the liability can be applied.

"These *conditions* are invariably conditions precedent. The action of the law never takes place till these are complied with. . . .

"For the reason that the legal action is postponed, and cannot act upon the legal subject, until these conditions are all complied with, *the expression of the conditions ought immediately to precede that of the legal subject.*" (Coode, pp. 28, 29, 31).

"Every form of every possible legislative enunciation resolves itself into two or more of these four elements, of which *the legal subject* and *the legal action* are essential, and must necessarily be present, while *the case* or *the condition* may or may not be present.

"If the enactment is to operate on its subject universally, constantly, and unconditionally, the sole elements are the *legal subject* and the *legal action*.

"If the enactment is only to operate on its subject in certain circumstances, *the case* must express these circumstances in *the first words of the sentence*, and not in a subsequent phrase inserted parenthetically in the description of the subject or the action, nor in a separate proviso.

"If the enactment is only to operate on its subject after performance by somebody of certain precedent conditions, these *conditions should be all expressed immediately before the legal subject and in the order in which they must be executed*; that is, in their chronological order.

"Next comes the *legal subject*, immediately followed by the appropriate modal *copula*, introducing the *legal action.*" (Coode, pp. 33, 34).

"Parliamentary considerations favour the accumulation of materials into one clause. But as a question of composition and interpretation, there can be no doubt that the more strictly each clause is limited to one class of *cases*, one class of *legal subjects*, and one class of *legal actions*, the better; and that it is a mischief to confer in one sentence two distinct species of rights, to impose two distinct kinds of obligations, to confer two distinct kinds of powers, and so on: where parliamentary convenience does not prevail, no good draftsman ever does so." (Coode, p. 42).

"It will perhaps seem to be a great waste of care to make all these distinctions, as to the elements, the method of distribution, and the expression of a *single legislative sentence.* . . .

"But it is of these simple elements that the whole law consists. If these be not well discriminated and well marshalled in each sentence, there is no hope for their being well combined in the whole law." (Coode, p. 68).

Use of Present Tense

A rule of construction, common to all our interpretation Acts, which is too frequently overlooked by draftsmen, is that dealing with the application of expressions in the present tense. This rule is that the law is considered as always speaking, and whenever any matter or

thing is expressed in the present tense, the same is to be applied to the circumstances as they arise.

"If the law be regarded while it remains in force as *constantly speaking*, we get a clear and simple rule of expression, which will, whenever a case occurs for its application, accurately correspond with the then state of facts. The law will express in the present tense facts and conditions required to be concurrent with the operation of *the legal action*; in the perfect past tense, facts and conditions required as precedents to the *legal action*." (Coode, p. 63).

"This mode of expression, assuming the law to be always speaking—*reciting facts concurrent with its operation, as if they were present facts, and facts precedent to its operation as if they were past facts*,—has two very considerable advantages:—

"First, it avoids the necessity of very complicated grammatical construction in the statement of cases and conditions, often involving the use of futures, perfect futures, and past conditionals—

"If a person *shall* be convicted of, &c.; and if he *shall have been* before convicted of the same offence; and if he *shall* not have undergone the punishment which he *should have undergone* for the offence of which he *shall have been so before convicted*.

"Secondly, keeping the description of *cases* and *conditions* in the present and in the perfect tenses, it leaves the imperative and potential language of *the legal action* clearly distinguished, by the broadest and most intelligible forms of expression. Narration will appear in narrative language, instead of being allowed, as now, to usurp imperious language, and thus to confound *the facts* and *the law*." (Coode, p. 66).

NOTE

See Mason, "Legislative Bill Drafting", 14 Cal.L.Rev. 379-381 (1926).

DALE E. SUTTON, USE OF "SHALL" IN STATUTES

4 John Marshall L.Q. 204 (1939).

In 1835, Arthur Symonds observed, in his work on English statute law:

"Most men, lawyers in particular, have become accustomed to the jingle of words, and though sensible people, they can scarcely believe, even on reflection, that the meaning is full and clear, if the usual formularies of expression are not employed."¹

The word "shall" is an accepted part of the statute-writer's formula. It appears in his product many times more often than in the speech or writing of everyday use. And that is an indication that the word is now a "legal" word, and need not be examined critically before use.² The objection to this uncritical acceptance of the word is not

¹ The Mechanics of Law-Making, Page 14.

² In *People v. Simmons*, 130 Misc. 821, 226 N.Y.S. 397, 407, the court says ". . . the legal meaning of 'shall' is not the lay meaning." Why this should be so, if it is, is not apparent to the writer.

merely a matter of grammatical nicety, nor of constructing readable law. The possibilities of misinterpretation, which are illustrated below, make this a serious problem.

"Shall", as used in statutes, is not only, in many cases, superfluous from the standpoint of good writing, but has too many meanings to make its unnecessary use safe. The courts, in following their well-defined policy of looking to the intent, rather than to the language, have variously held that "shall" is imperative, is directory, means "may", expresses a mandate, either permissive or peremptory, applies to the past, to the future, and to the present.³

In general, the various meanings of the word fall in two classes, ordinarily distinguishable by the context in which used: (1) in the sense of time or condition, and (2) in the sense of mandate.

The Future "Shall"

In 1937 the General Assembly of Illinois passed an act to provide for the creation of annuity benefit funds for municipal public utility employees, a typical paragraph of which is set out below with the word "shall" italicized, and beside it, the same paragraph with superfluous "shalls" deleted:

"Any future entrant who *shall* resign or be discharged from the service after he *shall have* served ten (10) or more years and who at the time of such resignation or discharge *shall be* less than fifty-five (55) years of age *shall have* a right to receive annuity from and after the date when he *shall* attain an age of fifty-five (55) or more years while out of the service and *shall* apply for such annuity; provided, that prior to his attainment of an age of fifty-five (55) years, such future entrant *shall not have* withdrawn nor applied for refund of the sum accumulated to his credit from deductions from this salary for age and service annuity purposes and widow's annuity purposes. Any such annuity *shall be* of such amount as can be provided from the entire sum accumulated to his credit for age and service annuity purposes on the date such employee

"Any future entrant who resigns or is discharged from the service after he has served ten (10) or more years and who at the time of such resignation or discharge is less than fifty-five (55) years of age has a right to receive annuity from and after the date when he attains an age of fifty-five (55) or more years while out of the service and applies for such annuity; provided, that prior to his attainment of an age of fifty-five (55) years, such future entrant has not withdrawn nor applied for refund of the sum accumulated to his credit from deductions from his salary for age and service annuity purposes and widow's annuity purposes. Any such annuity shall be of such amount as can be provided from the entire sum accumulated to his credit for age and service annuity purposes on the date such employee attained fifty-five (55)

³ 57 O.J. 545.

attained fifty-five (55) years of age. Any such annuity *shall be* computed as though such future entrant were exactly fifty-five (55) years of age at the time such annuity *shall be* granted regardless of his real age at the time application for such annuity *shall be* made, and no such future entrant *shall have* any right to any annuity for or on account of any time which may intervene between the time when he *shall* attain an age of fifty-five (55) and the time when he *shall* make application for annuity.”⁴

years of age. Any such annuity shall be computed as though such future entrant were exactly fifty-five (55) years of age at the time such annuity is granted regardless of his real age at the time application for such annuity is made, and no such future entrant has any right to any annuity for or on account of any time which may intervene between the time when he attains an age of fifty-five (55) years and the time when he makes application for annuity.”

It will be noted that not all of the “shalls” deleted are of simple future meaning, but 14 uses of the word have been reduced to two without changing the meaning of the section. The example quoted is, of course, complicated somewhat by the subject—the future entrant—which is all the more reason for the changes. And this is not an isolated case. It is an example which might be duplicated in the laws of almost every state and in federal statutes. . . .

It is, of course, a well-defined and frequently expressed rule that laws are generally prospective in their operation, and the courts often say that they are “presumed” to be so.¹² This being the case, however, it seems less than ever necessary to use the future “shall,” for despite its presence or absence, the act would carry the same presumption. This is illustrated by the fact that in the case of remedial legislation, the rule frequently is not applied, and this is true whether or not “shall” is used. The decisions sometimes say that “shall” is used in remedial statutes to include both past and future.¹³ Here the courts attempt to interpret a word which they might simply disregard. It is obvious that the word “shall,” in itself, cannot “include” the past.

Many valuable hours and needless paragraphs have been wasted on this word by the courts. In *Meadowcroft v. People*,^{13a} the court let its decision hinge, unnecessarily, on the word “shall.” A statute recited that if any banker

“*shall* receive . . . money . . . when at the time of receiving such deposit, said banker is insolvent, whereby the deposit so made

⁴ Ill.Rev.Stats., State Bar Ass'n. Ed. (1937), chapter 111½, § 169(d).

[Footnotes 5 to 11 are omitted, as are other footnotes to text not reprinted. Ed.]
¹² 59 C.J. 1169, § 694.

¹³ *Hemsley v. McKim*, 119 Md. 431, 87 A. 506; *Lindgren v. R. R. Co.*, 86 Minn. 140, 90 N.W. 378; *Ex parte Norton*, 113 Tex.Cr.R. 306, 21 S.W.2d 663; *Chenoweth v. Chambers*, 33 Cal.App. 104, 109, 164 P. 428.

^{13a} 163 Ill. 56, 45 N.E. 991.

shall be lost to the depositor, said banker . . . so receiving said deposit shall be deemed guilty of embezzlement."

It seems plain that two things are necessary parts of the crime thus defined—receiving a deposit while insolvent, and loss of the deposit—and that the element of time is not material. But the court says:

"The word 'shall' is in the future tense, and is indicative of a future event. It is only when the deposit so made shall be lost to the depositor, that the bankers shall be deemed guilty of embezzlement."

Compare this case with the one in a federal court in which the defendant was charged with violation of a statute which provided that "any owner . . . who *shall*, with intent to defraud the revenue, make, or attempt to make any entry of imported merchandise by means of any fraudulent or false invoices, affidavit, . . . by means whereof the United States *shall* be deprived of the lawful duties . . . *shall* . . . be imprisoned . . ."

The court points out that it is apparent that the United States cannot be deprived of duties by a mere attempt to make fraudulent entry, and there could be no conviction if it were necessary to prove in such a case that duties were lost. It then says, "Shall and will are frequently used *indiscriminately*, and it is apparent from the reading of the whole section that 'shall' was used here in the sense of 'will' or 'may'."¹⁴

The decision appears to be sound, substantively, but again, a poorly written piece of legislation leads the court into a long discussion of the interpretation to be placed on one word, and that word an unnecessary one. The court is led, also, to make an exaggerated statement. It is true that "shall" and "will" are frequently used interchangeably in common speech to denote the simple predictive future, but even statute-makers do not use them "indiscriminately" to signify the contingent future, as was done here.

Another undesirable result of the use of the simple future tense is the consequent use of the awkward future perfect tense. A case arose in Missouri out of a statute which provided that "if any action (relating to damages for torts) *shall have been* commenced within one year after the cause of action shall accrue and plaintiff suffer a nonsuit. . . . he may commence a new action within one year after the nonsuit . . ."

The court held that the statute applied to actions pending at the time the act took effect, as well as to future actions, and the writer of the opinion gravely remarked:

"We may presume all legislators grammarians, but that presumption would not drive us to the conclusion that they meant only future action when they wrote "shall have been commenced."

To illustrate the logic employed in reaching his decision, the learned justice continued:

¹⁴ U. S. v. Boyd, C.C.N.Y., 24 F. 692, 695.

"C, a plantation owner, is building barns and writes his overseer, 'Paint all barns red that shall have been commenced.' Would B, his overseer, take that command to mean that only barns commenced after the order should be painted red?"¹⁵

The answer to that, if the writer may supply one for this rhetorical question is No—but B would doubtless think his employer had gone daft. When the language of the legislature so defies common usage a layman's guess as to its meaning is as good as a judge's, or a grammarian's.

The Commanding "Shall"

The difficulties arising from the use of the word "shall" to express a command fall into two classes, and the cases arising from them revolve around an interpretation of the word either (I) as imperative or permissive; or (II) as mandatory or directory. The two are sometimes confused. Throughout the decisions, moreover, one gains the impression that the writers sense, and are not able to set forth, explicitly, a connection between the future and the commanding "shalls." It is difficult to trace, but there seems to be a sound basis for this feeling, and it may account for the extensive use of the future "shall" in statutes.

Jeremy Bentham linked the two meanings, saying:

"Thus, in the English language, the *command* expressed by the *future* which is expressed by the word 'shall', is more imperative, indicative of a stronger exertion of will, than the command expressed by the word to which alone the denomination of imperative mood has been commonly affixed by grammarians By the *future* above mentioned, not only the existence of the will is denoted, but the futurity of the event which is the object of it, is predicted as certain"

¹⁶

I

The use of the word as a command is now firmly fixed, both in common speech, in the second and third persons, and in legal phraseology.¹⁷ Frequently, however, the courts find that circumstances, or the context of an act, overcome the usual meaning, and the mandate conferred is held to be merely permissive, rather than imperative. The effect is to make the word "shall" have no stronger meaning than "may," and the courts so interpret it. It has been said that "the cases reading 'shall' as 'may' in fact are without value to a billdrafter, since they represent merely a misuse of 'shall' which is corrected by judicial construction."¹⁸

A reading of the cases indicates that this statement is perhaps too inclusive. It is not at all certain that the fault lies always with the legislature, or that the courts always are right in "correcting" statutes.

¹⁵ Clark v. R. R. Co., 219 Mo. 524, 118 S.W. 40.

¹⁶ Works of Jeremy Bentham, volume VI, page 230.

¹⁷ 57 C.J. 545; Webster's New International Dictionary, (2d Ed.)

¹⁸ Notes on Bill Drafting in Illinois, page 57.

In any event, it seems that a better procedure would be to declare, in cases in which the statute is obviously not intended to be imperative, simply that the mandate conferred is discretionary, and not to obscure the issue by deciding that the legislature meant to say "may" when it said "shall."

The circumstances upon which the interpretation of "shall" as "may" is based have been stated thus:

"It (shall) may be construed to mean 'may' when no right or benefit depends on its imperative use; when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual by giving it that construction, or when it is absolutely necessary to prevent irreparable mischief, or to construe a direction so that it shall not interfere with vested rights, or conflict with the proper exercise of power, by either of the fundamental branches of government, and it also means 'may' when used by a legislature in a grant of authority to a court."¹⁹

A strong factor in overcoming the primary meaning of "shall" appears in cases in which the validity of a statute is at stake.

A Nebraska statute provided that in case of disputed surveys of boundaries, the owners of land "*shall* refer same to the state surveyor and draughtsman for settlement." The state surveyor was given the power to summon and compel attendance of witnesses, and to appoint an arbitrator, whose decision was to be prima facie evidence of the correctness thereof. The court held that the statute, which was alleged to be invalid as taking away the constitutional right of appeal to the courts, was valid, by construing the word "shall" to mean "may." The court said:

"Where to construe the statute as mandatory would make it unconstitutional, such construction will be rejected if any other is possible."²⁰ . . .

The courts go even further than this. They sometimes disregard the primary meaning of "shall" when to do otherwise would lead to what they consider an absurd or unjust result. . . .

It leads to such statements as this by a Missouri court:

"The words, 'may,' 'must' and 'shall' are constantly used interchangeably in statutes and without regard to their literal meaning."²⁵

Substantially the same idea is more and more frequently expressed in the decisions.²⁶ It is an idea which not only does legislatures an

¹⁹ 35 Cyc. 1451.

²⁰ Reed v. Wellman, 110 Neb. 166, 193 N.W. 261. Also cf. People v. San Bernardino H. S. Dist., 62 Cal.App. 67, 216 P. 959; Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 188 N.W. 921.

²⁵ Kansas City v. J. I. Case Threshing Mach. Co., 337 Mo. 913, 87 S.W.2d 195, 205.

²⁶ Cf. Wheeler v. Chicago, 24 Ill. 105; Clancy v. McElroy, 30 Wash. 567, 70 P. 1095; Hess v. Turney, 109 Tex. 208, 203 S.W. 593; In re Trusteeship of First Minneapolis Trust Co., 202 Minn. 187, 277 N.W. 899, 7 Fletcher, Cyc. Corp. 779 and 780; Rockwell v. Junction City, 92 Kan. 513, 141 P. 299.

injustice, but seems to cover up with a generality a disinclination to study the matter deeply.²⁷

II

The second commanding "shall" presents a problem which has not always been recognized.

When "shall" is construed to be directory, the idea of permission is not involved. The legislature directs the course of action to be taken, and the person or body undertaking to proceed under the statute is vested with no discretion to vary or omit parts or all of the designated procedure. The question is simply one of whether or not such variance or omission, if it occurs, will invalidate what has been done. If the court considers it necessary to follow exactly the outlined procedure, the statute is mandatory. If not, it is directory.

This situation arises frequently in cases involving election laws.²⁸

. . .

There appears to be substantial unanimity as to the test to be employed in holding an enactment directory or mandatory. Lord Mansfield made it depend on whether that which was to be done was or was not of the essence of the thing required.³¹ The Connecticut Supreme Court, adopting this rule, said:

"The test most satisfactory and conclusive is whether the prescribed mode of action is of the essence of the thing to be accomplished, or in other words, whether it relates to matter material or immaterial—to matter of convenience or substance."³²

But of what substance is the essence composed? The court, in this case, described the test as

"whether or not it is on the one hand, affirmative and such as would naturally be chosen to prescribe directions for an orderly and proper dispatch of business, or . . . negative or prohibitive or expressive of a condition precedent, or appropriate to the creation of a limitation of power."

The phrase "directions for the orderly dispatch of business" is many times repeated, in varying forms, in the decisions. It is said that "provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory, though the statute uses the word 'shall.'"³³

In adopting this principle, the California Supreme Court has taken the abrupt stand that "It is a general rule of construction that the

²⁷ Black, *On Interpretation of Laws*, 2nd Ed. page 527, comments: "It has sometimes been loosely said that 'may' and 'shall', as used in statutes, are interchangeable terms. But this is not correct. To convert such terms, the one into the other, at the mere will of the court, would be little short of substantive legislation".

²⁸ Black, *Handbook on Construction and Interpretation of the Laws*, 2nd Ed., page 353.

³¹ *Rex v. Locksdale*, 1 Burr. 447.

³² *Appeal of Spencer*, 78 Conn. 327, 61 A. 1010.

³³ 25 A. & E. *Encyclopedia of Law*, page 634.

word "shall" when found in a statute is *not* to be construed as mandatory, unless the intent of the legislature that it shall be so construed is unequivocally evidenced."³⁴ The case involved a street widening assessment, the completion of which by the street superintendent took longer than the statutory 60 days after he received the diagrams. This is a simple case of a direction for the orderly conduct of business. No such broad language was necessary to the decision, and it does not appear that the court has since put the implications of its words into effect.

The weight of authority seems to be, however, that "shall" is used in a mandatory and not a directory sense, even when applied to public officials, unless the context of the statute or purpose of the requirement justifies a different meaning.³⁵ In any event, when some public or private right requires that the word be given a mandatory construction, that is usually done. For that matter, the word "may" is likewise held to impose an enforceable duty when the public or individuals have a claim *de jure* that the power conferred should be exercised.³⁶ So it seems the literal meaning of the word does not control in such situations.

A rule of interpretation sometimes expressed is that, as against the government, a statutory "shall" is to be construed as "may," unless a contrary intent is manifest.⁴⁰ In *Richborg Motor Co. v. U. S.*, 281 U.S. 528, 534, 50 S.Ct. 385, 74 L.Ed. 1016, it is expressed thus:

"Undoubtedly 'shall' is sometimes the equivalent of 'may' when used in a statute prospectively affecting the government. The usual provisions of criminal statutes that the offender 'shall' be punished as the statute prescribes is not necessarily to be taken, as against the government, to direct prosecution under that rather than some other applicable statute."

But if we substitute "may" for "shall" in this example, we find the government with discretion to prosecute or not to prosecute, which does not appear to be intended. It seems that this is a variation of the directory "shall," rather than the permissive.

The courts frequently fail to distinguish between these two problems, and while the decisions, in some cases, are probably the same as though the distinction were made, the need for careful draftsmanship and careful interpretation is thus accentuated.⁴¹

³⁴ *Cake v. Los Angeles*, 164 Cal. 705, 130 P. 723, 725.

³⁵ 57 C.J. 550, note 34(a); *Foley v. City of Orange*, 91 N.J.L. 554, 103 A. 743; *Clark v. Patterson*, 214 Ill. 533, 73 N.E. 806; *City of Newton v. Board of Sup'rs.* 135 Iowa 27, 30, 112 N.W. 167; *Trobough v. State*, 120 Neb. 453, 233 N.W. 452; *Ladies of the Maccabees v. Hand*, 235 Mich. 459, 209 N.W. 581; *Moyer v. Kelley*, Tex.Civ.App., 93 S.W.2d 502.

³⁶ 36 Cyc. 1160; *Jefferson County Farm Bureau v. Sherman*, 208 Iowa 614, 226 N.W. 182; *People ex rel. v. Matthiessen*, 269 Ill. 499, 109 N.E. 1056. In *Clark v. Crane*, 5 Mich. 150, the rule was laid down that "what the law requires to be done for the protection of the taxpayer is mandatory, and cannot be regarded as directory merely".

⁴⁰ 25 A. & E. Encyc. page 634.

⁴¹ In *Canal Commissioners v. Sanitary Dist.*, 184 Ill. 507, 56 N.E. 953, the court says, "where the word 'shall' is used, where no right or benefit depends on its

There is no broad and easy way out. More sparing use of "shall" and more careful draftsmanship are the first requisites.

Statutory definition has been used, as in the Canadian Interpretation Act, to declare "shall" imperative and "may" permissive.⁴² But this does not preclude a directory construction for "shall."⁴³ Any attempt to do so would merely have the legislator tugging at his own statutory bootstraps.

There seems no question as to the first step to be taken—the use of the present tense in all statutes for descriptive matter or matter stating a legal effect, as suggested by the commissioners on uniform state laws.⁴⁴ Automatically, most of the unnecessary "shalls" would be eliminated. The law would speak with greater emphasis; it would be easier to read, and consequently, harder to misinterpret. The future would not be confused with the imperative.⁴⁵ The remaining "shalls" would have greater authority.

An excellent piece of draftsmanship which might serve as a model in this respect, are the new Rules of Civil Procedure for the district courts of the United States, which are written entirely in the present tense, and are notable for their clarity and force.⁴⁶

In granting a right, the present form of "to be" speaks more authoritatively than does the future. For example, a statute might say;

"The holders of the outstanding shares of a class *are* entitled to vote as a class," rather than "The holders . . . *shall be* entitled etc. . . ."⁴⁷

At times, with the negative, "may" better expresses prohibition than does "shall". The statutory section now reading "No dividend shall be declared or paid at a time when the corporation is insolvent"⁴⁸, might be written: "A dividend may not be declared or paid, etc. . . ." The latter form not only removes the "shall", but also does away with the weak negative form of expression which starts with "no".

imperative use, that word may be held *directory* merely, and by legislative intention to be used *synonymously with the word 'may'*". And a Minnesota court, even more confusingly, says, "Ordinarily the word 'may' is directory and 'shall' is mandatory in meaning, but not always so". (In re Trusteeship of First Minneapolis Trust Co., 202 Minn. 187, 277 N.W. 899). Also cf. Rockwell v. Junction City, 92 Kan. 513, 517, 141 P. 299; State v. Budd, 65 Ohio St. 1, 5, 60 N.E. 988; Des Moines v. Oil Co., 193 Iowa 1096, 183 N.W. 921.

⁴² Rev.Stats. of Canada, chapter 1, § 37(24).

⁴³ 24 Can.Sup.Ct. 474.

⁴⁴ See note 9, *supra*.

⁴⁵ See Ilbert, Legislative Methods and Forms, Page 248.

⁴⁶ Adopted by the United States Supreme Court in Dec. 1937, and effective Sept. 1, 1938.

⁴⁷ Ill.Rev.Stats.(1937) chapter 32, section 157.54.

⁴⁸ Ill.Rev.Stats.(1937), chapter 32, section 157.41(a).

Likewise the expression "it shall be lawful", which is merely a permissive mandate, may be revised to say simply that the persons intended to be affected thereby "may" do the thing permitted.

There are ways in which the mandatory "shall" can be reinforced. The use of "negative words plainly importing that the act should be done in a particular manner and time, *and not otherwise*" is noted by Cooley as frequently conclusive.⁴⁹ And Willard suggests that the words "'and not afterwards' may be added to the specification" of the time in which an act is to be performed.⁵⁰ Certainly a plain statement that failure to comply exactly with certain requirements will render the attempted procedure void or voidable would override any disposition to interpret rules as directory. When it is not intended that a variation should render the act performed invalid, it may be stated what the effect will be, or what penalty is to be inflicted for the erroneous action.

These suggestions are by no means exhaustive of the subject. Other means of correcting the present situation would occur to one in drafting a particular piece of legislation.

E. E. BROSSARD,* PUNCTUATION OF STATUTES

Report of the Committee on Legislative Drafting, National Conference of Commissioners on Uniform State Laws, 1938. 3-4, 8-9, 19-20.

. . . At every conference considerable time is spent in discussing the punctuation of proposed uniform acts. Hence some study of that topic may be worth while.

"Punctuation is no part of the statute" said Justice Harlan speaking for the court in *Hammock v. Loan & Trust Co.*, 105 U.S. 77 (1881). "Punctuation marks are no part of an act" of Congress said Justice Sutherland speaking for the court in *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82, 53 S.Ct. 42, 77 L.Ed. 175 (1931). "For the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required" said Chief Justice Fuller in *United States v. Lacher*, 134 U.S. 624, 10 S.Ct. 625, 33 L.Ed. 1080. In *Cushing v. Worrick*, 75 Mass. 382 (1857) the court said: "It is unnecessary to resort to the draft of the bill as passed to be engrossed, in order to explain the statute as actually engrossed; for the general rule is that punctuation is no part of a statute" (p. 385). The law of England is the same as ours: "211. Punctuation and brackets do not form parts of a statute, and if found on the Parliament Roll, or a statute as printed by the King's Printer, can only at the most be regarded as *contemporanea expositio*." 27 Laws of England (Earl of Halsbury) 122. The last quotation is the entire text on punctuation in that monu-

⁴⁹ Constitutional Limitations (7th Ed.) page 114.

⁵⁰ Legislative Handbook, section 312.

* Revisor of Statutes, State of Wisconsin. This report is reprinted in 24 Ore. L.Rev. 157 (1945).

mental work of 31 volumes covering all the laws of England. Said Lord Esher in *Devonshire v. O'Connor* (1890): "To my mind, however, it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops." 24 Q.B.D. 468, 478.

The pronouncements above quoted are definite and should be accepted as final. Texas has clinched the point by enacting a statute which declares that "in no case shall the punctuation of a law control or affect the intention of the legislature in the enactment thereof." Article 3269, R.S. 1895; Art. 5503, Vernon's Texas Statutes 1914; Art. 11, Vernon's Texas Statutes 1936. All states should enact a like statute. Wisconsin has kindred provisions. Section 35.19, Statutes, provides that "subchapter, section, sub-section and paragraph titles, and history notes constitute no part" of the law. That section should be amended by adding a provision like that of Texas upon the subject of punctuation. The alternative is to adopt some text-book on the subject as the official standard and decisive of all questions of punctuation. Some states have resorted to that expedient for settling disputed spellings and maybe capitalizing and compounding. That no state has adopted that alternative as to punctuation is a strong reason for suspecting that the idea is unsound.

Possibly this report should end here. The foregoing authorities assert a sound and sufficient rule for the guidance of courts in disposing of punctuation problems. Yet in spite of what was said and often repeated by the Supreme Court of the United States about punctuation of statutes the subject will not down. Attorneys continue to wrangle and worry over punctuation; and courts occasionally defend or fortify their decisions with commas—absent or present or misplaced. "There be men who can a hair divide 'twixt east and northeast side."

Although punctuation is no part of a statute still punctuation serves a very useful purpose; and no draftsman of statutes can afford to disregard the subject. In fact he should give very careful attention to the punctuation of his drafts. . . .

Nearly all of the discussions recorded in the law books upon the subject of punctuation involve the internal pointing of a sentence and 90 per cent involve the comma. "The questions in court relating to punctuation as affecting construction have generally arisen on the presence, omission or misplacing of commas." Lewis' *Sutherland on Statutory Construction* (1904) Section 361, page 688.

Now if the points in a sentence are to decide its meaning there must be a code or standard to determine the meaning of the points in question. But there is no single standard. Double or multiple standards fail to answer the need. The many codes or systems of punctuation are not intended to serve that purpose. The textbooks on punctuation are intended as guides for composers and secretaries and compositors, for proof readers and printers. And all of those codes have for their purpose the making of printed matter easy to read. They proceed on the theory that a sentence is correctly punctuated when the marks en-

able the reader to extract the contained idea with the least mental exertion. The object sought to be obtained is much like that of the teacher of penmanship. The meaning of a sentence is the same whether it is scribbled or is written Spencerian style. The difference between the two is a difference in the labor required to read them. None of the codes of punctuation deals with putting meaning into the language used. It is assumed that the words used carry the author's meaning and that the reader can get along if all internal points were omitted, but that his progress would be much retarded. The punctuation aims at lifting the meaning of the words into plain view so that the reader may catch the sense at first glance and with the minimum of effort.

Quoting again from the Style Manual of the United States Printing Office: "The punctuation required even in well-phrased text should aid clearness. If the use of a punctuation mark is in doubt, the question to be asked is 'Why?' rather than 'Why not?' If doubt persists, the mark should be omitted to aid the smooth flow of words. Marks interrupt. They are needed only to make the thought clearer or to facilitate oral expression. Beyond that they are detrimental to speed, ease and exactness of understanding. Rules for punctuation may be arbitrary in origin and may be observed from habit or inertia." (Page 101.)

Not one of these punctuation codes deals with the subject from the standpoint of interpretation of statutes. . . .

Both reason and experience are against reliance upon punctuation. The interior points of a sentence and their absence should not control the meaning or make it different from what it would be if there were no such marks. We go to the dictionaries for the meaning of words, be they spoken or written. Where should a law student look for a standard work on punctuation, if there is such a standard applicable to the construction of statutes? In the law libraries. Well, there is no work (standard or otherwise) on that subject in the Wisconsin State Law Library. If there were agreement as to the meaning or significance of a comma we might safely use it to help convey our ideas. In the absence of such common understanding we are, if we rely on the presence or absence of commas, in the predicament of Boy Scouts trying to wigwag without having a common system of signals.

Punctuating is interpreting. For he who points a statute thereby puts his construction upon it. Now the interpretation of statutes is the prerogative of the judicial branch of our government. The Supreme Court is the final word. Any other theory throws our political structure out of plumb. Beyond the word definitions inserted in the statute the legislature does not control the meaning of the language which it employs. The same holds true of punctuation. Pursuing the advice of Dick to Jack Cade at Blackheath: The first thing we do let's kill all the commas (Henry VI—Part 2—Act 4).

NOTE

See Lavery, "Punctuation in the Law", 9 A.B.A.Jour. 225 (1923).

SANTOS v. DONDERO

District Court of Appeal of California, 1936. 11 Cal.App.2d 720, 54 P.2d 704.

LEMMON, JUSTICE PRO TEM., delivered the opinion of the court.

Appellant entered a plea of guilty in the justice's court of township 3, Lake county, to a charge of using artificial light in night hunting of game mammals in violation of section 1151 of the Fish and Game Code (St.1933, p. 494). By the judgment and sentence pronounced upon the plea, the justice's court ordered that certain personal property, including a Ford coupé automobile, be forfeited to the fish and game commission, and the defendant herein, a game warden, in pursuance thereof, took the automobile into his possession. An action in claim and delivery against the game warden, defendant herein, was thereupon instituted in the superior court of Lake county by appellant, to recover the possession of the automobile, or its value. From a judgment adverse to him, appellant prosecutes this appeal.

It appears that the appellant, in the commission of the offense charged against him, used a spotlight which was attached to the automobile in question. Section 1414 of the Fish and Game Code (St.1933, p. 509) provides in part: "The judge or justice before whom any person is tried for a violation of any provision of this code may, in his discretion, upon the conviction of the accused, order the forfeiture of any device or apparatus designed to be, and capable of being used, to take birds, mammals or fish, and which was used in committing the offense charged." . . .

It is to be noted that in the description of the property which may be forfeited, set forth in section 1414 of the Fish and Game Code, the clauses are conjunctive. The device or apparatus must not only have been used in the commission of the offense charged, but it must also be capable of being used, "and" designed to be used, to take birds, mammals and fish. Obviously, an automobile is not "designed" for such purpose. While it is true that, wherever necessary to arrive at the evident intent of the statute, courts will substitute "or" for "and," and vice versa, this exceptional rule of construction can only be resorted to where the act itself furnishes cogent proof of the legislative error. *State v. Tiffany*, 44 Wash. 602, 87 P. 932. The Legislature apparently intended to draw a distinction between property not designed or intended primarily to be used in hunting and fishing, but which might be incidentally used in such pursuits, and property manufactured for these definite purposes. There is nothing in the context or the words used which justify the giving to the word "and," as there used, a disjunctive construction. . . .

The judgment is reversed.

NOTE

In recent years the symbol "and/or" has crept into drafting usage to an extent which renders obsolete an Illinois judge's reference to it as a "confusing fad". The

attitude of laymen and courts toward this meaningless "conjunctive/disjunctive" is exemplified by the following:

Editorial in the New York Sun, Feb. 5, 1935. "The use of the expression 'and/or' is an indication of sloppy thinking and/or a deliberate intention to befuddle and/or confuse. . . . How came the expression 'and/or' to drag its bifurcated and ungainly form into our language? Our secret conviction is that it is the creation of lawyers and/or bankers. Lawyers notoriously write a graceless gibberish, lawyers notoriously love a cumbrous phrase. The notion of inserting a new sort of 'and', which was not merely an 'and' but was divisible by 'or', is just the sort of thing that would occur to a lawyer."

Employer's Mut. Liability Ins. Co. v. Tullefson, 219 Wis. 434, 263 N.W. 376 (1935):

"We are confronted with the task of first construing 'and/or,' that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients. We have even observed the 'thing' in statutes, in the opinions of courts, and in statements in briefs of counsel, some learned and some not."

See "An And/Or Symposium," 18 A.B.A.Jour. 574 (1932); Parsons, "And/Or", 10 Cal.S.B.J. 77 (1935); Morton, "For And/Or on Behalf of; or Against And/Or", 10 Cal.S.B.J. 89 (1935); Note in 45 Yale L.J. 918 (1936); *Paramount Productions Inc. v. Smith*, 91 F.2d 863, 864 (1937).

Do not use "and/or". Say what you mean, e.g. "Either A or B or both of them".

The dangers inherent in conjunctives and disjunctives may often be avoided by intelligent use of tabular construction.

HORACE E. READ, REGULATIONS REVISION COMMITTEE MANUAL

Canadian Naval Service: 1943. 11-18, 24.

(Articles in the regulations correspond to sections of a statute or clauses of a bill. While a measure is in the form of a bill, that is at all stages until its enactment into a statute, it is customary to refer to the parts designated as sections as "clauses". Ed.)

IV. Arrangement.

6. *The Sentence.*

. [a] . . . [a]

(e) *Examples of Legal Subjects and Actions.*

(Article 351, K.R. & A.I., in part.)

<i>Subject</i>	<i>Action</i>
Medical Officers of the rank of Surgeon Captain and below	will be allowed to undergo courses of post graduate instruction.
The duration of the course	will be determined by the Medical Director-General, according to requirements.

This Article illustrates both good and bad practice. In the first sentence, since a privilege is conferred and not a duty imposed, the action should read "may be allowed to undergo" or, preferably, simply "may take". The subject of the last sentence is a thing, which should not have been made the subject, although there happens to be no resulting uncertainty or ambiguity in this instance. The last sentence should read:

<i>Subject</i>	<i>Action</i>
The Medical Director-General	shall determine the duration of the course according to requirements.

(f) *Use of Active Voice in Stating Legal Action.*

(See Canadian Uniformity of Legislation Commissioners' Report, 1942, pp. 92 and 99.)

You will have observed that both legal actions in Art. 351, K.R. & A.I. are expressed in the passive voice. There are many instances of that manner of drafting in K.R. & A.I., and it is almost unavoidable when a thing is made the subject. The result is often uncertainty and obscurity.

- (i) Revisers should when drafting adhere to the Uniform Commissioners' Rule 6:
"The active voice should be used and the passive voice avoided."
- (ii) When there is any doubt concerning the identity of the person who is given the right, power, or privilege or is subjected to the duty or liability, change the subject from thing to person, and usually the voice from passive to active.
- (iii) Reserve the passive voice for use ordinarily when the person who is the legal subject is merely passively to submit or suffer, as where he is directed to suffer or submit to executory force, or punishment.

(g) *The Case.* If a draftsman desires to limit the extent or application of a legal rule he should do so by stating the case in which it operates. This method effectively decreases the need for provisos or exceptions. In fact, if the case is well stated there is never any occasion to use a proviso and the necessity for using an exception is rare.

Since the case sets out the state of facts where the rule is to operate, it should, normally, be stated at the beginning of the legislative sentence. It is fair notice to the reader that the law is limited in application if the case starts with the words "Where" or "When", and he is thus early informed whether the rule concerns a state of facts about which he desires to know the law. But where a single rule applies to numerous cases it may be more convenient to arrange them as a list following the rule.

When stating the case adhere to the following instructions:

- (i) A single case precedes the rule.
- (ii) Multiple cases may precede or follow the rule in the reviser's discretion.
- (iii) Use the word "Where" or "When" in preference to "In case", "In event that" or "Whenever" to introduce the statement of the case. Use "Where" if frequent occurrence of the event is contemplated. "When" may be used if a single or rare occurrence is contemplated.
- (iv) Cases may be stated in the alternative.
- (v) Express the case in the indicative mood.
- (vi) Always use the present or past tense of the verb to state the case, never the future. In addition to the logical absurdity of stating the case in the future, the future tense form is easily confused with the imperative. For example, say "Where the Captain satisfies himself that there is good reason (he may)"; or "When the Captain has satisfied himself"; using the present or past tense according to the time order of the case relative to the legal action. Never say "Where the Captain shall have satisfied himself".
- (vii) The case must always be so expressed as to be clearly distinguished from the other parts of the sentence, but it need not, and should not, be comprised in a consecutive sentence when rules of composition require a different arrangement.

(h) *The Condition.*

(See Canadian Uniformity of Legislation Commissioners' Report, p. 93)

It may be that both laws which are unrestricted in operation and those confined to certain cases are called into action only upon the fulfilment of stipulated conditions.

- (i) The logical position for a condition is directly after the statement of the case; and since the legal action is suspended until the condition is fulfilled, it should evidently be placed before the action, resulting in the operation of the law being brought into strong contrast with the condition on which it operates. Where there are several conditions it is good draftsmanship to enumerate them in the chronological order in which they are to be performed or to occur.
- (ii) When the legal action is stated affirmatively, a condition is aptly introduced with "If" or "Until"; when the action is stated negatively with "Unless". For example "If accommodation is available a Commanding Officer may permit", as compared with "Unless accommodation is available a Commanding Officer shall not permit".

- (iii) Do not use the future tense of a verb when stating a condition. Never say, for example "If there shall be accommodation available".
- (iv) Never phrase a condition in the form of a proviso. Provisos should never be used. If the legislative sentence is properly drafted there is never an occasion to use a proviso. The proviso is a badge of the lazy or incompetent draftsman.

(i) *The Exception.* An exception exempts some matter, which would otherwise be within its scope and meaning, unconditionally from the application of the law. There are few occasions when expression of an exception as applying to the entire legislative sentence is justifiable. In fact most authoritative writers do not include the exception as a distinct part of the legislative sentence. Expert draftsmen are agreed that no single element contributes more to confusing legislation than the inept use of exceptions (and, still worse, of provisos) where the matter should be covered by a direct statement. They concur in applying the following rules:

- A. If certain persons are to be excluded from the operation of the law this should appear in the language of the legal subject.
- B. Limitations on time, place, manner, or circumstance of the operation of the law should be stated in the legal action.
- C. If particular conditions are to be dispensed with, that should be done by qualifying the statement of the condition.
- D. All other limitations on the application of the law should be put in the case.

Additional Rules:

- (i) Reserve the use of exceptions as far as possible to incorporate by reference exemptions from the operation of the instant provision that are contained in another provision; for example "(1) Except as provided in (2) and (3) of this article".
- (ii) Introduce an exception with the word "Except," but take care to avoid using the device to create an ambiguity. Only such substantives should follow the word "Except" as are intended to be governed by it.
- (iii) When they are few, state exceptions at the beginning of the article or legislative sentence.
- (iv) If for some good reason it becomes necessary to use numerous exceptions, place them in list form at the end of the article or sentence or even in a separate article or clause.

7. References.

(a) *When Not Used.* Do not in one article apply or incorporate the terms of another by reference if the matter expressed in the article referred to can as easily be expressed as the reference, and in as few words.

- (b) *Be Specific.* Make every reference specific; none general.
- (i) For example, never say "As provided in this Chapter".
 - (ii) Do not use the words "hereinbefore", "hereinafter", "preceding", or "following" to make references, since they lead to uncertainty.
- (c) *Forms of Specific Reference to be Used.*
- (i) Where it is necessary in one article to apply or incorporate terms of another article, refer to the other article by number; for example "in Article 3.26".
 - (ii) Where it is necessary in the body of an article to refer to a clause of the same article, write, for example "In (3) of this Article".
 - (iii) When the purpose of a reference is to limit the referring provision by the terms of the one to which reference is made, always use the phrase "Subject to". For example "26.10 Subject to Article 15.12, a man may".
 - (iv) When the purpose of a reference is to except the provision to which reference is made from the referring provision, always use the phrase "Except as". For example "10.62. Except as provided in Article 10.23, an officer may".
 - (v) Where in an article reference is made to another article as constituting the authority for the doing of certain things, the word "under" should be used—e.g., "where under article 7.30, a man is sentenced. . . . etc."
- (d) *Method of Cross-reference.* Where an article or an appendix is cited merely for cross-reference, underline (italicize) the citation and place it in parentheses at the end of the article or clause in which the cross-reference is made, thus: "(See Article 6.10)" or "(See Appendix VII)".
-

9. *Tabular Construction*

Clearness is materially increased by breaking up the body of a legislative provision into its parts and presenting them in tabular arrangement. By this device the co-ordination of the subject-matter is portrayed readily to the eye. Where a succession of rights, powers, privileges, duties, or liabilities is referred to a single person or group, space may often be saved and the meaning made clearer by this method of setting out the law on the page. Arrangement of a provision in this way is especially recommended where the subject-matter makes short sentences impossible. Relation of the main and dependent clauses and the relation of the legal subject to the legal action and the other parts of a legislative sentence can then in no other way be so clearly brought out.

Instructions:

- (i) Where clearness of presentation is improved thereby, arrange the material in tabular form, normally within articles, in the form of clauses, sub-clauses, enumerations, or lists, as analysis of the particular subject-matter dictates.
- (ii) Occasionally it may be more advantageous to use a formal table arranged in parallel columns. This form is especially useful as a comparative device.

V. Language.**1. General.**

Remember that K.R.C.N. is primarily designed for the use of persons who are not lawyers. The constant aim must be to use language that can be readily understood by the young officer and enlisted man who is new to the Naval Service and unversed in technical and legal phraseology. At the same time the Regulations will have the force of a statute, and will on occasion be applied by a Court. Apply the following general rules:

- (i) Use modern language.
- (ii) The Regulations should be simple as distinguished from complex. As far as possible reduce them to plain propositions, free from technical terms.
- (iii) Be as concise as possible consistent with clarity.
- (iv) Avoid synonyms.
- (v) Never use a phrase when a word is its exact equivalent.
- (vi) Use nouns in preference to pronouns even though you must repeat the noun.
- (vii) Brevity is desirable, but full treatment of the subject-matter is more desirable. Greater harm may often be done by a provision which dismisses a complicated subject with a few sweeping rules than by one that is verbose or too repetitious. Avoid both extremes.
- (viii) If a provision is to apply to a class as a whole, it is safest to name the class in general terms rather than to mention particulars either preceded or followed by general language. It is best to enumerate only the particulars that are being excepted.
- (ix) Always consider carefully whether an enumeration of particulars is necessary. It is almost impossible to make the enumeration exhaustive, and accidental omission may be construed as implying deliberate exclusion, in accordance with the canon "*Expressio unius est exclusio alterius*".
- (x) It will sometimes, in order to comply with rules (viii) and (ix) of this paragraph or to shorten a sentence, be necessary to use a generic term to include several particulars. Define generic terms in either the interpretation article of the chapter or in the interpretation chapter of K.R.C.N., according to the generality of their use.

- (xi) *Attain, if possible, such precision in the language of a Regulation that a person reading in bad faith cannot misunderstand it.*

NOTE

See Henderson, "Report of Revisor of Statutes to the Minnesota Legislature, 1941, Appendix B" 57-62; and Kennedy, "Legislative Bill Drafting", 31 Minn.L.Rev. 103 (1946) for similar and other rules.

. . .

VII. Marginal Notes (Article and Clause Headings).

The Uniform Commissioners have adopted the following rules concerning marginal notes. They should be applied.

"14. (1) Marginal notes should be short and distinctive and should describe but not summarize the provisions to which they relate.

"(2) When read together, marginal notes should have such a consecutive meaning as will give a reasonably accurate idea of the contents of the provisions to which they apply.

"(3) Marginal notes should usually be in substantive form.

"(4) Marginal notes should be prepared by the draftsman of the Act.

"(5) Where a marginal note must be long to be distinctive, a presumption is raised that the section or subsection to which it relates should be broken into two or more subsections."

NOTES

1. See generally, Ilbert, "Legislative Methods and Forms" (1901); Thring, "Practical Legislation" (1902); Ilbert, "The Mechanics of Law Making" (1914); "Statute Law-making in Iowa" (Vol. III of Applied History, a State Historical Society of Iowa publication) (1916); "Proceedings of (U.S.) National Conference of Commissioners on Uniform State Laws, 1917;" "Reports of the Revisor of Statutes to the Minnesota Legislature, 1941, Appendix B"; "Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, 1942"; Cullen, "Mechanics of Statutory Revision," 24 Ore.L.Rev. 1 (1944). The following useful books are now out of print: "Legislative Expression" by George Coode; "A Legislative Handbook" by Ashton R. Willard.

2. The following illustrate:

(1) A draft by an expert in real property law with an eye primarily to substance:

"Realty of a competent owner whose spouse is under actual and subsisting guardianship by reason of insanity or incompetency may be conveyed, mortgaged or leased by separate instruments and/or one instrument executed by such guardian and/or owner. Before such execution by the guardian, he shall petition the Probate Court for authority therefor, but if such guardian refuses to petition, said competent owner may with notice to said guardian as ordered by said court, petition on behalf of said guardian; and upon proof of the said petition, the court may order and decree the said guardian to execute or join in the execution of such instrument."

(2) Redraft, rearranging and rephrasing for clarity:

"When the spouse of a competent owner of land is under general guardianship, that owner and the guardian may convey, mortgage or lease the land either by instruments executed by the owner and guardian separately or by one instrument executed by both.

"Before the guardian executes either instrument he must petition the Probate Court for authority.

"If the guardian refuses to petition, the owner may do so on his behalf, giving the guardian whatever notice the court in its discretion directs.

"Upon proof of the petition in either case, the court may order the guardian either to execute or join in executing the proper instrument."

PREFACE TO MINNESOTA STATUTES 1945, p. 6

8. Numbering System. The only system of numbering that lends itself completely to continuous revision is that in use in Wisconsin. It is based on having a decimal point in it so as to show on one side the chapter number and on the other the section number. The number at the left of the decimal indicates the chapter. The number at the right indicates the section. The section number 43.12, broken into component parts, would read chapter 43, section 12. Section numbers may run from .01 to .99. New sections may be placed at the end of a chapter, but, if logical sequence requires they should be inserted between certain sections, an additional decimal denominator may be used. For example, new sections not more than nine in number may be placed between 20.13 and 20.14 and may be designated 20.131, 20.132, or similar. It is easy to turn to a section for which you are looking. A citation of one number includes the chapter and the section designations. No two chapters and no two sections will ever have the same number. Future sections or chapters may be added easily without disturbing existing chapter and section numbers.

SOME DRAFTING DEVICES ILLUSTRATED

An example of the new way of writing laws advocated by Professor Conard (*supra*) is found in the Regulations for the Canadian Naval Service (Short Title—K. R. C. N.), of 1945. During 1943, 1944 and part of 1945 the naval regulations were completely revised and almost entirely re-written. The chairman of the Naval Regulations Revision Committee was given a free hand by the naval authorities in drafting both the regulations and the Canadian Naval Service Act of 1944 which they implement. He was therefore able to use the devices which experience proves aid the clarity and convenient use of laws. Consequently, the more than 900 pages of the book are written in simple, straightforward language with all legal jargon eliminated. The language of the legislative sentences is carefully arranged to enhance clarity, subheadings of articles are designed to appeal readily to the eye, and various forms of tabular construction are utilized.

The new regulations, although covering more subject matter, are expressed in less than half the language comprised in the old.

Use of devices appropriate to various types of subject matter is shown in the following illustrations.

K.R.C.N.

Chapter 1—Introduction and Definitions.

1.18—SYSTEM OF NAVAL GENERAL ORDERS(2) *General Orders and Confidential Orders.*

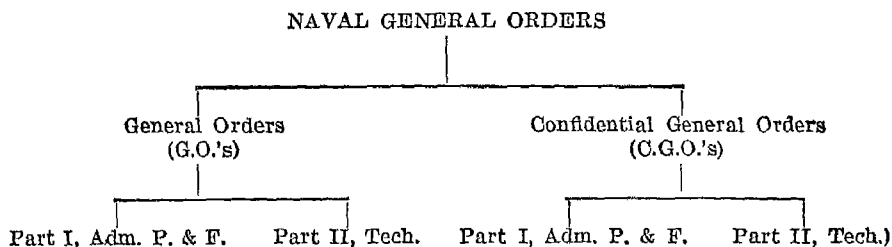
- (a) Naval General Orders shall be issued in two series, called, respectively, General Orders (G.O.'s) and Confidential General Orders (C.G.O.'s).
- (b) General Orders shall contain orders mainly of a non-confidential nature, marked "Restricted".
- (c) Confidential General Orders shall contain orders of a confidential nature, marked "Confidential", that should be seen only by officers; but Commanding Officers shall cause technical information contained in Confidential General Orders to be communicated to men under their command to the extent necessary to ensure the efficient performance of their duties.

(See article 1.25—"Classified Matter".)

(3) *Form and Arrangement.*

- (a) General Orders and Confidential General Orders shall be separate loose-leaf books, and each of these books shall be compiled in two parts entitled, respectively, "Part I, Administration, Personnel and Finance" and "Part II, Technical".

(Diagram showing basic organization of Naval General Orders:



- (b) Part I (Administration, Personnel and Finance) of both General Orders and Confidential General Orders shall be arranged in chapters whose titles shall correspond exactly with those of K.R.C.N. Within each chapter every order shall bear the number of the article of K.R.C.N. which the order implements and shall be placed accordingly. Under each article number the orders shall be arranged and numbered in chronological order of issue. (e.g. 10.25/1, 10.25/2, etc.)

(c) Part II (Technical) shall be arranged in sections as follows and orders placed within them and numbered in chronological order of issue: (e.g. A1, A2, etc.)

- A. Gunnery and Stores Relating Thereto.
- B. Torpedo and Stores Relating Thereto.
- C. Navigation and Stores Relating Thereto.
- D. Engineering and Stores Relating Thereto.
- E. Anti-Submarine and Stores Relating Thereto.
- F. Hull.
- G. Communications and Stores Relating Thereto.
- H. Electrical and Stores Relating Thereto.

Except for those orders which are the responsibility of the Electrical Department and are included in Section H.

(d) Immediately beneath every order there shall be printed, each in parentheses, the

- (i) date of taking effect,
- (ii) the number of the relevant Naval Service file, and
- (iii) if it was issued by the Chief of the Naval Staff, the letters "C.N.S."

(4) *When and by Whom Promulgated.* The Naval Secretary, shall promulgate both General Orders and Confidential General Orders at regular periods throughout each year, as directed by the Minister from time to time.

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K.R.C.N.

Chapter 4—Officers' Status.

Section 4—Retirement, Resignation and Discharge.

4.57—REASONS FOR DISCHARGE

(1) Under the provisions of Article 4.55 (Authority to Discharge Officers) an officer may be discharged from the Naval Forces for the reasons shown in the table entitled "*Article 4.57—(Table)*".

(2) (a) The discharge of an officer under the provisions of *Article 4.57—(Table)*, column (1), item (b), (c), (d), (e), (g), (i), (j), or (k), shall be effective 14 days from the date on which he is informed that his discharge has been approved.

(b) If for any cause it is not possible to effect a discharge within 14 days of the officer being informed, the reason shall be reported to Naval Service Headquarters.

- (c) An officer discharged under the provisions of *Article 4.57—(Table)*, column (1), item (b), (d), (j), or (k) may at the discretion of the Minister be granted the leave (normally due to him), to which he is entitled prior to being informed that his discharge has been approved. When it is proposed to grant leave under this clause the matter shall be referred to Naval Service Headquarters for approval.
- (d) An officer discharged under the provisions of *Article 4.57—(Table)*, column (1), item (h) shall be granted the pension leave to which he is entitled, his discharge being effective the day after the day on which his pension leave expires.
- (3) An officer discharged under the provisions of *Article 4.57—(Table)*, column (1), item (h) shall have the word "Pensioned" added to the reason for his discharge, e.g. "Appointment terminated—Invalidated—Pensioned".
- (4) (a) An officer whose discharge is recommended under *Article 4.57—(Table)*, column (1), item (c) shall immediately be informed of the recommendation for his discharge.
- (b) He shall within three days of being so informed, either
 - (i) render in writing his reasons against the carrying out of the recommendation, or
 - (ii) state in writing that he has no such reasons.
- (c) The statements rendered in accordance with (b) of this clause shall be forwarded to Naval Service Headquarters as soon as practicable.
- (5) (a) An officer whose discharge is recommended under *Article 4.57—(Table)*, column (1), item (i) shall be informed of the recommendation and given the opportunity of tendering his resignation.
- (b) If he was promoted from the lower deck, he shall be granted the opportunity of re-enlisting in the rating he held immediately prior to his promotion.
- (6) A discharge effected under *Article 4.57—(Table)*, column (1), item (f) shall be effective on the date of the sentence of the court.

NOTE

By using this form of tabular construction 34 pages of complicated description were reduced to three pages of relatively clear instructions. The duty to carry out these instructions is imposed on designated officers and administrative officials by various other articles; thus the use of the passive voice. [Items j to p of the Table are omitted. Ed.]

ARTICLE 4.57—(TABLE)

ITEM	REASONS FOR WHICH A DISCHARGE MAY BE EXPECTED	DESIGNATION OF DISCHARGE IN NAVY LIST AND APPOINTMENT LISTS	WHEN APPLICABLE	TO WHOM APPLICABLE	REMARKS
a.	Death of an Officer.	Commission (or warrant) terminated—Discharged dead.	At all times.	All Officers.	See Chapter 49—Casualties, Deaths and Funerals.
b.	An Officer who has been declared unfit by the Medical Director General under (i) of article 38.15—Procedures Regarding Discharge and Release. (i) a report of Medical survey (See Article 39.04, or —“Medical Categories and Records of Survey”.) (ii) In the case of an officer of the Reserve who is declared unfit by the Medical Director General, the disability must be attributable to the performance of naval duty, the Medical Officer.	Appointment Terminated—Invalidity, or in the case of an officer of the Reserve, disability is not attributable to the performance of Naval Duty— Appointment terminated — Medically Unfit.	At all times.	All Officers.	See clause 2 (a) See clause 2 (c)
c.	An officer by reason of: (i) incapacity, (ii) pecuniary of temperance, or (iii) inefficiency, or (iv) unsatisfactory performance of duties, as (v) intemperance, or (vi) irregular habits of life, or (vii) drunkenness, or (viii) for any other reason is considered unfit for or unworthy of further employment.	Commission (or warrant) terminated—Unsuitable for Naval Service.	At all times.	All Officers.	See clause 2 (a) See clause 4
d.	An Officer reaches the age limit for his rank under the provisions of Article 4.58 (Age for Retirement).	Appointment terminated—Over age.	At all times.	All Officers.	See clause 2 (a) See clause 2 (c)
e.	An officer tenders his resignation from the Naval Service.	Appointment terminated — Resignation accepted.	At all times.	All Officers.	See clause 2 (a)
f.	An Officer is sentenced by: (i) Court Martial to “Dismissal with disgrace from the Naval Service”, or “Dismissal from the Naval Service”, or (ii) Disciplinary Court to “Dismissal from the Naval Service”.	Commission (or warrant)—terminated, (i) Dismissed with disgrace from the Naval Service, or Dismissed from the Naval Service, (ii) Dismissed from the Naval Service.	(i) At all times. (ii) When the Naval Forces are on Active Service.	All Officers.	See clause (b).
g.	When for the good of the Naval Service a reduction must be made in the complement of officers.	Appointment terminated — To promote economy.	At all times.	All Officers.	See clause 2 (a)
h.	An officer whose release from service is approved and who, under the provisions of the Militia Pension Act, is eligible for and granted a pension.	Appointment terminated—Pensioned.	At all times.	Officers of the Royal Canadian Navy.	See clause 2 (d) See clause 3
i.	A probationary officer fails to qualify in his training course.	Appointment terminated — Failed to qualify.	When the Naval Forces are on Active Service.	Officers of the Reserve.	See clause 2 (a) See clause 3

K.R.C.N.

Chapter 15—Courts-Martial.

Section 6—Opening of Court and Commencement of Trial

(N.B.—The procedure at the trial is, in articles 15.33 to 15.43, laid down step by step, in chronological order.)

15.40—PLEA OF ACCUSED—“NOT GUILTY” OR “GUILTY”

(1) The judge-advocate shall inform the accused that he is not required to plead either “Not Guilty” or “Guilty”, but if he desires to plead “Guilty” he should now do so.

(2) The accused may plead “Not Guilty” or “Guilty” to all or any of the charges, or he may refrain from pleading, in which latter event the trial shall proceed as if the accused had pleaded “Not Guilty” to the charge or charges in respect of which he made no plea.

(3) When the accused pleads “Guilty” to any charge or charges, the court shall, in the following cases, reject the plea of “Guilty” and proceed with the trial in the same manner as if the accused had pleaded “Not Guilty” to the charge or charges:

(a) when the statement in mitigation of punishment (*see article 15.41*) amounts, in the opinion of the court, to a plea of “Not Guilty”;

(For example, when the accused alleges that

(i) he was subject to great provocation, or

(ii) his state of body or mind was such as to render him incapable of appreciating the nature and quality of the act constituting the offense charged, or

(iii) in the case of a charge of desertion, he intended to return to his place of duty, or

(iv) in the case of a charge of absence without leave, he was prevented, by circumstances beyond his control from returning at the appointed time, and that the absence without leave was not due to any misconduct or fault of his own).

(b) when the court is satisfied from the statement in mitigation, or by any other means, that the accused does not understand the effect of a plea of “Guilty”;

(c) when the court is of opinion that the full circumstances must be investigated before a proper sentence can be awarded.

(4) Subject to (3) of this article, when the accused pleads “Guilty” to a charge, the court shall accept his plea of “Guilty”, and the accused shall be deemed to have admitted the accuracy of all material statements relative to that charge, contained in the Circumstantial Letter.

DUNCAN L. KENNEDY, DRAFTING BILLS FOR THE
MINNESOTA LEGISLATURE

St. Paul: 1946. West Pub. Co. 25-29.

[The following specifications and forms are in conformity with the Minnesota constitutional requirements concerning titles and enacting clauses (See *supra* Chapter 5), the rules of the houses of the Minnesota Legislature, and a Memorandum on Drafting Bills by the Minnesota Attorney General. They can be readily adapted to corresponding requirements and rules of any other jurisdiction. Ed.]

**SPECIFICATIONS OF MEASURES FOR INTRODUCTION
(IN MINNESOTA).**

Number of Copies. For introduction in the House, 4 copies are required of each bill or other measure; for the Senate, 4 copies.

Paper. Measures must be typed on 8½ x 13 bond paper, light weight.

Margin. Left-hand margin, three-quarters of an inch; right-hand, one inch; top, one and one-half inches; bottom, one and one-half inches.

Numbering Sheets. Number each sheet at the bottom.

Spacing. Single space title and double space text.

Binding. Cover original and each copy with a good quality manuscript cover, and bind with wire staples. For the cover of House and Senate bills, use white.

Title on Cover. Fold covers twice, from bottom toward the top. On the back of the second fold, above the heading, H.F.——— or S.F.———, as the case may be, on the original type "ORIGINAL", on each copy type "COPY". On the back of the second fold, under the heading, H.F.——— or S.F.———, as the case may be, type the full title in capitals.

LEGISLATIVE FORMS

(Bill for new law)

A BILL

For an act relating to tree planting for conservation purposes, providing for the distribution thereof, and repealing Laws 1945, Chapter 213.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. This act may be cited as the Tree Planting Law of 1947.

Section 2. Subdivision 1. In this act, unless the context otherwise requires, the words and terms defined in this section have the meanings given them.

Subd. 2. "———" means ———.

Subd. 3. "———" includes ———.

Sec. 3. Trees may be procured etc.

Sec. 4. For the purposes authorized in this act, the commissioner may etc.

Sec. 5. Laws 1945, Chapter 213, is repealed.

(Bill for amendment)

A BILL

For an act relating to gross earnings tax on telegraph companies; amending Minnesota Statutes 1945, Section 295.32.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Minnesota Statutes 1945, Section 295.32, is amended to read as follows:

295.32 Every telegraph company, as defined in Section 295.01, Subdivision 9, shall pay into the state treasury, on or before March first, ~~of~~ each year, beginning 1, ~~1945~~ 1947, ~~five seven~~ per cent of its gross earnings derived etc.

A BILL

For an act relating to ———; amending Laws 1945, Chapter 42, Section 1.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Laws 1945, Chapter 42, Section 1, is amended to read as follows:
etc.

All ~~resident~~ men and women in any of the military *or naval* forces
(Claim bill)

A BILL

For an act appropriating money to ——— as reimbursement for ———

Be it enacted by the Legislature of the State of Minnesota:

Section 1. There is hereby appropriated, out of any money in the state treasury not otherwise appropriated, the sum of \$25.00 to ——— to reimburse etc.

A JOINT RESOLUTION

Requesting that deferment be granted and extended to farm laborers under the Selective Service Act.

WHEREAS, Minnesota farmers, desiring to render the fullest measure of patriotic service to the nation, have ———; and

WHEREAS, in addition to ———; and

WHEREAS, the growing shortage ———; and

WHEREAS, successful prosecution ———; and

WHEREAS, Congress, ———.

NOW, THEREFORE, BE IT RESOLVED by the Legislature of the State of Minnesota, in regular session assembled, that we ask ———.

BE IT FURTHER RESOLVED that the Secretary of State transmit a copy of this resolution to ———.

A CONCURRENT RESOLUTION

Relating to Legislation affecting aeronautics now before the Congress of the United States.

WHEREAS, the Congress of the United States has under consideration certain bills ———; and

NOW, THEREFORE, BE IT RESOLVED by the House of Representatives, the Senate concurring, that ———.

BE IT FURTHER RESOLVED that the Secretary of State transmit a copy of this resolution to ———.

RESOLUTION

WHEREAS, there exists a great difference of opinion as to the effect of ———; and

NOW, THEREFORE, BE IT RESOLVED by the House of Representatives that the application of ———.

BE IT FURTHER RESOLVED that a committee ———.

A JOINT MEMORIAL

Relating to the absence of water in the bed of the Minnesota River and the dearth of fish therein.

TO THE SECRETARY OF THE INTERIOR:

Your memorialist respectfully represents:

WHEREFORE your memorialist, the Legislature of the State of Minnesota, urgently requests:

1. _____
2. That the Secretary of the Interior recommend the actions suggested to the President and the Congress respectively.

A CONCURRENT MEMORIAL

Requesting the establishment of a national cemetery in Minnesota.

TO THE SECRETARY OF WAR:

Your memorialist respectfully represents:

WHEREFORE your memorialist, the Senate of the State of Minnesota, the House of Representatives concurring, requests:

1. _____
2. _____

A MEMORIAL

Requesting the establishment of a government general hospital at the City of Minneapolis.

TO THE SECRETARY OF WAR:

Your memorialist respectfully represents:

WHEREFORE your memorialist, the House of Representatives of the State of Minnesota, urgently requests:

1. That the Secretary of War give _____
2. _____

NOTE

Cf. Mason, "Legislative Bill Drafting", 14 Calif.L.Rev. 379, 385-392 (1926). For English forms, see Russell, "Legislative Drafting and Forms (1931).

Chapter 7

THE METHODS OF INTERPRETATION AND CONSTRUCTION

SECTION 1. INTRODUCTORY

INTRODUCTORY NOTE

Skill in interpretation of statutes demands essentially an understanding of judicially developed techniques for applying legislative enactments to the solution of issues. The language of statutes is neither formulated nor applied in a vacuum, and the task of the interpreter is to give it meaning with reference to concrete factual situations. It has been aptly said that "where the Legislature provides that when . . . a certain state of facts exists, certain liabilities or rights shall result, it always contemplates these results flowing from a finding of the facts by a judicial tribunal, not from the existence of the facts in the absolute."¹

The interpretative process does not consist of merely applying rules devised to ensure predictable decisions. The process is complex, not simple. It differs radically in many respects from that familiar to the application of judicial precedent. An accurate knowledge of the postulates, approaches, presumptions, aids and other judicially created tools of interpretation is but pre-requisite to learning the art of selecting and using them to assist the exercise of judgment.

Invocation of one or more of various historically founded presumptions as a supplement or alternative to one of the available approaches is an important interpretative device. Since, however, the tendency of a court to resort to presumptions and its manner of using them is a reflection of its attitude toward legislation as an element of law, treatment of them is most effective within the context of Chapter 8, "Fitting Legislation Into a Unified Legal System".

ERNST FREUND, LEGISLATIVE REGULATION

New York: The Commonwealth Fund, 1932, at p. 132.

It is a mistake to treat statutory construction like other branches of the common law, as a body of doctrine to be gathered from particular precedents and judicial utterances; the only proper method of approaching the problem is the inductive one, gathering from the mass of decisions certain tendencies and seeking to determine whether some of these tendencies are strong enough to impose themselves

¹ D. M. Gordon, "The Relation of Facts to Jurisdiction," 45 L.Q.Rev. 459, 460 (1929). (Commonly now an administrator is contemplated—Ed.) See also Jones, "The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes," 25 Wash.U.L.Q. 2, 8 (1939).

upon courts by reason of inherent fitness and necessity. . . .
And most of the current maxims stated in textbooks and judicial
decisions are of little value. . . .

KARL N. LLEWELLYN, THE MODERN APPROACH TO COUNSELLING AND ADVOCACY

46 Colum.L.Rev. 167, 179-183 (1946).

. . . In presenting the better advocates' realistic, operational approach one does better (as in any operational approach) by describing first the situation which the advocate is up against. His task is to persuade the court to his view of the law and of the facts of his case. What he is up against is therefore the court and *its* way of doing *its* work, *its* way of seeing the law and the facts of *any* case. The new development in this picture is not so much that the courts' ways have changed greatly in these war years as that the best advocates are beginning to realize more accurately (though often still dimly) what the courts' ways are. It is not, again, that the best advocates' best ways of work have changed greatly, but that those best ways are now becoming conscious techniques, and so available for more consistent use, available also to any man within the range of his own powers, no longer limited to the odd gifted few who are "born" artists in the craft and who then come to have "sufficient experience".

The realistic or operational approach to advocacy rests on facts like these (and they are carefully tested facts):

(1) While the courts have and know a duty to the Law, their office forces on them also, and they have and know and labor to live up to, a duty to Justice, to decency and fairness of result.

(2) Despite this felt duty to Justice, it is also their office to stay within the Law as they seek for Justice; and they do so stay within the Law. But the range of *leeway* which our case-law system offers both in *readjustment* of the Law and in its *application* is much greater than most lawyers let themselves realize. And the fact that a case-law court's duty to its case-law system is (and always has been) to take advantage of that leeway to further Justice and to improve the Law—that is a thing that the schooling of our lawyers has been slow to make adequately clear.

(3) Justice is a thing easier to feel than to think about. The conscious thought of courts runs rather in terms of "What is fair in the situation", or "What is good sense and decent in the situation"; and of course judgments on fairness or good sense or decency can and to some extent must differ, so that one needs to study the personnel of the court, and *their* ways of seeing sense.

(4) No court can feel happy with a decision unless the decision fits comfortably, under our accepted techniques of handling authorities, with the accepted body of the law. But the techniques which are accepted and in standard use are contradictory and alternative

techniques. This holds equally in regard to prior cases, to statutes, and to administrative regulations. . . .

. . . Our whole body of authoritatively accepted ways of dealing with authorities, ways in actual use in the daily work of the courts, is a body which *allows* the court to select among anywhere from two to ten "correct" alternatives in something like eight or nine appealed cases out of ten. That is, *technically* our system could find any of these alternatives to be correct. *Judicially*, our system does not allow most of them. That is not because the authorities and our accepted techniques for handling the authorities do not allow huge leeway. It is because judges have a duty to use the available leeways to make for sense and to accomplish decency, and because upright judges, these days, also want to and try to do just that. Whether consciously (as sometimes) or less consciously (as more often), they therefore use their two-faced or multi-faced accepted techniques to make the authorities take on some one of the (doctrinally) possible aspects which does seem to make for sense and to accomplish decency—always with the upright judge's ultimate and underlying drive to see the thing as best he can in terms of Justice-for-All-of-Us.

From these facts about the courts' methods and objectives a number of practical rules or principles or guides for the advocate emerge at once.

First, and negatively: it is plainly not enough to bring in a technically perfect case on "the law" under the authorities and *some* of the accepted correct techniques for their use and interpretation or "development". If the case is really worth litigating (and perhaps half of today's appealed cases are), then there is an equally perfect technical case to be made on the other side, and if your opponent is any good he will make it. The struggle will then be for *acceptance* by the tribunal of the one technically perfect view of the law as against the other. Acceptance will turn on something beyond "legal correctness". It ought to.

Second, a "technically" perfect case is equally unreliable in regard to the interpretation or classification of the facts. For rarely indeed do the raw facts of even a commercial transaction fit cleanly into any legal pattern; still less so do the "trial facts" as they emerge from conflicting testimony. No matter what the state of the law may be, if the essential pattern of the facts is not seen by the court as fitting cleanly under the rule you contend for, your case is still in jeopardy. This is of course the reason for the commercial counsellor's concern with "fixing" the transaction by a well-drawn document which does fit cleanly into known and certain legal rules. But even documents can have their difficulties (especially in commercial finance). Thus despite any and every document and the parol evidence rule, the "form" of outright sale will regularly be disregarded if oral testimony and circumstances persuade the tribunal that the "true transaction" was one for security only. Despite any document and the parol evidence rule, the "form" of legitimacy may even be-

come an adverse factor if the tribunal from oral testimony and circumstances is led to see in that form a "mask" for usury.

Per contra, and third: *Without a technically perfect case on the law*, under the relevant authorities and some one or more of the thoroughly correct procedures of their use and interpretation, you have no business to expect to win your case. Occasionally a court may under the utter need for getting a decent result go into deliberate creative effort; but few courts like to. Such effort interferes with the court's sense of duty to the law; such effort requires also skill and labor from a hard-pressed bench. Sound advocacy therefore calls for providing in the brief a job all done to hand; it calls as of course for not stirring up any conflict between the court's two major duties. If there is any difficulty with or about the authorities, the solving rule that takes care both of those authorities and of the sound solution calls thus for careful, clear, adequate phrasing in the brief: "The true rule is . . ." (with any needed qualifications taken care of). A court can *recognize* the good solution which gives satisfaction in regard to a tough problem rightly worked out.

All of this serves only to lead up to the crux:

Fourth: the real and vital central job is to satisfy the court that sense and decency and justice require (a) the rule which you contend for in this *type* of situation; and (b) the result that you contend for, as between these parties. Your whole case, on law and facts, must make *sense*, must appeal as being *obvious* sense, inescapable sense, sense in simple terms of life and justice. If that is done, a technically sound case on the law then gets rid of all further difficulty: it shows the court that its duty to the Law not only does not conflict with its duty to Justice but urges along the exact same line. . . .

EXPLANATORY NOTE

In *Bloomer v. Todd*, 3 Wash.T. 599, 19 P. 135, 138 (1888), Jones, C. J., said "Interpretation differs from construction in this: That it is used for the purpose of ascertaining the true sense of any form of words, while construction involves the drawing of conclusions regarding subjects that are not always included in the direct expression. . . . The administration of public justice . . . is conferred upon the courts, and the courts perform that duty by first ascertaining the facts in any case, and giving effect to their conclusions of fact by applying the law to the facts ascertained. In doing so, a construction or interpretation of law is necessary."

In *United States v. Keitel*, 211 U.S. 370, 387, 385-386, 29 S.Ct. 123, 53 L.Ed. 230 (1908), White, J., said: ". . . It is insisted that the construction of a statute is one thing and its interpretation another and a different thing. That abstractly there may be a difference between the two terms is not denied . . . and finds support in works of respectable authority. But, conceding the abstract distinction, . . . it may not be doubted that in common usage inter-

pretation and construction are usually understood as having the same significance. This was aptly pointed out in Cooley's *Constitutional Limitations*, 6th edition, where, after stating the theoretical difference, it is observed (p. 51): 'In common use, however, the word construction is generally employed in law in a sense embracing all that is properly covered by both, when each is used in a sense strictly and technically correct.'

The student should bear in mind the technical distinction here drawn between interpretation and construction while reading the material contained in this chapter, and determine (a) how far the courts adhere to the distinction, and (b) its utility in the process by which meaning is given to statutes in the solution of concrete issues.

FREDERICK J. de SLOOVERE, STEPS IN THE PROCESS OF INTERPRETING STATUTES

10 N.Y.U.L.Q.Rev. 1, 17, 22 (1932).

Steps in the judicial process of interpreting statutes, taking interpretation in its broadest sense, may be divided into three parts: (1) finding or choosing the proper statute or statutes applicable (and incidentally, the authentication of the text); (2) interpreting the statute law in its technical sense; and (3) applying the meaning, so found, to the case at hand. In short, one must first find the relevant statutes, determine what they mean, and then apply that meaning to the case at hand. The first—choosing the statute—may likewise be divided into three: (a) finding the unitary body of law applicable—a problem in conflict of laws; (b) finding which statute or statutes of that body of law are relevant to the particular case; and (c) determining what section or sections, paragraphs, phrases or words, the particular case involves more directly. . . .

. . . Interpretation, strictly speaking, includes the process of determining (1) whether several statutes, a single statute or any part or parts thereof are relevant to the case at hand; (2) whether the text or texts, so chosen as relevant, are susceptible of more than one sensible meaning in light of the case at hand; and (3) which of the several sensible meanings is the proper one. Interpretation properly so called, then, only includes these three definite steps. On the other hand, application of a statute, which is often included under interpretation, is the process of determining whether the facts of the case at bar are within or without the single, sensible meaning of the statutory law already chosen as relevant to the case. Interpretation is therefore based upon the assumption that there is but one meaning—that the legislature did not intend to give two inconsistent commands—with regard to any given case. Although determining one meaning from several possible meanings is therefore imperative, application of that meaning may give rise to difficulties and doubts which are not problems of interpretation at all. For

example, a statute provides that a penalty shall be imposed on "every tradesman, laborer and other person who carries on his worldly calling on a Sunday. . . ." Determining a choice from the several possible meanings of these words is a question of interpretation. This may involve no more than choosing among the popular or technical or other meanings of the words, "tradesman" and "laborer" and determining the limitations by definition to be placed upon the words "other person" by the *eiusdem generis* rule. It does not include the question whether the acts or persons involved in the case at hand are within classes or definitions so chosen, for this is purely application. . . .

In short, after the proper statute has been chosen, determining whether it is plain and explicit for the case at hand is necessary; if it is not plain, to find a single meaning out of the several possible meanings in view of the case at hand is the next step, which may involve many problems of interpretation, properly so-called. The facts of the case serve at this stage only as a focal point for narrowing the problem of interpretation to the part or parts of the statutes actually involved, so as to eliminate possible inconsistencies and conflicts in these aspects of the statute. The facts focus one's attention on the part of the statute actually involved and help to crystallize the problems as to the meaning. Finally, application is determining whether the statute, now plain and explicit and reduced to one meaning, covers the case at hand. Often both processes are accomplished simultaneously. Analytically, application cannot be indulged in until the statute has been reduced to a single meaning. Of course, to say in any case that the statute for the case at hand has only one meaning often involves a fine and difficult task. To determine what possible meanings the text or context will bear, whether other possible meanings are reasonable, and to choose one among the reasonable meanings may involve the whole gamut of interpretative processes, without as yet having applied the statute at all.

The distinction between interpreting and applying statutes has significance, however, in many phases of the subject: (1) in explaining away what appear to be contradictions in the cases as to the meaning and exceptions that courts have read into general words and phrases; (2) in distinguishing more clearly the exact functions of judge and jury in applying statute law; (3) in determining what phases of the whole process of interpretation and application of statute law are questions of fact and of law; and (4) in explaining the basic theories underlying the reading of exceptions into statutes by way of interpretation or the applying of common-law defenses to persons whose acts come within the express and clear wording of statutes. . . .

HARRY WILLMER JONES, THE PLAIN MEANING RULE AND
EXTRINSIC AIDS IN THE INTERPRETATION OF
FEDERAL STATUTES

25 Wash.U.L.Q. 2, 8-9 (1939).

In a still influential article,²⁴ published in 1913, Dean Pound divided the judicial process in dealing with statutes into three stages: (1) finding the statute; (2) interpreting it, that is, arriving at its meaning; and (3) applying it to the facts of a given case. This analysis gives the impression that the discovery of the meaning of a statute and the determination of its applicability to a particular fact-situation are separate operations, successive in point of time. Professor de Sloovere, who has accepted the analysis as a working principle, has carried the distinction between "meaning" and "application" to its logical conclusion.²⁵ . . .

What Dean Pound and Professor de Sloovere seem to be suggesting is that in determining the effect of a statute in particular situations of fact, the court must first determine the *connotation*²⁶ of the general terms of the statute, and then determine their *denotation*, that is, their applicability to the concrete facts of an actual case. Whatever merits this distinction may have, and the present writer doubts even its general validity,²⁷ it may lead to misunderstanding in an attempt to analyze the significance of "plain" and "unambiguous" as those terms are employed in judicial decisions on the plain meaning rule. A distinction between the "meaning" of a statute and its "application" would appear to suggest that a statute may have a "plain meaning" which would bar resort to extrinsic aids, although the effect of the statute upon the particular case in question is subject to serious doubts. The courts, however, employ the phrase "plain meaning" without regard to the jurisprudential distinction drawn between "meaning" and "application."

²⁴ Courts and Legislation (1913) 77 Cent.L.J. 219, 222. The analysis is also found in Pound, An Introduction to the Philosophy of Law (1922) c. 3.

²⁵ de Sloovere, Textual Interpretation of Statutes (1934) 11 N.Y.U.L.Q.Rev. 538, 553, 554. And see de Sloovere, Steps in the Process of Interpreting Statutes (1932) 10 N.Y.U.L.Q.Rev. 1. For further implications drawn from the distinction, see de Sloovere, The Functions of Judge and Jury in the Interpretation of Statute (1933) 46 Harv.L.Rev. 1086.

²⁶ "A term may be viewed in two ways, either as a class of objects (which may have only one member) or as a set of attributes or characteristics which determine the objects. The first phase or aspect is called the *denotation* or extension of the term, while the second is called the *connotation* or intension." Cohen & Nagel, An Introduction to Logic and Scientific Method (1934) 31. (Italics are the present writer's.)

²⁷ When a judge refers to a statute it is for guidance as to the decision of a case, the particular facts of which are already known to him. His thinking is affected throughout by his awareness of the facts of the controversy which it is his duty to decide. Is it not an unrealistic description of actual judicial thinking to suggest that the judge arrives at a determination of the abstract meaning of a statute *before* he considers its applicability to the particular case?

SECTION 2. POSTULATES AND APPROACHES

A. *Introductory Note*

During the past six centuries courts in England, the United States and elsewhere in the common law system have consistently adhered verbally to their unchanging postulates of the nature of the interpretative process. During this period, however, gradual changes have occurred in the techniques and relative functions of the legislature, courts and executive as new needs of government have developed. In response to those changes and to styles of drafting prevalent at certain times, the courts have taken chronologically the so-called literal, equitable, "mischief rule" and "golden rule" approaches to the fulfillment of their practical task of utilizing statutes as legal precepts.¹ Preference for each approach has varied from time to time with the rise and wane of conflicting ideas about consistency of one or another with the established postulates and about the constitutional theory of separation of powers. When reading each case on this topic consider how far the choice of approach may have predetermined the result, and weigh the considerations, expressed and otherwise, that led to the particular approach being preferred. Observe closely the method and limitations peculiar to each approach.

B. *Historical Origins and Development in England*THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF
THE COMMON LAW.

Rochester, N. Y. and London (2nd ed. 1936, 3rd ed. 1940). 292-298*

The Problem of Interpretation

Until late in the middle ages, lawyers tried to avoid facing the problem of interpretation. Indeed, even the word connoted in their minds fraud or evasion. Nor was the division of labour into law-making and law-interpreting generally accepted in fourteenth-century thought; the canonists, for example, had a maxim that interpretation properly belonged to the power that ordained, which alone could authoritatively interpret its own acts. The civilians were of the same mind: *ejus est interpretari cujus est condere*. There was a possibility that the common law might accept this principle, which the best legal opinion seemed to approve. Early in the reign of Henry III dispute arose on the interpretation of the great charter between certain sheriffs and the inhabitants of their shires; the King therefore called

¹ See especially Willis, "Statute Interpretation in a Nutshell," 16 Can Bar Rev. 1, 9-16 (1938). Cf. Bruncken, "Interpretation of the Written Law," 25 Yale L.J. 129 (1915).

[* License of 2nd ed. in the United States: The Lawyers Co-operative Pub. Co.]

the disputants before him to clear the matter up. The same procedure was followed eight years later, when the greater part of the bishops, earls and barons, by their common counsel, placed an interpretation upon c. 35 of the great charter, which the King then published by letters close. Nor was this merely a royalist theory, for a quarter of a century later when Henry III was at the mercy of his barons they wrote in his name a warning to the Bishop of Durham in these terms—

“in view of the fact that the interpretation of laws and customs belongs to us and our nobles, and none other, we of the counsel of our nobles forbid you, as you would desire to use those royal liberties which you pretend are yours, to put any interpretation on them contrary to the laws and customs current in our realm.”

Edward I frequently put the principle into practice; the King and his justices published an extra-judicial “exposition” of the statute of Gloucester in 1278, and in 1281 the King in Council made a “correction” in the same statute.

The common law courts themselves acknowledged the principle of appealing to the legislator when faced with difficulties of interpretation. In 1303 Hengham, C. J., cut short a discussion of the statutory procedure of *eligiti* by saying: “this statute was put before the king and his council, who accorded that when the debtor came with the debt ready, his lands should be restored to him; so will you take your money?” Even as late as 1366 Thorpe, C. J., recalled that there had been a discussion before him on the interpretation of a statute, “and Sir Hugh Green, C. J., K. B., and I went together to the council where there were a good two dozen bishops and earls, and asked those who made the statute what it meant.” The archbishop told them what the statute meant, after remarking (with some justification) that the judges’ question was rather a silly one.

Practice, however, was setting the other way, and after this date interpretation was relinquished to the courts. The inherent reasonableness of the principle that the legislator was the best interpreter was still, however, admitted by those who gave thought to the problem. For example, a tract attributed to Lord Ellesmere maintains that it would be more reasonable for statutes to be interpreted by Parliament which made them than by the courts. More recently, Lord Nottingham in an early case on the Statute of Frauds reports himself thus:

“I said that I had some reason to know the meaning of this law for it had its first rise from me who brought in the bill into the Lords’ House, though it afterwards received some additions and improvements from the judges and the civilians.”

Such would appear to be the attitude of some Continental systems at the present day, but the common law courts have completely reversed their policy since the days of Nottingham. No greater contrast to his words just quoted could be imagined than this statement of Lord Halsbury:

"I have more than once had occasion to say that in construing a statute I believe the worse person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. . . . I was largely responsible for the language in which this enactment is conveyed, and for that reason, and for that reason only, I have not written a judgment myself."

With the growth of international legislation this divergence of view has already created difficulty.

The Judicial Interpretation of Statutes

If we had completely adopted the principle that the law-giver was the only competent interpreter, we should have had to erect a chamber or council specially devoted to the work as legislation grew in bulk and complexity. This in fact is the solution which the canonists reached in the end, and the tendency which we have already noticed for the enforcement of statute law to be entrusted to special bodies is perhaps a symptom of the same trend in the common law.

The principal reason, however, for the triumph of the present system in the common law may be sought in the history of Parliament. While legislation was the work of a very small group of judges and councillors in close contact with the King, recourse to the same small group was easy when an interpretation was desired. The rise of Parliament and its increasing participation in the task of law-making created a very different situation. We have already noted the proposition that things settled by Parliament cannot be altered save by Parliament. Now Parliament served well as a legislature and as a political assembly, but its sessions were too irregular and its activities too much engaged in other directions to allow it to become a permanent organ for the interpretation of statutes. Declaratory acts represent the best that Parliament could be expected to do under such circumstances. In the meantime, there was the important fact that the legislature and the judiciary did actually have a common membership in the thirteenth century, and so nothing was more natural than to allow the judges considerable latitude in the reign of Edward I and even of his son, for they were intimately connected with the group which in fact drew up the statutes.

Early Freedom of Interpretation

It must also be remembered that the earlier mediaeval statute had very little in common with modern legislation. It was possible to handle these enactments with an easy unconcern as to their authenticity and precise content, and obviously there was no trace of the modern notion that every letter of the statute may be significant. Nor did the judges have difficulty in deciding what the real intention of an act was. The famous Chief Justice Hengham, for example, settled a difficult question in these words, "We agreed in Parliament that the wife if not named in the writ should not be received," and

when counsel suggested an interpretation of another statute, Hengham again had an authoritative answer: "Do not gloss the statute," he said, "for we know better than you; we made it." In short, the court was well aware of the intention of a statute because the judges had had the biggest share in making it, and consequently there was little difficulty; the law-maker was simply explaining his own policies. A little later we find the next stage. The great Hengham had gone, but his successors remembered his words. When counsel suggested a particular construction of a statute, Shareshulle, J., replied that when he was at the bar he had used the same argument, and Herle, J., had informed him that Hengham, who had made the statute, read it another way. Again in a remarkable case involving the Statute *De Donis*, Chief Justice Bereford used these words:

"He that made the statute meant to bind the issue in fee tail, as well as the feoffees, until the tail had reached the fourth degree, and it was only through negligence that he omitted to insert express words to that effect in the statute; therefore we shall not abate this writ."

In short there is a tradition among the judges as to the intention of the principal statutes. Finally, as we approach the middle of the fourteenth century, the judges have separated from the Council to such an extent that they treat legislation as the product of an alien body, of which they know nothing save from the words of the statute itself, and from that wording alone can they infer its intention—and with the rise of this idea we reach the modern point of view.

CHARACTERISTICS OF FREE INTERPRETATION

This impression is confirmed when we examine the way in which statutes were interpreted in the fourteenth century. Sometimes their wording is strictly applied; sometimes it is stretched very considerably; sometimes the court finds it necessary to restrict the operation of a statute which was too widely drawn; on other occasions the court simply refuses to obey the statute at all. But in this connection two points must be emphasised.

"First, the courts undoubtedly did disregard statutes when they thought fit, and secondly, they expressed no principle of jurisprudence or political theory which would serve as an explanation—still less as a reason—for their attitude. The evidence has been recited here with as little gloss as possible, and the absence of any discussion in the reports of the juridical and constitutional questions involved is really its most significant feature. Only one explanation is possible, and put quite simply it is this—that such questions as these were not asked during our period. If reasons of however great technicality made it desirable to neglect some words of a statute, then they were quietly set aside, but in doing so neither counsel nor judges enquired into the nature of statutes and legislation, the sovereignty of Parliament, the supremacy of the common law, the functions of

the judicature, and all the other questions which the modern mind finds so absorbingly interesting. They made no fuss about it, either. No sensational judgment that a statute was 'void,' no thrilling vindication of the common law and *Magna Carta*, nothing of the judges' professional pride as Coke felt it, will be found in these cases. The reporters note them in just the same way as all the other cases, and with as little expression of surprise or question. It is needless to pretend that such a state of mind is easy to imagine, but on the other hand it is not impossible in these days when historians recognize the value and the necessity of thinking in unfamiliar dimensions. We shall be getting nearest the truth, it seems, when we remember that the fourteenth century was in urgent need of good law, firmly enforced, for then we shall understand that the judges' great preoccupation was to apply the best law they knew as courageously as they could, and that our modern difficulties, whether political or juridical, to them would have seemed, if not unintelligible, at least irrelevant and pedantic."—(Plucknett, "Statutes & Their Interpretation," 70.)

The Limitation of Judicial Discretion

In the middle of the fourteenth century this free and easy attitude begins to disappear. We are beginning to find statements in the Year Books that statutes ought to be interpreted strictly, while in other matters, too, the bench is less confident in using its ancient powers of discretion. By 1340 or thereabout the Court of Common Pleas had developed an elaborate procedure which required considerable technical skill to work. More than that, the intimacy between the Council and the judges which had been such a feature of Edward I's reign had almost ceased. As a result the judges no longer felt themselves in the position of councillors whose nearness to the King enabled them to exercise the wide royal discretion which, as we have seen, was the privilege of the King's closest advisers. Instead, the Court of Common Pleas regards itself as a government department whose function is to carry out its duties along prescribed lines. At about this time, therefore, we find such statements as that of Hilary, J., that "we will not and cannot change ancient usages," and "statutes are to be interpreted strictly," while at the same date we see the earliest distinctions drawn between strict law and equity. Then, too, it is highly significant that at this very moment the Chancery begins to appear as a court exercising the Council's discretion. Towards the middle of the fourteenth century, therefore the judges begin to interpret statutes strictly. No longer are they to be regarded as merely suggestions of policy within whose broad limits the court can exercise a wide discretion. Instead they are regarded as texts which are to be applied exactly as they stand, and so we find the beginnings of a radical separation into two functions: the first legislates and establishes a text, and the second adjudicates and interprets the text. This separation was momentous for English history, for more than anything else it promoted the isolation of the law courts and the judges, enabling them to develop an independent position and to act

as checks upon the executive and as critics of the legislature. This became all the more significant since the legislature inevitably became a political body controlling the executive; the courts now stood outside of both. The extent to which the courts were conscious of this special position is clear from their endeavours to prevent any tribunal except the superior common law courts exercising the function of interpreting statutes. Ecclesiastical courts were to be resolutely barred, and the admiralty was attacked; even Chancery was expected to send to a common law court when the high mystery of interpretation had to be performed.

A Technique of Interpretation

As we pass through the fifteenth century to the sixteenth and the age of Coke, we find the courts applying themselves with great diligence to the task of interpreting statutes, which to this day is one of the most difficult functions which a judge has to perform. Shorn of their powers of openly exercising discretion, the common law judges took refuge in logic. Attempts were made to devise rules whereby the grammatical structure of a sentence, combined with a general consideration of the nature of the act, could be used as a guide to the interpretation of the text in question. Some statutes confirmed or amended previous law; others removed abuses; some commanded things to be done, while others prohibited certain actions; some statutes conferred benefits and others were penal. Combined with these general considerations a statute might be drawn in affirmative or negative terms, and out of all this the courts elaborated a system of great complexity.

The Equity of the Statute

As a result of this development, there was a multiplicity of rules available for the interpretation of any particular statute. So great was their variety, and so diverse were the rules, that almost any conclusion might be reached, simply by selecting the appropriate rule. The real problem therefore receded further back than ever, and the power of the courts to construe or misconstrue legislation was unimpaired, and indeed increased.

This became obvious by the reign of Elizabeth, and many lawyers, notably Plowden, gloried in the liberty which the courts enjoyed in playing fast and loose with statutes. "The judges who were our predecessors have sometimes expounded the words quite contrary to the text, and sometimes have taken things by equity contrary to the text in order to make them agree with reason and equity," said Bromley, C. J., in 1554. Rules of construction which produced such striking results were clearly inadequate as an explanation of this situation, and so, when a general theoretical justification was needed, lawyers turned to the convenient word "equity."

The "equity" of the chancellor and the "equity" of a statute have nothing in common; their nature is different, and their origins are

different. The equity of the chancellor is a native growth (although, of course, some of its doctrines may have felt foreign influences); the equity of the statute, however, seems to be a Continental notion imported to explain the situation which had grown up in England. Blackstone was looking in the right quarter when he sought a definition of equity in Grotius' remark that equity was "the correction of that wherein the law (by reason of its universality) is deficient." When the courts therefore spoke of the equity of a statute they meant only that adjustment of detail which is necessary when applying a general rule to a specific case. Obviously it might sometimes amount to subordinate legislation by the courts, and such work had to be done by the courts if it was not done by the legislature or its deputy.

NOTE

See Radin, "Early Statutory Interpretation," 38 Ill.L.Rev. 16 at p. 35 et seq. (1944).

SAMUEL E. THORNE, INTRODUCTION TO ELLESMERE "A DISCOURSE UPON THE STATUTES," 42-68 (1942) *

The freedom with which legislation was handled by Hengham and Bereford, and their companions, in the early fourteenth century . . . must not be attributed to extraordinary powers in their possession, for there is no indication of the existence of these, but rather to the fact that no particular sanction attached to the words of statutes, which were merely suggestions of policy to be treated with an easy unconcern as to their precise content. An enactment might be radically supplemented by reading into it provisions that were wholly judicial in origin, yet for such actions judges did not feel it necessary to offer apologies, nor do explanations of any sort appear. Alterations of this kind were not regarded as interferences with legislative power, and thus *ultra vires* acts to be explained only in the light of a broad judicial discretion, but instead as an integral and in no way exceptional part of the judge's task, which had for its objects the reaching of legally sound results and the proper administration of justice between litigants. . . .

In the early fourteenth century, if the words of an act supplied a remedy for one complex of facts but did not provide for a comparable situation that deserved equal treatment, no difficulty was experienced in achieving justice by permitting the same result in the analogous case. To a modern mind such an extension, though it would today be regarded as judicial legislation on an excessively broad scale, is less drastic than others that were contemporaneously made, since it is interstitial in character and therefore more limited in scope. But a distinction of this kind, dependent as it is upon a more sophisticated concept of legislation, is not visible in the undifferentiated practice of the early fourteenth century, for at that time all extensions, whether circumscribed by the words of the statute or not, were

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equally proper or, with the advent of a stricter approach toward legislation, correspondingly improper. After the third quarter of the century, however, judicial action with respect to statutes is distinguished into that which is equivalent to legislation and that which falls short of it—a separation reflected in the emergence of the doctrine of 'lequity de lestatut.' If the words of an act remedied a particular hardship, for example, by giving an action *de bonis asportatis* to executors, the equity of the statute allowed administrators the same action, since, though they were not mentioned in the act, they were 'in the same mischief.' The appearance of that doctrine reflects the fact that a definition of legislation had been formulated, during the middle years of the fourteenth century, which now made it possible . . . to distinguish in some degree . . . between judicial action that was completely legislative in character and that which did not overstep the proper function of courts. Though the making of *novel ley* was not actually outside their province, judges no longer attempted to supplement the words of an act to the extent that a wholly new rule was provided, as had been done by Hengham and Bereford, but less drastic action on their part was clearly permissible. Put more precisely, the terms in which an act was phrased had gained greater importance than they had possessed earlier and could not be easily augmented without parliamentary action, but, on the other hand, a statute was not yet thought to provide solely for the one set of circumstances it mentioned, and thus its words had not acquired the sanction that was later to force courts to take the position that a case similar to that dealt with in a statute, but entirely unprovided for by it, must remain so.

The bold supplementation of statutes, recognized after the middle fourteenth century to be legislative action, was no longer within the province of judges, but, just as analogous cases were within a common-law rule, so situations unmentioned in an act but in the same mischief as that toward which it was directed were aided by 'lequity de lestatut. . . .

. . . . Definite principles indicative of the factors that must be present for a situation to be remedied by 'lequity de lestatut' did not evolve: if a useful result could be reached, or if no remedy was otherwise available, a case might be brought within an act that had not dealt with it in express terms. A rudimentary rule does appear in Henry IV's reign, though it was by no means always observed in practice: analogous cases are not to be taken by the equity of penal statutes. Later in the Year Book period, statutes in derogation of common right, and those that restrained or abridged the common law, are said to fall within that rule, and the argument was made that 'when a statute abridges the common law nothing will be taken by equity of it but it must be read *stricte*.' The answer to this contention was a denial that the act abridged common law or the counter-assertions that it enlarged the law, that it was beneficial, that if the act were not extended to the case before the court 'great mischief would ensue,' or, more rarely, that the act did not restrain but was an

affirmance of the common law. Such reasoning, however, must not be given undue prominence, for the decisions in fact turned only on the answers to these questions: Is the case in the same mischief as that for which the statute provided? Is the result a legally reasonable and beneficial one? . . .

That acts of Parliament had achieved a new status by the middle sixteenth century, however, is reflected in the fact that the distinction between 'penal' and beneficial statutes then took its place as an objective rule of primary importance. As parliamentary enactments were removed from the ambit of private law and were no longer to be handled in essentially the same manner as common-law rules, the formulation of regulations governing their application naturally became necessary. . . . The eighth chapter of the *Discourse* notes the exceptions, amply supported by precedent, that were quickly made to the rule that 'penal' statutes must not be extended beyond their words, and similarly in Plowden many cases were brought forward to show that a 'penal' statute may be extended, for though it is 'penal against one, yet it is beneficial to all others,' or, in the words of Chief Justice Montague, 'although it restrains the liberty of the tenant in tail, Sir, every statute which shall be extended by equity restrains someone, and is penal to someone, but yet inasmuch as it is beneficial to the greater number, it shall be taken by equity, and so is this statute, for it tends to the suppression of deceit and to the advancement of truth.' The need for these arguments indicates the strength the distinction had acquired but also that it was, like the others that emerged contemporaneously, inadequate. One must not conclude, however, that it represents the fruit of three centuries of effort toward the formulation of a satisfactory rule: on the contrary, it was a pioneer attempt to treat statutes on a public- rather than a private- law level and as such an understandably imperfect and stumbling first step toward meeting a problem that had not pressed for solution earlier.

As the sanction behind statutes rather than their content is stressed, they lose their separateness and form a cognate group that must be dealt with as a whole. In response to this need the distinctions mentioned above became prominent and took their places as authentic rules of statutory interpretation. The change is no less apparent, however, in the transformation of 'equity de lestatut' to 'equity.' In the Year Books, each statute had been considered individually and cases that were in the same mischief as that for which an act had provided, though they were not expressly included within it, were considered to be within the equity of that statute. But in the sixteenth-century reports 'equity' appears unconnected with particular enactments, and clearly it is not accidental that Aristotle's general principle of *epieikeia* was then for the first time taken to form its foundation. Extensions of acts to analogous cases were now made by judges in the light of a controlling *Equitas*: 'the wise judges of our law deserve great commendation for having made use of it to enlarge the letter according to its discretion.' . . .

In the sixteenth century, then, the extension of an enactment to a situation not within its precise words could be justified by means of the doctrine of a controlling 'equity' which was 'no part of the law, but a moral virtue which corrects the law.' This was a more generalized form of the Year Book concept of 'equity de lestatut,' which in turn reflects the new attitude towards statutes which were now being recognized as a body of material to be treated as a whole; but other explanations were also offered. The *Discourse* met the difficulties by a theory grounded upon 'reason & the commen lawe.' Statutes that confirm the common law may be taken by equity to include similar cases, just as the common law itself advances *ad similia*; and so, too, may statutes that resolve a difficulty at common law by choosing between conflicting rules, for when 'doutes are determyned by parlyament, it shalbe said that that was the commen lawe, for so muche as it is presumed that which they doe to be upon beste reason.' Statutes which 'come in encrease of the commen lawe,' by broadening a particular remedy beyond its recognized common-law area, may be taken to indicate that the remedy may be further extended to others in like mischief, 'for synce the commen lawe is grounded upon commen reason yt is good that that which augmenteth commen reason shulde be augmented.' These cases were perhaps sufficiently clear, though it must be noted that no similar systematization had taken place in the Year Books; but where the common law had not dealt with a situation at all (which was most often true) there the reason of the statute may unaided serve to extend it to similar but unmentioned cases, 'for the reason of the lawe is the soule & pythe of the lawe, yea, the verie lawe itselfe.' Thus the *ratio* of the statute is its important part, and the extension of an act was explained as an application of its 'sence' or 'reason' (*quia ratio legis est anima legis*), rather than as a simple equalization of similar situations made without theoretical justification in the course of the administration of justice. The *Discourse* clearly does not visualize a statute as a rigid pronouncement of law in the Austinian sense, to be applied literally and no further; nevertheless, it is evident that extensions to analogous cases raised more difficulties and thus required a more complex explanation than the lawyers in the Year Books had felt themselves obliged to formulate.

As acts of Parliament take on the attributes of modern legislation, the intention of the legislator must grow in importance and take the place of the equity, conjectured purpose, or reason that had controlled earlier. It is therefore significant that only during the middle years of the sixteenth century did the intention of the makers begin to form the justification for extending a statute beyond its words. The *Discourse* had recognized that statutes must be taken *ex mente legislatorum*, and that the intention of the makers, whether secured directly 'by theire lyvinge voice,' or inferred from the actions of judges who had been 'mooste neerest the statute,' or from the words of the act itself, was important, but such considerations there occupied a position subordinate to 'reason' which was itself sufficient

warrant for extension. Similarly, 'yf it maie be expresslye gathered to be the meanyng of the statute makers,' a 'penal' statute could be extended, but this was only one of several exceptions to the general rule. In Plowden's *Commentaries*, however, legislative intent was more heavily stressed: statutes were to be read 'according to common reason, and common intendment, and according to the minds of the makers.' The phrase 'the cases which are in the same mischief as those which are remedied by a statute are taken by the equity of that statute,' and other variations of the maxim *ubi eadem est ratio ibi idem ius*, gave way to another: 'for everything that is within the intent of the makers of the act, although it be not within the letter, is as strongly within the act as that which is within the letter and intent also.' The tract attributed to Hatton is more explicit: "For when the words express not the intent of the Makers, the Statute must be further extended than the bare words, but ever it must be thought that the meaning of the Makers was such, when there is any proceeding other than the words bear, for it were an absurd thing to make an exposition go further than either the words, or the intention of the Statutaries reached unto.' This new approach was immediately projected backward—a not unusual procedure in the common law—and it was recognized that in the past, when judges had extended the words of statutes, 'the reason for their interpretation has always been founded upon the intention of the makers of the act, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of it with another and sometimes through extraneous circumstances. So that they have ever been guided by the intention of the makers, which they have always taken according to the necessity of the matter and according to that which is consonant with reason and good discretion.'

Plowden's use of the word 'interpretation' must be remarked. The word had been used earlier, though in other connections, and there is every indication that not until his period did extensions of the words of statutes become judicial 'interpretations' or 'constructions' of them. The appearance of the term 'interpretation' provides another indication of the growing sanction back of acts of Parliament, for as enactments acquire formal rigidity their words must be saved by regarding departures from them as 'interpretations' made by judges. These were founded, as has been indicated, upon reason or equity—words substantially synonymous with justice—and in the later sixteenth century they were being made as well in the light of the intention of the legislature. In Plowden this is taken in its widest sense—as the desire to reach results 'beneficial a le common weal' or to avoid 'enconuenience & mischief'—and under so broad a concept of legislative intention, similarly equivalent in all respects to that of justice, acts could be boldly extended, or (as will be shown later) narrowly restricted, without difficulty. The words 'lenten del feasons,' therefore, though they reveal a wholly different approach from that customary in the Year Books, did not immediately lead to results

contrary to or more limited than those that had been reached earlier by means of 'equity de lestatut' or those that were contemporaneously achieved by 'equity'—by reliance upon the general purpose of the act or the *ratio legis*. Indeed, the last quotation shows that they were alternate methods for reaching the same end. An act may still extend to similar cases, though now that is explained as well by the presumption that the legislature could not have intended to permit the continuance of a mischief 'en equall degree.' The legislators alone know what they had intended, and therefore 'the life of the statute rests in their minds,' but 'if they are dispersed, so that their minds cannot be known, then those who may approach nearest to their minds shall construe the words, and these are the sages of the law whose talents are exercised in the study of such matters.' Finally, judges must, since the words of statutes are to be extended in the light of the legislative will, approach that as closely as may be by acting as the lawmaker would have acted had the case presented for decision been brought before him rather than the court.

Legislative intent, since it differed only verbally from the other reasons brought forward to explain the extension of statutory words, did not lead to their abandonment. Coke, it is true, used the doctrine of 'equity' sparingly; the explanation most frequently offered by him for the extension of the words of an act (whether it be 'penal' or beneficial) was the purpose of the statute or the legislative will or intention, sometimes secured from the preamble or title, but often simply drawn from the circumstances Plowden had enumerated. But, in the reports of the seventeenth century, arguments based upon 'equity'—often synonymous with the actual or presumed intention of the makers as revealed by the act, but occasionally used in its older sense—continued to be found useful. The other explanations are found as well, and in addition the results to which equity, purpose, reason, and intention all led could be reached by a 'benigne & fauourable interpretation.' As legislative intent narrowed in scope and became less clearly identified with the 'auauncement del veritie' or 'le conseruation de tranquillity, peace & concorde,' and as the purpose or intention of the statute came to be more rigidly limited by its words, the last-named grew more frequent, developing naturally into the liberal or equitable construction of beneficial acts characteristic of the early eighteenth century.

Though that century and much of the seventeenth fall outside the scope of the present essay, there was evidently no acceptance, prior to Blackstone's day, of the rule that, Parliament having spoken only of specific things and specific situations, all others were *casus omissi* within the maxim *casus omissus habetur pro omisso*. As Parliament became the sovereign and the duty of the judge was recognized to be merely to determine what Parliament has said and to 'apply' it, omitted particulars could no longer be supplied, since that would amount to a usurpation of or incroachment upon the power of the legislature. This is a view of the judicial function that differed fundamentally from that which had prevailed earlier, and one that in re-

cent years has been the subject of increasingly vigorous attack. Its acceptance marks both the final abandonment of the powers of equitable construction assumed by judges in the sixteenth century (and thus of the older undifferentiated practice best described in terms of 'lequity de lestatut') and the beginning of a long series of apologetic explanations for their past use.

THEODORE F. T. PLUCKNETT, (REVIEW OF THORNE'S)
"ELLESMERE ON STATUTES"

60 Law Q. Rev. 242, 246-248 (1944).

That we are in for a lively debate is clear from the first sentence: 'the history of statutory interpretation begins in the sixteenth century' after the close of Henry VIII's outburst of legislation. As opposed to this, 'the currently received theory' which speaks of statutory interpretation as having existed during the Middle Ages (a) tacitly assumes a 'developed sanction' behind acts of Parliament so that strict adherence to their terms would be the norm, and (b) ascribes the observed deviations from that norm to a 'power wielded by the judges' which authorized them to depart at times from the legislative dictates. Professor Thorne objects to the 'current theory', first, that there was no compulsion to follow a statute strictly during the Middle Ages, and that the extension of a statute was no usurpation by the judges of the Legislature's functions; and hence he objects, secondly, that there is no need to postulate 'powers' in the judges of the year book period. This portentous dogma is something of a shock to one who has been accustomed for many years to write about what he fancied was the 'interpretation of statutes' in the Middle Ages. As a statement of the practice of a later age, Professor Thorne seems to profane those *arcana* of the law which ordinarily are not discussed; but since the matter is now raised, we may venture to ask what is the sanction behind statutes at the present day? Is there any compulsion upon a Court to interpret a statute in a particular way? (Similarly, what sanction compels a Court to regard certain precedents as binding?) What can we say of such sanctions (supposing them to exist) if we must also postulate a 'power' wielded by the judges permitting them to depart from the legislative dictate?

Clearly it is useless to talk of 'powers' in any sense adverse to the Legislature in England, and we are not aware that anyone has used such language of our mediaeval law; the whole burden of the present writer's contributions to the subject has been that mediaeval dealings with statutes were unfettered by theoretical considerations. True, the judicial attitude slowly changed—and it is changing still, and at no time was it logically consistent; but of a theory of interpretation there is little trace until the doctrine of the separation of powers became fashionable. Professor Thorne associates 'the currently received theory' which he criticizes with the present writer, 'though it is not usual to find the assumption that lies back of it so explicitly

stated' as he himself has revealed it. Our defence may be stated very shortly: the omission to state the assumption is due simply to the fact that no such assumption was made.

All this arises on pages 4 and 5; the clue to the difficulty does not appear (or did not appear to this reader) until reaching page 62, and so it may be helpful to draw attention at once to a remark which does much to illuminate the author's position. The author there adopts the word 'interpretation' in the peculiar sense in which some sixteenth century writers used it: 'as enactments acquire formal rigidity their words must be saved by regarding departures from them as "interpretations" made by the judges'. This use of the word introduces the atmosphere of fiction and make-believe which certainly did become prominent in later times, and in this sense the word does imply a somewhat disingenuous evasion of a lawful command. The toleration of such a practice by the Legislature, and the language sometimes used by the Courts, combine to create the impression that the Courts are exercising some sort of 'power' to interpret statutes. But that is not the ordinary sense of the word to-day, and the fact that a modern book or article is entitled the 'interpretation of statutes' does not mean that the author accepts all the implications that the word held four hundred years ago.

There is indeed a difference between the fourteenth century and the sixteenth century attitude towards statutes, and Professor Thorne is assuredly right in thinking that the change is in the statutes—we have often felt that the Statute of Uses is typical of the new age, with its elaborate drafting methodically dealing with every possible aspect and detail of its general plan. The Legislature there took up the burden, which former ages had left to the Courts, of working out the detailed consequences of a legislative policy. We would venture the suggestion that the last years of the fifteenth century saw a change in parliamentary procedure which facilitated this development. Instead of a prayer by the Commons in general terms for a particular legislative remedy, we find the famous petition *formam cuiusdam actus in se continens*. As a result, Parliament considered not merely the general policy, but the exact wording of the proposed statute; and that wording had most often been settled in Government offices. The lawyers in the Commons, the judges in the Lords, and the council, which kept a close watch upon the proceedings, were all dealing with specific and carefully drafted texts. Under this improved and businesslike procedure it was inevitable that the words of a statute should acquire a new significance from the fact that they had been so often examined and finally adopted after prolonged deliberation. Legislation, in fact, was no longer the Government's vague reply to vaguely worded complaints, but rather the deliberate adoption of specific proposals embodied in specific texts emanating from the Crown or its officers. When the time came for lawyers and judges to apply these statutes, they perforce approached them with the knowledge that not only their general drift, but also their detailed wording, was the result of careful thought. Documents pre-

pared by such a procedure inevitably invited the reader to think that they meant exactly what they said, and nothing else. In short, we are inclined to think that the new attitude towards statutes, and the new spirit within the statutes, was primarily the result of more businesslike methods of Parliamentary procedure.

The above suggestion is put forward as an explanation in part, at least, of the unmistakable change in thought upon which Professor Thorne rightly insists. The principal issue involved is that in our view the change in attitude towards statutes was not the outcome of changing political thought; instead, we believe that the change in attitude was the product of procedural and administrative processes. The new attitude towards statutes was not the result of new doctrine, but finally it did in its turn influence political thought. Having acquired the habit of setting great store upon the express wording of a statute, it became all the easier to accept an enhanced estimate of the nature of legislative authority. It is inevitably very difficult to find words which truly define that estimate. The author uses several phrases such as the 'inviolability' of a statute, the 'developed sanction' behind Acts of Parliament, or the 'compulsion to follow Acts of Parliament'. Taken literally, all these expressions seem to us too precise, more especially since the author himself insists upon them, and balances them against the correlative 'powers' which are implied in his use of the word interpretation. For our own part, we are inclined to believe that the greater reverence for Parliament and its statutes was primarily a matter of judicial sentiment rather than of theory. As for the 'powers' of interpretation, it is hazardous to use this word to mean more than the practical possibility of deciding a contested point of interpretation one way or the other—a possibility which will be wider or narrower as the sentiment of reverence for the *ipsissima verba* of Parliament varies.

NOTE

Cf. Frank Horack, Jr., "Statutory Interpretation—Light From Plowden's Reports", 19 Ky.L.J. 211 (1932).

J. A. CORRY, ADMINISTRATIVE LAW AND THE INTERPRETATION OF STATUTES

1 U. of Toronto L.J. 286, 297-298 (1936).*

The constitutional theory after 1688 bore upon interpretation of statutes in several ways. It affected the form of legislation by tending to make its provisions particular rather than general, an enumeration of instances rather than a broad statement of principle. Prior to the revolution, the details of administration had been largely settled by the executive under the prerogative. With prerogative cut to the bone, and the command of the king no longer a justification for governmental action, anything of moment that was done in the name

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READ & MACDONALD U.C.B.LEG.—63

of government had to be authorized by a statute passed by parliament. However, to have given an authority in general terms would have created a statutory prerogative. Hence the tendency to specify in detail the exact powers given.⁵⁵ This spread to all branches of legislation and was accelerated by the judicial policy of strict construction.⁵⁶ When the judges cut down the operation of general expressions, parliament had to attempt to achieve its object by specific enumeration of all that the general expression was meant to include.⁵⁷ A vicious circle was established, and prolixity became a pronounced vice of eighteenth-century statutes. . . .

The great constitutional change was the supremacy of parliament. . . . The constitutional implications of the political victory of parliament were not at once perceived. Even at the date when Blackstone wrote, he took serious note of the contention that "where the main object of the statute is unreasonable, the judges are at liberty to reject it".⁶⁰ He himself held that this could not be so; and he added "if Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it".⁶¹ Yet he was close enough to older views to say that "if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void".⁶² The eighteenth century was well advanced before the sovereign and absolute power of parliament was generally conceded.

. . . If parliament may legislate anything it wishes and no other power may legislate at all, the duty of the judge is to determine what parliament has legislated and nothing else. Furthermore, if parliament in legislating speaks only of specific things and specific situations, it is a legitimate inference that the particulars exhaust the legislative will. The particular which is omitted from the particulars mentioned is the *casus omissus*, which the judge cannot supply because that would amount to legislation. When general language is not used, there is little need for interpretation. The doctrine of literalness, the direct application of the particular expressions in the statute to the facts of the case, became hard to resist.

⁵⁵ "English legislation in the eighteenth century bears a wonderfully empirical, partial and minutely particularizing character. . . . In this 'age of reason', as we are wont to think it, the British Parliament seems rarely to rise to the dignity of a general proposition" (Maitland, "English Law," *Encyc. Britt.*, Vol. 9, 11 ed., p. 605).

⁵⁶ Report of the Commissioners on Consolidation of the Statute Law, (1835) *Parl. Papers*, vol. XXXV, 361, at p. 19 of the Report; Maitland, *op. cit.*, p. 605.

⁵⁷ See the instance referred to in *Fletcher v. Lord Sondes*, (1826) 3 *Bing.* 501, at pp. 580-1.

⁶⁰ *Bl. Comm.* (1766), vol. I, at p. 91.

⁶¹ *Ibid.*

⁶² *Ibid.*

C. Enunciation of Postulates by American Courts

SPENCER v. THE STATE

Supreme Court of Indiana, 1853. 5 Ind. 41.

PERKINS, J. At the June term, 1853, of the Vigo Court of Common Pleas, Spencer, the appellant was convicted of bigamy, and sentenced to the state prison. He appealed to this Court; and he asks that said judgment and sentence be reversed, on the ground that the Court had no jurisdiction of the cause in which they were pronounced.

The statute creating the Court of Common Pleas, and conferring its jurisdiction, was approved on the fourteenth day of May, 1852, and it empowered said Court to take cognizance of certain civil cases, of certain misdemeanors, and of felonies in two specified cases: 1. When a person charged with that grade of crime was in custody; and, 2. When a person so charged, not in custody at the time, voluntarily submitted to the jurisdiction of the Court.

On the first day of June, 1852, eighteen days after the passage of the Common Pleas act, a statute was approved, entitled, "An act providing for the organization of Circuit Courts, the election of judges thereof, and defining their powers and duties." Said statute contained this clause, viz.: Such Circuit Courts, in their respective counties, "shall have original, exclusive jurisdiction in all felonies."

Both of the above statutes were enacted at the same session of the legislature, and are incorporated in the same volume of the revised statutes, the latter at page 5, the former at page 16.

The question presented is, does the act conferring exclusive jurisdiction of felonies upon the Circuit Courts, by implication, take away the limited jurisdiction previously possessed, in such cases, by the Courts of Common Pleas? . . .

. . . One of these acts, the first enacted, contains a provision, in substance, that the Court of Common Pleas shall have, in certain cases, concurrent jurisdiction of felonies; and the other of said acts, that last enacted, declares that the Circuit Court shall have original, exclusive jurisdiction of all felonies. These two provisions, touching this single point, are all that are alleged to conflict. In relation to these, and these alone, have we anything to determine.

It first devolves upon this Court, then, to inquire whether these two provisions do, in point of fact, conflict; whether they are irreconcilably repugnant; for the law does not favor repeals by implication, and requires clearly repugnant language to effect them.

Can, then, the Court of Common Pleas of a county possess a limited jurisdiction over some felonies, and the Circuit Court of the same county possess original, exclusive jurisdiction of all felonies?

It would seem that there could be but one opinion upon language so explicit as that contained in the Circuit Court act. Exclusive means without the participation of any other; and exclusive jurisdiction of

all felonies means a jurisdiction of them in which no other Court has any participation. Hence the Common Pleas can not participate in such jurisdiction, and still leave it in the exclusive possession of the Circuit Court. . . .

The two provisions, then, being repugnant, the next question is, which provision shall be modified by the other? When two statutes directly conflict in any of their provisions, which of them, by implication, repeals or modifies the other? Does the one last enacted modify the one first enacted, or does the one first enacted modify the later statute. And now arises the necessity of consulting the authorities, and ascertaining the rule of decision applicable to this question.

We find that where such statutes are passed at different sessions of the legislature, there is no difficulty. The rule is settled by a cloud of authorities that the act last enacted controls the former. *Bowen v. Lease*, 5 Hill 221, and cases cited; *Norris v. Crocker*, 13 How. 429, and cases cited. . . .

And here we must be indulged in the remark that we regard the rules for the construction of statutes equally a part of the law of the land with, and a not much less important part than, the statutes themselves. This power of construction in Courts is a mighty one, and, unrestrained by settled rules, would tend to throw a painful uncertainty over the effect that might be given to the most plainly-worded statutes, and render Courts, in reality, the legislative power of the state. Instances are not wanting to confirm this. Judge-made law has overrode the legislative department. It was the boast of Chief Justice Pemberton, one of the judges of the despot Charles the second, and not the worst one even of those times, that he had entirely outdone the parliament in making law. We think that system of jurisprudence best and safest which controls most by fixed rules, and leaves least to the discretion of the judge—a doctrine constituting one of the points of superiority in the common law over that system which has been administered in France, where authorities had no force, and the law of each case was what the judge of the case saw fit to make it. We admit that the exercise of an unlimited discretion may, in a particular instance, be attended with a salutary result; still, history informs us that it has often been the case that the arbitrary discretion of a judge was the law of a tyrant, and warns us that it may be so again. . . .

We must now proceed to the inquiry whether the fact that the two statutes in question were passed at the same session of the legislature, makes any difference?

This precise point arose in *The King v. The Justices of Middlesex*, 2 Barn. and Adolph. 818. The question in that case was, "if two contradictory acts are passed in the same session of parliament, to come into operation on the same day, which is to take effect?" After the Court had advised, Lord C. J. Tenterden delivered the opinion of the Court. He said, "It appears that in this case the metropolitan act received the royal assent a few days after the local act, and, con-

sequently, we are of opinion that so far as the two acts are contradictory to each other, the metropolitan act, which last received the royal assent, must have the effect of repealing the other." And again: "Our decision is conformable with the doctrine laid down in the *Attorney General v. The Chelsea Water Works Company*, (Fitzgibbon 195.) There it was resolved that where the proviso of an act of parliament is directly repugnant to the purview of it, the proviso shall stand, and be held a repeal of the purview, as it speaks the last intention of the makers." . . .

The repugnant acts involved in the case before us, then, are to be considered as though enacted at different sessions of the legislature. . . .

It will be observed that, thus far, we have devoted almost no space to the question of intention on the part of the legislature, while it is a prominent general doctrine, that statutes must be interpreted according to the intention of the makers. And the question arises, how is that intention to be ascertained?

Formerly it was the custom of the judges to go to the legislature, and inquire what they meant, where the language of an act was ambiguous or contradictory. Campbell, in the first volume of his *Lives of the Lord Chancellors*, p. 241, says: "The qualifications of the chancellor now became of great importance to the due administration of justice, not only from the increase of his separate jurisdiction, but from the practice of the common-law judges, when any question of difficulty arose before them in their several Courts, to take the advice of parliament upon it before giving judgment. In a case which occurred in the King's Bench, in the 39th of Edward 3, Thorpe, the chief justice, says, 'Go to the parliament, and as they will have us do, we will, and otherwise not.' The following year Thorpe himself, accompanied by Sir Hugh Green, a brother judge, went to the house of lords, where there were assembled twenty-four bishops, earls, and barons, and asked them, as they had lately passed a statute of jeofails, what they intended thereby. Such questions, which were frequent in this reign, must have been answered by the chancellor." Lord Campbell adds that "if the lords were still liable to be so interrogated, they would not unfrequently be puzzled; and the revival of the practice might be a check to hasty legislation."

But the practice has not been revived, and we now go, not to the legislature, but to the language of the statutes they enact for the public, and governed by certain established and binding rules of construction, we, from that, declare the legislative intention.

The first of those rules is, that where the legislature have enacted a statute capable of being executed, couched in plain, explicit language, Courts shall declare that the legislature meant what they said.

Such an act we find the Circuit Court act in question to be, which expressly declares that the Courts created by it shall have original, exclusive jurisdiction of all felonies. We are bound, then, to hold

that on the first of June, the day said act was passed, the legislature intended the Circuit Courts should have such jurisdiction, no matter what their intention had been eighteen days before. Hence, applying the rule to the present case, where we find they had previously passed a statute which had given a portion of that jurisdiction to the Courts of Common Pleas; and the question is asked, what is now to be done? what did the legislature mean? The answer must be, the legislature shall be intended to have meant that what they last said shall govern, and that it shall, so far as repugnant to what they had formerly said, repeal that former declaration. Such, indeed, is another settled rule of construction.

There is no necessity, therefore, for us to inquire whether the legislature, or the members of it, really, personally did mean that a later statute, totally repugnant to a former, should repeal such former statute or not. This is not a case for such inquiry, and we are not at liberty to make it. And the legislature itself is not privileged to make an answer upon the point—an *ex post facto* interpretation to suit the times. That body is estopped by its language; and the law, the settled rules of construction, which this Court is bound to apply, make it imperative that we declare the later statute did repeal the former. It is only where the language of the statute is ambiguous—doubtful, or totally unreasonable—that Courts may proceed to hunt for intention, and then only to aid in giving a meaning to the language.

There is another point upon which we have said nothing thus far, viz.: in relation to the inconvenience, or failure of justice which it is supposed may result from a decision in accordance with the view we take; for, in the language of the Supreme Court of Ohio, in the *Heirs of Ludlow v. Johnson*, 3 Ohio 553, 17 Am.D. 609, "it is our duty to declare, not to make the law. To do this correctly, the ordinary rules of construction must be adopted, and the meaning of words, sentences and phrases must not be distorted in order to sustain a favorite opinion." And in that of the Supreme Court of Massachusetts in *Pitman v. Flint*, 10 Pick 504: "A mere failure of justice would not be a sufficient ground for construing the statutes against their clear meaning, so as to give a Court jurisdiction. The proper mode of proceeding would be to apply to the legislature for remedy. It is only where the construction is doubtful, that the argument from a failure of justice applies." . . .

We will add that we are strengthened in the position we have taken upon the construction of the acts involved, by the nineteenth section of the criminal-practice act, an act still subsequent to both the aforementioned, but passed at the same session, and embodied in the same volume of the code, and to be construed with them. It reads thus:

"Informations are filed by the prosecuting attorney, upon affidavit, in any Court having jurisdiction of the offence. Criminal actions prosecuted by information, include all offences not within the juris-

diction of the grand jury, or the exclusive jurisdiction of justices of the peace."

Now, felonies are within the jurisdiction of the grand jury, and, hence, are not to be prosecuted by information; but prosecutions in the Common Pleas are by information, and, hence, must be limited to offences below felony. This statute, it will be observed, does not relate to particular cases of offence, but to the classes of offences as recognized by our statutes, and is a clear legislative expression that no felony shall be prosecuted in the Common Pleas, but that all of that class of offences shall be prosecuted by indictment, and in the Circuit Court. We regard it as conclusive upon the question, and as furnishing a complete answer, if any were needed, to the suggestion, so far as such suggestion could bear on this case, that perhaps the jurisdiction of the Circuit Court was intended to be limited to prosecutions according to the course of the common law; for it shows that felonies are to be prosecuted in no other way. This act is in *pari materia* with both the other acts involved in this case, as it relates to the practice in both the Courts organized by said acts. See, also, the act for the election of prosecuting attorneys. 2 R.S. 1852, p. 385.

If it be said that the constitution prohibits the effect given to the Circuit Court act, we reply that that act contains no provision other than upon the subject-matter of it as indicated by its title, and hence is in conformity to that instrument, and any effect it may have by implication upon prior statutes is not within any constitutional prohibition. It would be doing injustice to the convention to decide, upon slight conjecture, that they intended to change a long-established rule of law. We think, therefore, that the Court of Common Pleas had no jurisdiction of the case, and that the judgment against the appellant should be reversed.

STUART, J. . . . The question now presented is one of conflicting jurisdiction between the Common Pleas and the Circuit Court.

Since the decision in 3 Ind., the Revised Statutes have been published. The fifth section of the act to organize Circuit Courts confers on that tribunal "original, exclusive jurisdiction in all felonies." 2 R.S. 6. It is contended that this act, approved June 1, 1852, and taking effect May 6, 1853, repeals the seventeenth and eighteenth sections of the Common Pleas act, approved May 14, 1852, and taking effect October 1, 1852, as being the later expressed will of the legislature.

In favor of this view, *Ham v. State*, 7 Blackf. 314, *McQuilkin v. Doe*, 8 id. 581, *State v. Miskimmons*, 2 Ind. 440, and numerous other authorities, are adduced. But the rule in these cases is applicable only to enactments "clearly repugnant." In all such instances of "manifest repugnance," the maxim *leges posteriores priores contrarias abrogant*, must prevail. . . .

There are several considerations recognized by Courts in the exposition of statutes, which seem to exempt the sections in question from the operation of the rule.

A seeming or partial repugnance is not sufficient. Courts are invariably reluctant to declare a statute repugnant, unless it is clearly so. Accordingly, every hypothesis favorable to the harmonious co-existence of the two acts is to be first carefully weighed.

In this connection, the intention of the legislature in distributing jurisdiction between the two Courts is a primary object of inquiry.

It has been seen, 3 Ind., *supra*, that the new Court was intended to provide against the ruinous delays of the old system; to administer justice more promptly and, therefore, more efficiently, at less expense to the public, and without the intervention of a grand jury; to secure witnesses more easily and while the facts were yet fresh in the memory; and in the spirit of the new constitution, to administer justice "speedily and without delay."

So far, it is believed, the exercise of this jurisdiction by the Common Pleas has operated beneficially. Before a feature so satisfactory to the public is blotted out of the new Court, with all the confusion and consequences that must ensue, the intention of the law-maker to repeal should be clearly ascertained.

These two acts are now component parts of the revised statutes. In a legislative revision, the work of many hands, discrepancies were to be expected. No doubt there are many. At almost every step ambiguity and seeming conflict will meet the Courts. And yet the task of ascertaining the leading design of the legislature is not believed to be insuperable. By a cautious adherence to the settled rules of statutory construction, the Courts may, in most instances, reconcile seeming discrepancies, and carry out those beneficial reforms which the legislature contemplated.

This mode of interpretation is as far removed from "bending rules to meet cases" as it is from that narrow, literal adherence to mere words, insensible of principles, which would render almost any enactment a mass of ridiculous contradictions. "*Scire leges, non hoc est verba earum tenere sed vim ac potestatem.*" In statutory exposition, the reason, the spirit, the intention of the law, is above the mere cavil about words. The chief thing to be explored is the intention. This the judiciary is to seek in the history of legislation; in the objects contemplated, the evils to be corrected, and the remedies provided.

It ill becomes the judiciary to affect to ridicule statutory exposition. So long as we have a judicial system, says a distinguished judge, we can not escape the power of judicial construction. "Wherever human language is used, except in mathematics," says Lieber, "interpretation is indispensable. Its necessity lies in the nature of things, in our minds and in our language. No code can provide for all specific cases, or be construed so as to close all further inquiry." It is quite visionary, says Kent, to expect, in any code of statute law, such precision of thought, and perspicuity of language, as to preclude all uncertainty.

This statutory interpretation, it is needless to add, is a work necessarily devolved upon the judiciary.

The case at bar is important in itself; but still more so as evolving the principles which are to govern the Courts of the state in the construction of the revision.

It will be observed that, in the Circuit Court act, there is no direct repealing clause. The repeal, if any, is by implication; and the policy of the law is not favorable to this species of repeal. . . .

This rule is applicable to penal, as well as to other statutes. Thus the act of 1 and 2 Philip and Mary, that all trials for treason should be according to the course of the common law, and not otherwise, was held not to repeal 35 H. 8, for trial of treason beyond sea. *Dwarris*, supra. So in *Capen v. Glover*, 4 Mass. 305, where one town was set off from another by act of the legislature, containing a stipulation that certain lands should not be taxed, it was held that a subsequent general tax law, though in terms it embraced these very lands, did not operate as a repeal of the former provision. So also in *Dodge v. Gridley*, 10 Ohio 177, by an act regulating estrays, passed in 1831, persons living outside of village corporations were entitled to have their stock at large exempt from liability of being taken up by the village authorities. The charter of the town of Harmer, passed in 1837, authorized the town council to prevent any description of animals from running at large in the streets. It was insisted that as to the limits of Harmer, the latter act repealed the former. But the Court says, "repeals by implication are not favored. When two affirmative statutes exist, the one is not to be construed to repeal the other by implication, unless they can be reconciled by no mode of interpretation." . . .

So also our own Court in *The State v. Rackley*, 2 Blackf. 249. The act of January 20, 1824, left it discretionary with the jury to find a verdict of guilty, in criminal cases, without costs. The act of January 30, 1824, expressly provided that, upon every conviction, the officers should be entitled to certain specified fees. The one act, it was held, did not repeal the other. The practical construction given to these acts, sustaining both, was, that upon every trial the costs should follow the conviction; the officers should have their fees, except when the jury expressly found otherwise. Here it will be observed, as in *Goldson v. Buck*, and as in the case at bar, the prior act was the exception, the latter act the rule. Thus were both acts upheld.

In each of these cases, and the first and last upon penal statutes, too, the seeming repugnance is quite as strong as in the case at bar. In the first example, the affirmative words are as comprehensive as those in the Circuit Court act—all treasons shall be tried according to the course of the common law, to which the strong negative language, "and not otherwise," is superadded. Yet in all these and numerous other parallel cases, scattered through the books, repeal by implication is denied and both statutes upheld. *Bac. Ab.*, Statute, J.; *Dwarris* 674; *Smith Comm.*, supra.

Judicial reasoning on this subject is, perhaps, more uniform than in almost any other. To ascertain the intent by settled rules of interpretation is the great problem. Thus, Smith on Statutory Construction. Where it is not manifestly the intention of the lawgiver, from the whole system of legislation on the subject, that the latter act should control the former, it shall not be construed to have that effect, even though the words, taken strictly and grammatically, would repeal the former act. Smith Comm., § 757. So, accordingly, Lord Kenyon, one of the most conservative of judges. . . .

Again, all the parts of a statute, and different statutes in *pari materia*, whether repealed or not, in short, the whole system of legislation on the subject-matter, are to be considered with reference to the intent. . . . For it is to be presumed that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious. 1 Kent 463. Thus, also, the Supreme Court of the United States. If, from a view of the whole law and other laws in *pari materia*, the evident intent is different from the literal import of the terms employed to express it in a particular part, the intention should prevail, for that is, in fact, the legislative will. United States v. Fisher, 2 Cranch 386. In such cases, some degree of implication will be called in to aid the intent. Durosseau v. United States, 6 Cranch 307. Nor shall a particular thing given in a prior statute in *pari materia*, be taken away by any subsequent general words. Dwarris 658. But in such case the particular intent is to be considered in the nature of an exception. Id. 658, 765. Or, as Marshall, C. J., states it, the general expressions were used in a particular sense. Adams v. Woods, 2 Cranch 336.

This mode of reasoning in regard to conflicting statutes has the greater significance when, as in the case at bar, the two acts were passed at the same session of the legislature. State v. Rackley, *supra*. For it is not to be presumed that the assembly would capriciously undo to-day what had been solemnly done yesterday on matters of such vital moment to the public.

Nor is it easy to conceive how, consistently with the reasoning and principles of the authorities cited, the jurisdiction of the Common Pleas over felony, being the particular thing, definitely and minutely pointed out, can be controlled by the general words in the Circuit Court act.

There are other rules of construction recognized in the books, which, at first view, might seem to militate against the jurisdiction claimed. Thus it is said that statutes which give a new remedy, or create a new jurisdiction, ought to receive a strict construction. But the same authority questions its correctness, and limits its application to commissioners, and other inferior officers, exercising summary powers. Dwarris 750.

Another salutary rule, sometimes perverted, is that penal statutes shall receive a strict construction. Dwarris 736. Yet accord-

ing to the same author, this applies only to the fact and the punishment. *Ibid.* In the *United States v. Morris*, 14 Pet. 464. Taney, C. J., while admitting the rule, held, that the evident intention of the legislature ought not to be defeated by an over-strict construction. The rule, says Parker, C. J., does not exclude the application of common sense, in order to avoid an absurdity which the legislature ought not to be presumed to have intended. *The Commonwealth v. Loring*, 8 Pick. 370; 9 Bac.Ab. 252-3; 1 Kent 462; *People v. Utica Insurance Co.*, 15 Johns. 380; 8 Am.D. 243. Accordingly, Spencer, C. J., in *Sickles v. Sharp*, 13 Johns. 497.

But in a question not so much affecting persons as it is a seeming conflict between two Courts, to what end should the construction be strict? It is a penal statute, either way. The felony over which both have jurisdiction, is punished to the same extent in both Courts. But, on other grounds, the preponderance seems in favor of the Common Pleas. The very object of that Court as explained in *Lindville v. The State*, *supra*, is dispatch and efficiency. The public is every way deeply interested in having prisoners promptly disposed of. So that of the two, the new Court, giving the accused a speedier adjustment of his constitutional rights, and the public a more efficient administration of justice, is entitled to the greater consideration.

Here, then, are two affirmative acts passed at the same session. As to felony, they are in *pari materia*. The words of both are explicit. It is not surely the first duty of the Courts curtly to announce that the one repeals the other, before the settled rules of construction have been carefully applied, to the end that both may, if possible, stand and have effect.

The practical operation of such a rule would be, it is feared, to repeal by implication a large part of the revision.

It is, therefore, deemed wiser and safer to adhere to the rule laid down by Judge Holman in the earlier days of this Court, (since quoted with approbation by the best elementary writers), that less violence is done to the intention of the legislature by giving a construction which shall support both acts, than there would be to suppose that by one act it was intended to repeal another enacted at the same session. *State v. Rackley*, 2 Blackf. 249.

Having thus deduced the rule from the adjudicated cases, it seems proper to inquire whether any light is to be obtained from other parts of the revision. . . .

It is believed the revision itself furnishes the very rule of construction contended for. 2 R.S. 339. "The construction of all statutes of this state shall be by the following rules, unless such construction be plainly repugnant to the intent of the legislature, or the context of the same statute." "Words and phrases shall be taken in their plain ordinary sense; technical words in their technical import."

Now taking this all together, it is substantially the rule of construction at common law, only, as we shall see, made still more liberal. 1 Kent 462. In cases of ambiguity or conflict, the Courts are

as much bound as ever to resort to the well-settled rules of statutory exposition, to ascertain the intent of the legislature. It is still left, after all, as a matter of intent, whatever words are used. To so expound a statute as, on the one hand, to carry into effect the beneficial reforms contemplated by the lawgiver, and, on the other, not to assume legislative powers by making rather than expounding law, remain now as they have ever been, among the highest and most delicate duties of the judiciary.

The rule of construction, as to whether it shall be strict or liberal, is worthy of special notice. "The foregoing rules of construction and definition of terms shall be in addition to and part of those adopted in the code of civil practice; and, together with those, shall apply to all statutes or acts of the legislature." 2 R.S. 341. So it would seem that in the construction of statutes, penal acts shall not be distinguished from others. The same rule shall apply to all, civil and criminal.

What, then, are the rules adopted in the civil practice, as above alluded to? Among them are the following: "The provisions of this act shall be liberally construed, and shall not be limited by any rules of strict construction." 2 R.S. 223.

The sum of these various and scattered provisions is this: A liberal construction is extended to all statutes, and the plain intent of the legislature respected and carried out. This rule gives efficiency to remedial legislation. On any other principle, a technical judiciary, clinging narrowly to the letter, in disregard of the spirit of the statute, might retard, and even wholly defeat, the most useful and needed reforms.

It but remains to apply to the case at bar the canons of construction thus deduced.

Regarding the two acts in *pari materia* as to felony, they stand and may be interpreted thus: The Circuit Court shall have original, exclusive jurisdiction of all felony, except as is otherwise provided in the seventeenth and eighteenth sections of the act to establish Common Pleas. Thus may both be upheld.

The jurisdiction of the Common Pleas over felony is different from that of the Circuit Court. The one is purely statutory, dispensing with the grand jury and other common-law appendages. The jurisdiction of the other is according to the course of the common law. These powers severally conferred for different purposes, and to be exercised in a different manner, may well subsist together, and thus both acts be upheld.

The history of the legislature that passed these acts furnishes two remarkably strong facts against the intention to repeal. One of these is the strict observance of the parliamentary law, that an act passed is not to be repealed at the same session. Dwarris 673. This rule was obviously known and respected. For when the assembly of 1851-2, the same which passed the acts in question, wished to dispose of the act in relation to county boards and other enactments

passed at an early day, and which were found to be duplicated, or inconsistent with the subsequent revision, it did not leave these conflicting acts in the statute-book, to be repealed by implication, to the embarrassment of the people and the Courts. Nor yet did the assembly violate the parliamentary law by repealing at the close what had been enacted at the beginning of the session. But an act was passed suspending the obnoxious statutes. Laws 1851-2, p. 31.

The second fact in the history of the legislature of 1851-2, relates to the repealing act. It must be conceded that, notwithstanding the parliamentary rule, the assembly had the power to repeal acts passed at the same session. The very claim that there was an implied repeal admits the right to repeal directly. Now, on the 18th of June, 1852, and long after the approval of both the Common Pleas and Circuit Court acts, another act was passed, entitled, "An act to repeal all former acts of the legislature except those therein named." The first section reads: "All laws not enacted at the present session of the general assembly are repealed." Had it been the intention to repeal the seventeenth and eighteenth sections of the Common Pleas act, that intent could have been easily and briefly expressed. That no such repeal is expressed, leaves, says Dwarris, a strong presumption that it was not intended. Dwarris 717. Had the seventeenth and eighteenth sections been obnoxious, we should have found them either suspended in the suspending act, or repealed in the repealing act. Instead of that, we find all the laws enacted during the session carefully excluded from the operation of the repealing act.

If the intention of the law is thus plain, and yet words are used which either in their usual sense or technical import are fatal to that intention, what are the Courts to do? The common-law rule of construction, as deduced from the authorities, and the legislative rule, as prescribed in 2 R.S., chap. 17, *supra*, make the judicial path plain. In such cases of repugnance between the intent and the language, the Court has only to follow the statutory rule, viz: ordinary words shall not be taken in their usual sense, nor technical words in their technical import; but the Courts shall give the words and phrases used such limited acceptation as shall make the law accord with the manifest intention of the legislature.

If this be judicial legislation, it is such as the common law and the statutes of this state authorize.

The opposite ground combines far more of the elements which define judicial law-making, without the merit of being either remedial or politic. For this Court to divest the Common Pleas of jurisdiction over felony—a jurisdiction so clearly, and upon such weighty considerations of public policy, conferred, is not easily distinguished from the assumption of power to repeal statutes, and repudiate the rules of construction which the coordinate branch had provided.

For these reasons, it is thought that both acts are in force. Passed at the same session, relating to the same subject-matter, and forming parts of the same general system, they require no judicial indul-

gence to enable them to stand together harmoniously in the revision.

I am therefore of opinion that the judgment of the Common Pleas should be affirmed.

PER CURIAM. The judgment is reversed.

In re COBURN

Supreme Court of California, 1913. 165 Cal. 202, 131 P. 352.

SLOSS, J. The superior court of the county of San Mateo having entered a judgment or order appointing M. J. Hynes guardian of the person and estate of Loren Coburn on the ground of incompetency, the alleged incompetent appeals from the judgment and from an order denying his motion for a new trial. The proceeding was instituted in February, 1908, when Azro A. Coburn, nephew of Loren, filed a petition averring the incompetency of his uncle and praying for the appointment of a guardian. Upon a trial, the court found in favor of the allegations of the petition, and appointed Carl Coburn, the adopted son of a brother of Loren Coburn, guardian of the latter's person and estate. An appeal prosecuted by the alleged incompetent resulted in a reversal by the District Court of Appeal for the First Appellate District of the order appointing a guardian. *In re Coburn*, 11 Cal.App. 621, 105 P. 924. The present appeals are based upon the result of a second trial of the same issues.

The allegations of the petition, as amended, were as follows: "That said Loren Coburn is unable, unassisted, to properly manage and take care of his said property, and by reason thereof is likely to be deceived and imposed upon by artful or designing persons, and is mentally incompetent to manage his said estate. That he is mentally incompetent to manage his property; and that he is, by reason of old age and physical disability and weakness of mind, unable to take care of himself and manage his property." The court found that all of the allegations of the petition, and the amendment thereto, are true. It further found that at the time of the filing of the original petition "Loren Coburn was, for a long time prior thereto had been, ever since has been, and still is by reason of old age and weakness of mind, unable, unassisted, to properly manage and take care of himself and his property, and by reason thereof likely to be deceived and imposed upon by artful and designing persons"; and that at all the times stated, said Loren Coburn was and is "incapable of taking care of himself and managing his property."

The statutory provisions governing the appointment of guardians of incompetent persons are found in article 2 of chapter 14 of part 3 of the Code of Civil Procedure. Section 1763, the first section of this article, provides that "when it is represented to the superior court, or a judge thereof, that any person is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given to the supposed insane or incompetent person of the

time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced at the hearing. . . . Section 1764 reads: "If, after a full hearing and examination upon such petition, it appear to the court that the person in question is incapable of taking care of himself and managing his property, such court must appoint a guardian of his person and estate, with the powers and duties in this chapter specified." Both of these sections, in substantially the same form which they now present, were parts of the Code as originally adopted. In 1891 the Legislature added section 1767, which declares that "the phrases 'incompetent,' 'mentally incompetent,' and 'incapable,' as used in this chapter, shall be construed to mean any person, who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof, would be likely to be deceived or imposed upon by artful or designing persons." The appellant contends that the act adding section 1767 to the Code is, in various respects, in conflict with the Constitution and therefore void. For the purpose of upholding the sufficiency of the petition and findings, both of which papers are assailed by the appellant, it is necessary to look to section 1767. . . .

Section 1767 is a statute which purports to define certain terms used in existing sections of the Code. The first point made against the validity of section 1767 is that the act adding the section to the Code is an attempted exercise by the legislative branch of the government of a power belonging exclusively to the judiciary; the power, that is to say, of interpreting a pre-existing statute. The appellant quotes, in support of his position, this passage from Cooley's work on Constitutional Limitations: "If the Legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute and cannot be done by a mandate to the courts which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial, but according to the legislative judgment." Const. Lim. (7th Ed.) 137. But the decisions cited in support of this declaration, with one exception (*Gov. v. Porter*, 5 Humph. [Tenn.] 165), seem, when the facts are examined, to go no further than to deny the power of the Legislature to alter the construction of a statute in such manner as to affect rights existing when the declaratory statute was passed (*People v. Board of Supervisors*, 16 N.Y. 424; *Reiser v. Wm. Tell S. F. Ass'n*, 39 Pa. 137; *Lambertson v. Hogan*, 2 Pa. 22; *Lincoln, etc., Ass'n v. Graham*, 7 Neb. 173; *Union Iron Co. v. Pierce*, Fed. Cas. No. 14,367).

The weight of authority supports what we think to be the true rule, i.e., that such declaratory or defining statutes are to be upheld, except with regard to past transactions, as an exercise of the legislative power to enact a law for the future. Immediately following the passage above quoted from Cooley, the learned author says: "But in any case the substance of the legislative action should be followed rather than its form; and if it appears to be the intention to establish by declara-

tory statute a rule of conduct for the future, the courts should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous, and suitable that could have been adopted." In *Stebbins v. Board of Co. Com'rs* (C.C.) 4 F. 283, Mr. Justice Miller, sitting in circuit, referred to an act similar to the one before us in these terms: "While it might not be true that rights existing prior to the explanatory or declaratory statute will be affected by that declaratory statute, yet, inasmuch as Congress or any legislative body has a right to pass a law for the future that such a statute shall be held to mean so and so, while it may not affect past transactions, it is equivalent to the passage of a statute of that character for the future." See, also, *Stockdale v. Ins. Co.*, 20 Wall. 323, 22 L.Ed. 348; *Singer Mfg. Co. v. McCollock* (C.C.) 24 F. 667; *State v. Com'rs*, 83 Kan. 199, 110 P. 93.

Adopting the view, then, that section 1767 is a valid enactment, there can be no occasion to go beyond its terms to learn what conditions will justify the appointment of a guardian.

The grammatical construction of the section is not above criticism, but defects in this respect, while they may enhance the difficulty of interpreting the enactment, do not impair its binding force.

The judgment and the order denying a new trial are affirmed.

STATE v. PARSONS

Supreme Court of Iowa, 1928. 206 Iowa 390, 220 N.W. 328.

Conviction for the crime of bootlegging, resulting in the imposition of sentence and judgment that the defendant pay a fine of \$750 and in addition thereto be committed to the county jail of Marshall county, Iowa, for a period of nine months. The defendant appeals. Reversed.

DE GRAFF, J. . . . Assignment of error is predicated on instruction 9 given by the court, in which the statute (section 1922, Code 1924) is substantially quoted that "courts and jurors shall construe" the liquor laws of the state "so as to prevent evasion." We discover no reason why this statute should find a place in the instructions of the court in a case involving an alleged violation of the prohibitory liquor law. The jury has nothing to do with construing the law. That is the function of the court. The Legislature does have power to prescribe legal definitions of its own language, and it may be conceded that when a legislative act embodies a definition, it is binding on the courts. However, the Legislature has no power to direct the judiciary in the interpretation of existing statutes. *State v. Schlenker*, 112 Iowa, 642, 84 N.W. 698, 51 L.R.A. 347, 84 Am.St.Rep. 360. While a legislative construction of an act is entitled to due consideration from the courts, it is in no sense binding on the courts. *Slutts v. Dana*, 138 Iowa, 244, 115 N.W. 1115. See, also, 36 Cyc. 1143; 12 C.J. § 813, p. 1102.

If a jury could render any obedience to section 1922, *supra*, it would have to be on the evidence, and, although the statute law may prescribe rules of evidence, it is not the function of the Legislature to instruct the jury how it shall weigh evidence. We recognize that this statutory provision has frequently found lodgment in the charge given by the trial court in cases involving violation of the liquor law, but this fact does not constitute a justification for the continuance of the use of the challenged instruction. Nor are we unmindful that the instruction given in the instant case was approved by this court in *State v. Comer*, 198 Iowa, 740, 200 N.W. 185. We would not reverse the instant case on this ground, but we no longer approve, as a matter of practice, the giving of such an instruction.

The judgment entered is reversed (on other grounds)

NOTES

1. The important dictum in the principal case was specifically overruled in *State v. Matthes*, 210 Iowa 178, 189, 230 N.W. 522 (1930). The court in the *Matthes* case stated, "We are not concerned at this point with the question of how far, if at all, the legislature may bind the courts in the construction of statutes. We simply have a case where the court told the jury that it was their duty to construe the law so as to prevent evasion." De Graff, J., who wrote the opinion in the *Parsons* case, dissented on the basis of a lack of constitutional power in the legislature to tell a court how a statute shall be construed. He still leans heavily also on the conception of the jury as a fact finding body with no function construing statutes.

2. See de Sloovere, "The Functions of Judge and Jury in Interpretation of Statutes", 46 *Harv.L.Rev.* 1086 (1933).

GORIN v. UNITED STATES

Supreme Court of the United States, 1941.
312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488.

[The case appears *supra*, p. 871]

IN RE CAMERON'S ESTATE

Supreme Court of Wisconsin, 1946. 249 Wis. 531, 25 N.W.2d 504.

WICKHEM, JUSTICE. Decedent, an adult single person, was found insane and committed to the Winnebago State Hospital on June 25, 1926. He remained at this institution until August 4, 1938, when he was transferred to the Outagamie County Asylum at Appleton. He remained here until his death on August 17, 1944. Appellant, successor to the Board of Control, filed its claim in the county court against decedent's estate for care and maintenance during the entire period. The court applied the ten-year statute of limitation to the claim and it is this that appellant complains of. The heirs of decedent are two adult brothers. Appellant contends that the claim of the Department of Public Welfare from June 25, 1926 to August 17, 1934, is

not barred by the statute of limitations. This requires a study of the applicable statutes and the several decisions that have construed them.

In 1935 sec. 46.10(7) Stats. was created by chapter 336, laws of 1935. This read as follows:

"46.10(7). The actual per capita cost, as defined by rule of the state board of control, of maintenance furnished an inmate of any state institution, or any county institution in which the state is chargeable with all or a part of the inmate's maintenance, may be recovered by the state board of control, or in counties having a population of five hundred thousand or more by the county, from such person, or from his estate, or may be recovered from the husband or wife, father, children or mother of such person. In any such action or proceedings the statutes of limitation shall not be pleaded in defense"

In *State Dept. of Public Welfare v. Shirley*, 243 Wis. 276, 10 N.W.2d 215 (1943), this court held that sec. 46.10(7) imposed no liability at all but merely authorized recovery of maintenance from relatives; that the liability of relatives was provided for in sec. 49.11; that sec. 46.10(7) merely vests authority for collection in the State Board and prescribes the manner of collection. The 1943 legislature, c. 548, amended sec. 46.10(7) and added the following:

"The legislature intends, and so intended at the time this section was enacted by chapter 336, laws of 1935, to impose, exclusively by this subsection and no other, a liability for care in those institutions to which this subsection has application, upon the person receiving such care, upon his estate, and upon the relatives named herein and upon their estates. The words 'may be recovered' appearing in this subsection are and were intended to impose this liability."

[The Court re-examined the *Shirley* Case in the light of legislative history and concluded that it was wrongly decided. The Court continued:]

. . . . It has always been regarded as a strong answer to a contention that we should change a construction of a statute that subsequent sessions of the legislature had come and gone without any attempt to amend it. This has been regarded as an indication of legislative concurrence with our interpretation. In this case, however, we have an especially pointed repudiation of the *Shirley* case at the first legislative session where the matter could be considered and in addition to making the meaning of 46.10(7) Stats. unmistakably clear, the legislature went on to state that it had always been the purpose of the section to impose liability. While the 1943 legislature cannot usurp the function of this court and authoritatively construe a statute enacted by a previous legislature, its immediate and forceful repudiation of a decision is entitled to at least as much weight as has always been given the failure of the legislature to act at all. . . .

Judgment reversed and cause remanded with directions to enter judgment for plaintiff in accordance with this opinion.

NOTES

1. In *State ex rel. Johnson v. Broderick*, — N.D. —, 27 N.W.2d 849, 866 (1947), the Supreme Court of North Dakota stated and applied the so-called "reenactment rule" as follows: "The rule is well settled that 'where a statute that has been construed by the courts of last resort has been reenacted in the same, or substantially the same, terms the legislature is presumed to have been familiar with its construction, and to have adopted it as a part of the law, unless a contrary intent clearly appears, or a different construction is expressly provided for.' 59 C.J. pp. 1061, 1063."

See Section 3 of this Chapter *infra*, p. 1088 et seq., concerning the re-enactment rule.

2. In *Blumenthal v. United States*, 88 F.2d 522 (C.C.A.Minn.1937), an issue was whether the Knox Act of 1909, regulating interstate shipment of alcoholic liquor, was impliedly repealed by the (Volstead) National Prohibition Act passed pursuant to the Eighteenth Amendment to the United States Constitution of 1920. The court concluded its argument on this point as follows (p. 527):

"It is also to be observed that by Act of June 25, 1936, § 8 (18 U.S.C.A. § 390), subsequent to the repeal of the Eighteenth Amendment and the Volstead Act, Congress amended section 240 of the Knox Act. This amendatory act may be considered as a legislative interpretation, and as such has a direct bearing on the legislative intent. It was manifestly the understanding of Congress that the Knox Act had not been repealed; otherwise, there would have been nothing to amend. It is, of course, ultimately the province of the courts to interpret statutes, yet in so doing, they should give effect to the legislative intent, and hence, the legislative interpretation is entitled to consideration. [Citing cases.]

"If we were otherwise in doubt as to whether the Knox Act was repealed by the enactment of the Prohibition Act, this amendment should, we think, be accepted as persuasive evidence of the intention of Congress, and that, in the final analysis, is the province of the courts in construing congressional enactments."

D. The Literal Approach and the Plain Meaning Rule.

WALL v. PFANSCHMIDT

Supreme Court of Illinois, 1914. 265 Ill. 180, 106 N.E. 785.

CARTER, J. Plaintiffs in error filed a bill for the partition of certain real estate, in the circuit court of Adams county, to the June term, 1913. A demurrer thereto was sustained, and the bill, which had been amended, was dismissed for want of equity. Plaintiffs in error elected to abide by their bill as amended and the cause was dismissed at their costs. A writ of error was sued out to review that decree.

The amended bill averred that certain real estate was devised under the will of Christian Abel to his daughter, Matilda, for her natural life and at her death to her children; that said Matilda intermarried with one Charles A. Pfanschmidt and to them were born two children, Ray and Blanche; that said Charles A. owned certain real estate adjoining that devised to his wife, Matilda, all of which the family occupied as a farm, residing on that portion devised to the wife; that on or about September 27, 1912, Ray Pfanschmidt, one of said children, murdered his father, mother, and sister and Emma Kaempfen, a school teacher boarding with them, setting fire to the residence and partly burning

the remains of said four persons so killed, and that the order of their respective deaths could not be determined; that said Ray Pfanschmidt had been indicted in the circuit court of Adams county for the murder of said four persons and pleaded not guilty; that under the indictment for the murder of his sister said Ray Pfanschmidt was tried and found guilty and his punishment fixed by verdict of the jury at death; The amended bill in this cause further alleged, that Ray Pfanschmidt could not acquire any estate, right, or title in and to said real estate through his act of murder;

The sole question in dispute is whether he could acquire an interest, by inheritance, in the real estate owned by his father, mother, and sister, who under the pleadings in this cause met their death by his acts intentionally committed.

Our statute on descent provides:

"That estates, both real and personal, of residents and nonresident proprietors in this state dying intestate, shall descend to and be distributed in manner following, to wit: First—to his or her children and their descendants, in equal parts; Second—when there is no child of the intestate, nor descendant of such child, and no widow or surviving husband, and if there is no parent living, then to the brothers and sisters of the intestate, and their descendants." Hurd's Stat.1913, p. 907.

This statute has never been construed by the courts of this state as to the question here involved. Counsel for plaintiffs in error admit that under the literal wording of the statute Ray Pfanschmidt would inherit, but their argument is to the effect that in construing this as well as all other statutes the maxims of the common law must be applied, and that according to those maxims no one can be permitted to take advantage of his own fraud or wrong or acquire property by his own crime; that it must be assumed that the Legislature, in passing the statute of descent, had these maxims in mind, and that the statute should be construed according to such legislative intent; that so construed Ray Pfanschmidt acquired no interest in the estate of his father, mother or sister.

If in a statute there is neither ambiguity nor room for construction, the intention of the Legislature must be held free from doubt. The question as to what the framers of the statute would have done had it been in their minds that a case like the one here under consideration would arise is not the point in dispute. The inquiry is as to what, in fact, they did enact, possibly without anticipating the existence of such facts. This should be determined, not by conjecture as to their meaning, but by the construction of the language used.

"Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of the words, especially in a penal act, in search of an intention which the words themselves did not suggest." Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat. 76, 5 L.Ed. 37.

The statute of descent does not in any way, directly or indirectly, recognize this question. The wrong to be obviated and the remedy for it will guide the court in finding the intention of the Legislature, but this rule of law offers no authority for adding an important exception or limitation to a statute which in clear language states a rule of public policy. . . . Knowledge of the principles of statutory interpretation must be imputed to the Legislature. In plain language our statute of descent designates the persons who shall succeed to the estates of deceased intestates. That statute provides that in cases like this the son and brother shall take the estate. By what authority can this court say that although there is a son and brother he shall not take, but that relatives who under the wording of the statute have no right to these estates shall take? It is impossible for the court to designate different persons to take such estate without a violation of the law. Under the rules for the interpretation of statutes the courts cannot read into a statute exceptions or limitations which depart from its plain meaning. . . . If there were any ambiguity in this statute, or if it were the province of the court to settle this question with respect to the descent of property, then the argument of counsel for plaintiffs in error would have weight. When the Legislature has spoken in clear and unequivocal language the courts are bound thereby. . . . This court has held that the rules of the common law as to descent and devise have been wholly superseded by our statutes on those subjects. The courts have no concern with the wisdom of a statute unless it contravenes some constitutional provision.

Counsel for plaintiffs in error further contend that, if defendant in error obtained the title under the statute of descent, only the naked legal title passed to him; that he cannot hold it for his own benefit, but only as a trustee *ex maleficio* and in trust for the heirs equitably entitled thereto, as held by the Court of Appeals of New York (*Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188), basing the argument on like principles to those under which devises or bequests procured by fraud have been held constructive trusts, and applied, in equity, to the benefit of the persons equitably entitled thereto. 3 *Pomeroy's Eq.Jur.* § 1054; *Larmon v. Knight*, 140 Ill. 232, 29 N.E. 1116, 33 *Am.St.Rep.* 229; 2 *Tiffany on Real Prop.* § 505a.

Counsel argue that, even though the grounds of public policy would not justify the construction of the statute of descent as contended for by them, public policy will forbid such a construction or enforcement of the statute as will encourage crime or give a reward for its performance. . . . This court has repeatedly held, in line with the general rule in other jurisdictions, that the public policy of a state must be sought in its constitution, legislative enactments, and judicial decisions. . . . In *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 44, 83 N.E. 544, . . . we said:

"When the sovereign power of the state has by written constitution declared the public policy of the state on a particular subject, the legislative and judicial departments of the government must accept such declaration as final. When the Legislature has declared, by law,

the public policy of the state, the judicial department must remain silent, and if a modification or change in such policy is desired the lawmaking department must be applied to, and not the judiciary, whose function is to declare the law but not to make it. Limiting their actions to questions left open by the Constitution and the statutes, courts may, no doubt, apply the principles of the common law to the requirements of the social, moral, and material conditions of the people of the state and declare what rule of public policy seems best adapted to promote the peace, good order, and general welfare of the community; hence arises the rule that the decisions of its courts are to be investigated in determining the public policy of any government."

Statutes of descent and devise are declarations of public policy of this state on this subject. To hold that defendant in error obtained the naked legal title but only held it as trustee, as contended by counsel for plaintiffs in error, would be to hold that by his crime he forfeited the right to inherit.

Section 11 of article 2 of the Constitution of 1870 provides:

"All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate."

The Criminal Code, in fixing the punishment for murder, states:

"Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years." Hurd's Stat.1913, p. 835.

It does not state that the guilty person shall forfeit his right to inherit. In *Collins v. Metropolitan Life Ins. Co.*, . . . supra, it was said:

These provisions are "clear and unequivocal declarations of the public policy of this state to the effect that no forfeiture of property rights shall follow conviction for crime."

Public policy does not demand this forfeiture, for the demands of public policy are satisfied by the proper execution of laws and the punishment of crime. If other punishment be required, the duty to so provide rests upon the legislative branch of the government. Whether this accords with natural right and justice is not for the courts to decide. The laws of descent do not depend upon the ideas of court or counsel as to justice or natural right but depend entirely upon the provisions of the statute. In *re Kirby's Estate*, 162 Cal. 91, 121 Pac. 370, 39 L.R.A. (N.S.) 1088, Ann.Cas.1913C, 928.

"The line between legislation and interpretation is clear, and for the courts to declare a forfeiture for crime where the Legislature has remained silent is legislation by judicial tribunals—a subject with which they have no concern." *Holdom v. Ancient Order United Workmen*, 159 Ill. 619, 43 N.E. 772.

The decree of the circuit court must be affirmed.

Decree affirmed.

NOTES

1. The principal case was distinguished in *Ill. Bankers Life Ass'n v. Collins*, 341 Ill. 548, 173 N.E. 465 (1930), which construed an insurance contract so as to preclude a murderer beneficiary from reaping its benefits. It was stated that the Wall Case "involved solely the construction of the statute of descent as to real estate." Into the construction of a contract, say the court, "entered . . . the law and public policy of the state as evidenced by the decisions of this court."

2. Observe the varying degrees of reluctance with which the courts adhere to the "plain meaning", the reasons given for refusing to adopt the approach advocated by losing counsel, and the considerations of policy which influenced the courts' choice in the following cases in this Section: *Duncan v. Magette*, *Caminetti v. United States*, *Chung Fook v. White*, *American Trucking Ass'ns v. United States* (lower court), and cases noted to each.

*E. The Equity of the Statute*REPORTER'S NOTE TO *EYSTON v. STUDD*

2 Plowden 459, 465; 75 E.R. 688, 695-696 (1574).

. . . It is not the words of the law, but the internal sense of it which makes the law, and our law, (like all others) consists of two parts, viz. of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law.

. . . And the law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter. And it often happens that when you know the letter, you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. And equity, which in Latin is called *equitas*, enlarges or diminishes the letter according to its discretion.

. . . And this correction of the general words is much used in the law of England. . . .

NOTE

In the course of his opinion in *Guiseppi v. Walling*, 144 F.2d 608, 616, n. 15a, Frank, J., notes that Aristotle, "in his remarks on 'equity,' said that 'all law is couched in general terms, but there are some cases upon which it is impossible to pronounce correctly in general terms. Accordingly, where a general statement is necessary, but such a statement cannot be correct, the law embraces the majority of cases, although it does not ignore the element of error. Nor is it the less correct on this account; for the error lies not in the law, nor in the legislature, but in the nature of the case. For it is plainly impossible to pronounce with complete accuracy upon such a subject matter as human action. Wherever then the terms of the law are general, but the particular case is an exception to the general law, it is right, where the legislator's rule is inadequate or erroneous in virtue of its

generality, to rectify the defect which the legislator himself, if he were present, and had he known it, would have rectified in legislating . . . This is in fact the nature of the equitable; it is rectification of law where it fails through generality . . . For where the thing to be measured is indefinite the rule must be indefinite . . . ' Nicomachean Ethics, Bk. V, Ch. 10, 1137b, 13-31. "The equitable seems to be just and equity is a kind of justice, but goes beyond the written law. This margin is left by legislators, sometimes voluntarily, sometimes involuntarily; involuntarily when the point escapes notice, voluntarily when they are unable to lay down a definition, and yet it is necessary to lay down an absolute rule; also in cases where inexperience makes it hard to define . . . ; for life would not be long enough for a person to enumerate the case.' Rhetoric, Bk. I, Ch. 13."

BAKER v. JACOBS

Supreme Court of Vermont, 1891. 64 Vt. 197, 23 A. 588.

THOMPSON, J. In the county court the jury returned a verdict for the plaintiff. Immediately after the verdict was returned the plaintiff directed the deputy-sheriff who had had charge of the jury to get them all together at the American House in Hyde Park, saying that he wanted "to pay the cigars." Thereupon the deputy-sheriff informed some of the jury that the plaintiff was going to treat, and several of the jury soon after met the plaintiff at the American House, and were treated by him with cigars furnished and paid for by him. At the same term the verdict was rendered the defendant moved to set it aside on account of the plaintiff's having thus furnished several of the jurors with cigars by way of treat. The facts not being contradicted, the county court held, as a matter of law and not as a matter of discretion, that the case was within R.L. § 997, and set the verdict aside and granted a new trial, to which holding of the court the plaintiff excepted.

By R.L. § 997, it is provided that "if a party obtaining a verdict in his favor shall, during the term of the court in which such verdict is obtained, give to any of the jurors in the cause, knowing him to be such, any victuals or drink, or procure the same to be done, by way of treat, either before or after such verdict, on proof thereof being made the verdict shall be set aside and a new trial granted." The determination of this case depends upon the construction to be given to this section. In ascertaining the intent of the legislature in enacting R.L. § 997, we are aided by the trend of previous legislation on this subject. The first act relating to it was passed November 1, 1791, and was entitled, "An act to prevent undue influencing of jurors," and was as follows: "Whereas, the very pernicious practice of treating jurors by parties in litigation before the courts of law within this state has become prevalent by the party recovering, which tends much to the corruption of the manners of the jurors, and is often subversive of justice by giving an undue bias, therefore, to prevent such evil practices in the future, it is hereby enacted by the general assembly of the state of Vermont that if any person obtaining a verdict in his favor in any court in this state shall, during the session of the said court in which such verdict is obtained, give to any of the jurors in said cause, know-

ing him or them to be such, any victuals or drink, or procure the same to be done, by way of treat, whether before or after such verdict, on due proof thereof being made, it shall be sufficient reason for arrest of judgment in said cause." By an act passed March 2, 1797, the provisions of this act of November 1, 1791, were re-enacted in the same words, with the exception of the change that such treating "shall be sufficient reason to set aside the verdict, and award a new trial in such cause," (Tolman's Comp. p. 82, § 71;) and this continued to be the law until the enactment of R.L. § 997, in 1880. We thus see that the constant tendency of our legislation on this subject has been to make the law more stringent against the evil sought to be remedied by the act of November 1, 1791, and more efficient to suppress it.

It is contended on the part of the plaintiff that cigars do not come within the meaning of "victuals or drink," as used in R.L. § 997, and hence the treating of the jury by the plaintiff with cigars is not within the prohibition of the law. We do not deem it necessary to decide whether tobacco falls within the strict meaning of the terms "victuals or drink," as has been ingeniously argued by the defendant's counsel. In construing a statute of this kind, as was said in *Ryegate v. Wardsboro*, 30 Vt. 746, we are to ". . . ascertain the true meaning of the legislature, though the meaning so ascertained conflict with the literal sense of the word." In that case the court quoted with approval from an old book the following summary of the rules of construing statutes: "In some cases the letter of an act of parliament is restrained by an equitable construction; in others, it is enlarged; in others, the construction is contrary to the letter. In order to form a right judgment, whether a case be within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him this question: 'Did you intend to comprehend this case?' Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statutes; for while you do no more than he would have done you do not act contrary to the statute, but in conformity thereto." We think the rule thus laid down in *Ryegate v. Wardsboro* is the true rule of construction to be adopted in this case. . . . We think the furnishing a juror with a cigar by way of treat is as much within the true intent and spirit of the statute as the treating him with a glass of whisky. Indeed, among a large class of people, in treating, cigars are now given and received instead of intoxicating liquors. We hold that the treating of the jurors by the plaintiff as stated was clearly within the provisions of R.L. § 997, and that as a matter of law the court below was bound to set aside the verdict and grant a new trial. Judgment affirmed and cause remanded for a new trial.

IN RE TYLER'S ESTATE

Supreme Court of Washington, 1926. 140 Wash. 679, 250 P. 456, 51 A.L.R. 1088.

HOLCOMB, J. From an order in probate proceedings setting over to respondent \$3,000 worth of property out of the separate estate of his deceased wife under the provisions of section 1473, Rem.Comp.Stats., as amended by section 2, c. 142, of the Laws of 1923, entered in the court below, this appeal is taken.

On November 10, 1924, respondent murdered his wife. On January 5, 1925, Ida S. Spangler was appointed administratrix of the estate of Anna L. Tyler, deceased. Prior to the filing of the petition by respondent to have the property set over to him in lieu of homestead, he had been tried, convicted, sentenced, and committed to life imprisonment. An affirmative answer to the petition was filed by appellants alleging the above facts and that respondent killed his wife for the purpose of securing the property. A demurrer to the affirmative answer was sustained.

The question to decide is whether an uxoricide killing his wife for the purpose of getting possession of her separate property is entitled to the benefit of the above-cited statute. In that statute it is provided:

"If it shall be made to appear to the satisfaction of the court that no homestead has been claimed in the manner provided by law, either prior or subsequent to the death of the person whose estate is being administered, then the court," upon such notice as may be determined by the court, "upon being satisfied that the funeral expenses, expenses of last sickness and of administration have been paid or provided for, and upon petition for that purpose, shall award and set off to the surviving spouse, if any, property of the estate, either community or separate, not exceeding the value of three thousand dollars (\$3,000). . . . The order or judgment of the court making the award or awards provided for in this section shall be conclusive and final, except on appeal and except for fraud. The awards in this section provided shall be in lieu of all homestead provisions of the law and of exemptions."

By the express terms of this statute the apparent duty of the court is to award and set off to the surviving spouse the amount of property therein mentioned in lieu of homestead provisions of the law and all exemptions. The only exception provided for in the statute is that of fraud. But the apparent duty above stated must be construed in connection with other statutory provisions and principles in such a case as this. His honor, the trial judge, rendered a very able judicial opinion upon this question, which, indeed, constitutes a brochure upon the subject. Nor is he to be criticized for accepting the one statute at its face value and feeling fettered thereby, for it is a fact that the majority of about 14 jurisdictions which have considered this and analogous questions sustain him.

It is so offensive to good conscience, repugnant to justice, and revolting to the mind of every right-thinking person that one should come into court with bloody hands and receive as it were a reward for his iniquity that we cannot conceive that the Legislature composed of persons of good sense and integrity should ever have intended, in enacting the statute and its amendment, that such consummation could be accomplished. It must be true that such a state of facts as appear in this case was not in the mind of the Legislature at the time the statutes were passed.

It is argued on behalf of respondent, in effect, with which the trial court agreed, that the courts must give effect to the language of the statute as written, it being plain and unambiguous; that to construe this statute so that it would provide that one as in the present case should not benefit by his own crime would be to judicially interpret into the statute a provision not there found. It is also declared that it cannot be said that the Legislature did not have in mind the making of exceptions, because it provided against fraud.

We are compelled to admit that a majority of the courts which have passed upon similar questions have held that the court has no power to write into an unambiguous law an exception which would prevent one from benefiting by his criminal act, when the Legislature has not so provided. Some of the cases which have been examined have dealt with statutes upon insurance policies where the beneficiary by homicide killed the insured so as to more speedily come into the money. Others have been upon statutes of inheritance or descent, where one has killed a person whose property had been willed to, or would descend to him, in order more speedily to come into the estate.

The New York Court of Appeals decided in *Riggs v. Palmer*, 115 N. Y. 506, 22 N.E. 188, 5 L.R.A. 340, that a murderer cannot take there, as legatee or heir, the estate of one whom he has murdered for the purpose of obtaining the property. It was well observed:

"Besides, all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. . . . These maxims, without any statute giving them force or operation, frequently control the effect and nullify the language of wills. . . . Here there was no certainty that this murderer would survive the testator, or that the testator would not change his will, and there was no certainty that he would get this property if nature was allowed to take its course. He therefore murdered the testator expressly to vest himself with the estate. Under such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime?"

And so in the case at bar, under the allegations of the petition, the murderer killed his wife so that he could possess himself of her prop-

erty. The Legislature, thinking, of course, of the most common acts and conduct of mankind, provided only the exception for fraud, but is it to be supposed that, when providing against fraud as an exception in which the award should not be granted, it had in mind that the much blacker act and crime, homicide, should not bar one from taking the property as a homestead, while a mere fraud should? Such a supposition is unthinkable.

An English case (*Cleaver v. Mutual Reserve Fund Life Ins. Co.*, 1 Q. B. 147), a case interesting also because it grew out of the famous Florence Maybrick Case, held that the trust created by the insurance policy in favor of the wife under the English Married Woman's Property Act, was incapable of being performed by reason of Mrs. Maybrick's crime, and that the insurance money became a part of the estate of the insured.

In giving judgment, Lord Esher, M. R., said:

"Applying the rule of public policy to this construction of the section the wife here has, by her crime, rendered the trust in her favor incapable of performance. It must therefore be treated as if it did not exist."

Fry, L. J., in giving judgment, said that:

"It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanor. . . . This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion."

A similar question arose from a devise by will by a testator who was killed by his beneficiary, reported in 24 Ont.Rep. 132. It was there held that by his felonious act in killing his wife, although the killing was manslaughter and not murder, the husband had absolutely precluded himself from obtaining any benefit under her will or out of her estate. This decision was affirmed in that respect by the Supreme Court of Canada, in 24 Can.Sup.Ct.Rep. 650. . . .

To allow respondent to reap the reward of his intentional homicide by granting him the separate property of his murdered wife is so utterly opposed to justice, good conscience, morals, and the maxims of the common law which are a part of the law of the land in force in this state that we are utterly unable to assent thereto.

The judgment is reversed, with instructions to overrule the demurrer to appellant's answer to respondent's petition, receive evidence in support of the answer, and proceed further in accordance herewith.

ASKREN, J. (dissenting). The majority opinion is a splendid exposition of what exceptions should have been placed in the statute. But the failure to place them there affords us no ground for supplying the deficiency. It may be, as the opinion says, offensive to good con-

science to allow a guilty person to obtain the benefits of the statute, but I confess that the shock to my conscience is greater at the attempt of the court to legislate an exception into the statute.

As long as the Constitution provides that the Legislature alone shall enact laws for the people of the state, I shall deny that the court possesses that right.

NOTE

The principal case was summarily distinguished in *In re Welch's Estate*, 200 Wash. 686, 94 P.2d 758 (1930). After noting the holding in the case and the fact that the statute concerned had been amended so as to coincide with it, the court said, "Without further discussion of the cited case, we think neither the facts nor the reasons assigned for the decision applicable to the instant case," and went on to hold that a statute creating an award to the surviving spouse in lieu of homestead rights gave an absolute right in spite of countervailing equities. There is language in the case tending contra to the ideas of the principal case.

DUNCAN v. MAGETTE

Supreme Court of Texas, 1860. 25 Tex. 245.

This was a suit brought on the 28th day of March, 1857, by John J. Magette against John Duncan, for the sum of \$730, with interest thereon from the 1st day of March, 1856, the date of the alleged promise. The defendant demurred to the petition, and answered to the facts by a general denial, and pleaded that the plaintiff, on the 9th day of August, 1856, whilst acting as his overseer, wantonly, and without lawful excuse, killed a certain slave of the defendant, of the value of \$1500, "which he pleads in reconvention," and prayed for judgment for the same.

ROBERTS, J.: The defendant pleaded as an equitable offset, that Magette being his overseer, without any just cause, killed one of his (defendant's) slaves of the value of fifteen hundred dollars; and that said Magette was a transient person, and had no visible means, within the knowledge and belief of the defendant, sufficient to satisfy the said damage done to the defendant by said tort.

This is hardly a sufficient allegation of insolvency, or of his nonresidence. Admitting it was, we do not think the plea a good one. Our statute prescribes "that when any suit shall be commenced and prosecuted, in any court within this republic, for any debt due by judgment, bond, bill, or otherwise, the defendant shall have liberty, upon trial thereof, to make all the discounts he can against such debt; and upon proof thereof, the same shall be allowed in court." Again: "and when the defendant may have a claim against the plaintiff, similar in its nature [but they need not be of the same degree] to that of plaintiff, he shall be permitted to file in his answer a plea of reconvention, setting forth the amount due him," etc. And again: "that if plaintiff's cause of action be brought on a claim of unliquidated or uncertain damages founded on a tort or breach of contract, the defendant shall not be permitted to set-off or discount any debt due him by the plain-

tiff; and if *the suit be founded on a certain demand, the defendant shall be permitted to set-off unliquidated or uncertain damages, founded on a tort or breach of covenant on the part of plaintiff.*" Hart. Dig., Arts. 606, 609, 610.

These clauses of the statute contain the general power given to the court to allow discounts and set-offs, with the limitations and restrictions of that power.

The case now before us falls clearly under the last restriction. The plaintiff has sued for a certain demand—seven hundred and thirty dollars, loaned money, and defendant attempts to set-off against this, uncertain damages founded on a tort—committed by killing his slave. This restriction has been modified somewhat, by the construction given to the word *reconvention*, used in this statute, in cases where the demand and the tort were a part of, or grew out of, or were connected with, the same transaction. (*Walcot v. Hendrick*, 6 Tex. Rep., 406.) This was by giving to that term the effect given to it in the civil law of Spain, by its being used in our statute,—it being a word peculiar to the civil law. We think this construction has been sufficiently liberal already.

It is now proposed to add another qualification or exception to this restriction by preventing its operation in case the plaintiff be insolvent. This exception is not contained in the statute; nor is such a case embraced within the scope of the general power granted to the court to allow discounts. (Art. 606.) And therefore if it be exercised by the court, it must derive the power from some source, other than the statute. A court of equity will set-off mutual demands, which cannot be set-off under the statute, in case of insolvency of the plaintiff. This is from an inherent power of a court of equity, independent of the statute allowing off-sets. It furnishes a remedy by permitting a cross action. This is a remedy in aid of the law, and in advancement of its spirit, in cases where its letter might permit an irreparable injury. But can it be truly said that a court of equity would be granting a remedy in aid of the law and in the advancement of its spirit by extending it to a case positively prohibited by the law? Our law positively prohibits the application of a set-off arising upon a tort to a certain demand. The cases of uncertain damages relied on by defendant arose out of contracts not torts. Such is not now regarded to be the province of a court of equity. If it be said that the law did not contemplate a case of insolvency in this provision, it may be answered, that upon the same reasoning every rule of law, however absolute or unqualified, may have implied exceptions annexed to it until it will almost cease to be a rule at all.

We think then that the statute prohibits this plea, and that the court below did not err in overruling it.

The counsel for the appellee applied for a rehearing.

ROBERTS, J.: Although the counsel on both sides rely upon the rules of law as respectively presented by them, it is obvious that the great argument, whether expressly developed or not, by which those rules

are sought to be discovered, interpreted and enforced, consists in an appeal to the sense of justice of the court. The opinion of the court in this case does not yield to the force of that appeal. Having written it, I avail myself of the opportunity afforded by this application, to present my own views upon the foundation and force of this appeal to the sense of justice of the court, whether used as an influencing consideration, in interpreting and enforcing the rules of law, or directly urged as the basis of judicial action. A frequent recurrence to first principles is absolutely necessary in order to keep precedents within the reason of the law.

Justice is the dictate of right, according to the common consent of mankind generally, or of that portion of mankind who may be associated in one government, or who may be governed by the same principles and morals.

Law is a system of rules, conformable, as must be supposed, to this standard, and devised upon an enlarged view of the relations of persons and things, as they practically exist. Justice is a chaotic mass of principles. Law is the same mass of principles, classified, reduced to order, and put in the shape of rules, agreed upon by this ascertained common consent. Justice is the virgin gold of the mines, that passes for its intrinsic worth in every case, but is subject to a varying value, according to the scales through which it passes. Law is the coin from the mint, with its value ascertained and fixed, with the stamp of government upon it which insures and denotes its current value.

The act of moulding justice into a system of rules detracts from its capacity of abstract adaptation in each particular case; and the rules of law, when applied to each case, are most usually but an approximation to justice. Still, mankind have generally thought it better to have their rights determined by such a system of rules, than by the sense of abstract justice, as determined by any one man, or set of men, whose duty it may have been to adjudge them.

Whoever undertakes to determine a case solely by his own notions of its abstract justice, breaks down the barriers by which rules of justice are erected into a system, and thereby annihilates law.

A sense of justice, however, must and should have an important influence upon every well organized mind in the adjudication of causes. Its proper province is to superinduce an anxious desire to search out and apply, in their true spirit, the appropriate rules of law. It cannot be lost sight of. In this, it is like the polar star that guides the voyager, although it may not stand over the port of destination.

To follow the dictates of justice, when in harmony with the law, must be a pleasure; but to follow the rules of law, in their true spirit, to whatever consequences they may lead, is a duty. This applies as well to rules establishing remedies, as to those establishing rights. These views will, of course, be understood as relating to my own convictions of duty, and as being the basis of my own judicial action.

NOTES

1. Cf. *Spencer v. State*, supra, p. 995.
2. The doctrine of equity of the statute has, as such, been generally abandoned today. See especially *Tompkins v. First National Bank*, 18 N.Y.S. 234 (1892), and generally Loyd, "The Equity of a Statute," 58 U.Pa.L.Rev. 76 (1909), Horack, "Statutory Interpretation—Light from Plowden's Reports", 19 Ky.L.J. 211 (1931), de Sloovere, "Equity and Reason of a Statute," 21 Cornell L.Q. 591 (1936).
3. See Radin, "A Short Way With Statutes", 56 Harv.L.Rev. 388, 400-404 (1942).

GREENVILLE BASEBALL v. BEARDEN

Supreme Court of South Carolina, 1942. 200 S.C. 363, 20 S.E.2d 813.

FISHBURNE, JUSTICE. At the 1941 session of the General Assembly the following Act was passed (Acts 1941, 42 St. at large, page 307):

"Section 1: . . . For a period of two years after the effective date of this Act, it shall be lawful to exhibit publicly motion pictures, athletic sports and musical concerts and to engage therein from and after two p. m. on Sunday in counties wherein the United States Government *has established and maintains permanent or temporary Army Forts, Naval or Marine bases*; Provided, that the exhibition of such motion pictures and engagements in athletic sports is lawful on other week days. Provided, However, that the theatre operator shall first obtain from the town or city council a special permit to run his theatre on Sunday. The terms of this Act shall in no way conflict with any Sunday evening church service.

"Section 2: Repeal.—All laws or parts of laws in anywise inconsistent herewith are hereby repealed." (Emphasis added.)

The primary question for determination presented in this action, which by permission was instituted in the original jurisdiction of this Court, is whether an army *air* base comes within the purview of the statute. The specific issue has to do with the air base located at Greenville. The plaintiff seeks injunctive relief restraining the sheriff of Greenville County and his duly authorized deputies from in any manner prohibiting or interfering with the plaintiff in the exhibition of baseball games for public amusement in Greenville County after 2 o'clock P. M., on Sundays, and from arresting plaintiff's employees, baseball players and baseball umpires engaged in and officiating at such baseball games. Under the order of this Court a temporary restraining order was issued pending the final decision of the case.

It appears that on Sunday afternoon, April 26, 1942, in Greenville, a baseball game was commenced between a team of the plaintiff and a team from Macon, Georgia, both teams being members of the South Atlantic League. The sheriff of Greenville County and his deputies stopped the game, and arrested the umpires upon a charge of violating Section 1733 of the 1932 Code. It is alleged and is admitted that the sheriff has threatened and intends to stop all future games played on Sunday, and to arrest those participating therein. The plaintiff sets

forth that unless the sheriff and his deputies are restrained, it will suffer irreparable property loss and damage; and that the steps threatened by the respondents if carried into execution will involve numerous lawsuits, will result in a multiplicity of successive prosecutions, and will effectually deprive the plaintiff of its property and property rights without due process of law.

It is contended by the plaintiff that Section 1733, under which the respondents acted, has been repealed by the Act of 1941, and is clearly void in the County of Greenville. Section 1733 proscribes and prohibits public sports in this State on Sunday, and a violation of the statute is made a misdemeanor.

The respondents take the position that the Act of 1941 should be given a literal and narrow construction. They say that an army "fort" does not include an army "air base."

It often happens that the true intention of the Legislature, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning. In such cases, the carrying out of the legislative intention, which is the prime and sole object of all rules of construction, can be accomplished only by departure from the literal interpretation of the language used. Hence, Courts are not always confined to the literal meaning of a statute; the real purpose and intent of the lawmakers will prevail over the literal import of the words.

Modern authorities generally favor the interpretation of statutes according to the natural and obvious signification of the wording, without resort to subtle and refined construction for the purpose either of limiting or extending their operation. And Courts will reject the ordinary meaning of the words used in a statute however plain it may be, when to accept such meaning would defeat the plain legislative intent.

It is a familiar canon of construction that a thing which is in the intention of the makers of a statute is as much within the statute as if it were within the letter. It is also an old and well-established rule that words ought to be subservient to the intent, and not the intent to the words.

It is argued that the army air base at Greenville does not justify the application and operation of the Act in Greenville County, because an army "air base" does not come literally within the wording of the 1941 Act. In our opinion, however, an army air base does plainly come within the intent, purpose, spirit and design of the Act.

When the 1941 statute was adopted by the Legislature, the Congress of the United States had passed the Selective Service Act, 50 U.S.C.A. Appendix § 301 et seq., which called to the colors millions of young men. This Act was passed to meet the grave emergency which then and now confronts this nation. The United States Government by virtue of the Selective Service Act embarked upon a vast undertaking, all of which was well known to the General Assembly of this State,—the organiza-

tion and training of an armed force of tremendous proportions. Upon induction into the service, these men were assigned and are still being assigned to the Army, the Navy, the Marine Corps, the Air Corps, and other branches of the service too numerous to mention. Training centers were established by the Federal Government in practically every State in the Union. These centers are designated as Forts, Camps, Naval and Marine Bases, Air Field, Airports, Air Bases, and words of like import and terminology. But regardless of name or particular designation, these centers are places generally devoted to the garrison and training of men in the art and science of modern warfare—whether they be soldiers, sailors, marines, air pilots or bombardiers.

We have in South Carolina several of these training centers, of which the Court takes judicial notice: Fort Jackson, formerly Camp Jackson, near Columbia; Camp Croft, at Spartanburg; the Marine and Naval Bases at Charleston and Parris Island; Air Bases in Richland and Sumter Counties. We may safely assume that the Legislature was fully cognizant of the history and conditions of the time, and that the 1941 Act was passed in the light of a realistic situation. The lawmakers were obviously confronted with the problem of legally allowing to the thousands of troops at all training centers reasonable recreation and diversion on Sunday afternoons,—relaxation from the hard and continuous work of their daily routine.

To construe the Act as contended for by the respondents would do violence to the evident intention of the General Assembly. We would have to hold that the lawmakers were more concerned with the recreational welfare of the troops at *Fort* Jackson than they were with the soldiers at *Camp* Croft, and that they completely ignored the exact similarity of situation and condition of those men undergoing training in aviation at the army *air bases* in Sumter and Richland County. If those in authority should tomorrow change the designation of Fort Jackson, to Camp Jackson then to be logical, in accordance with the contention of respondents, the thousands of soldiers now at Fort Jackson would ipso facto be prevented from attending athletic sports on Sunday in Richland County, because the mere change of name would take Richland County out of the operation of the Act.

It was held in the case of *Hull v. Hull*, 2 Strob.Eq. 174, 21 S.C.Eq. 175:

"Where the words of a Statute, in their primary meaning, do not expressly embrace the case before the Court, and there is nothing in the context to attach a different meaning to them, capable of expressly embracing it; the Court cannot extend the Statute, by construction, to that case, *unless it falls so clearly within the reasons of the enactment as to warrant the assumption that it was not specifically enumerated among those described by the Legislature, only because it may have been deemed unnecessary to do so.* [Emphasis added.]

"Where the general intention of the Statute embraces the specific case, though it be not enumerated, the Statute may, nevertheless, be applied to it by an equitable construction, in promotion of the evident design of the Legislature. But where this is done, it is always presup-

posed that such a case was within their general contemplation, or purview, when the Statute was enacted by them; for if the case be omitted in the Statute because not foreseen or contemplated, it is a *casus omis-sus*, and the Court, having no legislative power, cannot supply the defects of the enactment."

It seems to us too clear for argument that the present case falls clearly within the reasons of the enactment and warrants the assumption that an army "air base" was not specifically enumerated only because the lawmakers deemed it unnecessary. By an equitable construction, "air base" must be deemed included, although not enumerated, in promotion of the evident design and purpose of the Legislature.

Included in the record and attached to the return of the respondents are affidavits from several State Senators who were members of the State Senate when the Act of 1941 was adopted, which purport to show the construction placed by them upon the Bill in the course of its passage.

It is a settled principle in the interpretation of statutes that even where there is some ambiguity or uncertainty in the language used, resort cannot be had to the opinions of legislators or of others concerned in the enactment of the law, for the purpose of ascertaining the intent of the Legislature. . . .

Another question presented by the respondents, a discussion of which we *deferred*, is that the *Greenville Air Base is not yet established or maintained* in Greenville County. It will be recalled that the 1941 statute uses the words, "established and maintains permanent or temporary Army Forts," etc. . . . Unquestionably, the air base site has been established, and the air base project is nearing completion. But under the recited facts, we are unable to say, in the light of the 1941 Act, that the Greenville Army Air Base has yet been established and is being maintained as an air base. We do not think that it is, and for this reason alone a permanent injunction will not be issued at this time as prayed for in the complaint. Therefore, the temporary restraining order heretofore issued is vacated and discharged.

Contrary to the contention of the respondents, we are of the opinion that the plaintiff lacked an adequate remedy at law, and was warranted in bringing this suit in the court of equity.

Injunction denied.

NOTE

In *In re Englewood Mfg. Co.*, 28 F.Supp. 653 (D.C.Tenn.1939), the court, in refusing to depart from the literal meaning to meet what it assumed to be the "equities" of the case, said (pp. 655-656): ". . . It must be remembered that an act of a legislative body is a mandate from the people, which is, in theory at least, promulgated for the greatest good for the greatest number. The Courts have no right to change legislation in a given case even though the Court might feel that the equities are not fully met."

F. The Mischief Rule Approach

HEYDON'S CASE

Exchequer, 1584. 3 Co. 7a, 76 E.R. 637.

And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:—

- 1st. What was the common law before the making of the Act.
- 2nd. What was the mischief and defect for which the common law did not provide.
- 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy. And then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and proprivato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*. And it was said, that in this case the common law was, that religious and ecclesiastical persons might have made leases for as many years as they pleased, the mischief was that when they perceived their houses would be dissolved, they made long and unreasonable leases: now the stat. of 31 Hen. 8, doth provide the remedy, and principally for such religious and ecclesiastical houses which should be dissolved after the Act (as the said college in our case was) that all leases of any land, whereof any estate or interest for life or years was then in being, should be void; and their reason was, that it was not necessary for them to make a new lease so long as a former had continuance; and therefore the intent of the Act was to avoid doubling of estates, and to have but one single estate in being at a time; for doubling of estates implies in itself deceit, and private respect, to prevent the intention of the Parliament. And if the copyhold estate for two lives, and the lease for eighty years shall stand together, here will be doubling of estates *simul & semel*, which will be against the true meaning of Parliament. . . .

SAMUEL E. THORNE, THE EQUITY OF A STATUTE

31 Illinois Law Review 202, 214-215, 217 (1936).

. . . We come finally to the celebrated rules in Heydon's Case. They are not new—Plowden had anticipated them years earlier—but in the light of the tyrannically strict theory of interpretation we have sketched above they are revealed in their true light. They represent an effort to substitute *Sinnauslegung* for the mechanical *Wortauslegung* that was current judicial theory. They are phrased in very wide

terms, and on their face may seem to envisage the idyllic picture they are said to describe. But that picture is brought by the words only to a modern mind. Their kernel lies in the fourth rule—"the true reason of the remedy"—the purpose of the remedy—the *Sinn* of the remedy. The rules cannot be taken anachronistically as an early effort to inculcate in judges a view that the statute revealed an attitude that the appropriate exercise of judicial power permitted courts to advance. Courts had not yet reached the stage of looking beyond a statute's *words*. Two hundred and fifty years will elapse before Baron Parke enunciates his golden rule of statutory interpretation, narrow as it is. The resolutions in *Heydon's Case* are instead much closer to what courts were groping toward by means of the equity of the statute: and understanding of the *ratio legis* rather than the *ratio verborum*, an effort to make the interpretation of statutes, whether they be phrased in the singular or plural, something more than merely a grammatical exercise. The words, and not their sense, had heretofore absorbed complete attention: *Heydon's Case* points toward another side, and gives a rule of thumb for illuminating the words by reference to that which they are to do. The choice is not the modern one between what a statute said and what a statute intended to do, but rather between what it said in abstract, *in vacuo*, so to speak, and what it intended to do. It is needless, as Professor Plucknett has pointed out in another connection, to pretend that it is easy to think in these unfamiliar dimensions, and it may be urged that the distinction put forward here is a distinction without a difference. Nevertheless we think it one of much importance and one too frequently overlooked. . . .

Prior to *Heydon's Case* we find no effort to extend statutes (except those in affirmation of an already existing common law rule) beyond their literal word content in the light of what they were intended to do. *Heydon's Case* itself extends a statute only slightly, and that in view of an apparent and exceptionally clear *ratio legis*. After the case we similarly can find no insistence upon purpose distinguished from words: the meaning of the statute continues to be gathered from its words as they stand, and the process of interpretation is confined to the grammatical or literal meaning of the text.. . .

NOTE

In Allen, "Law in the Making", 3rd ed. (1939) the author states at p. 378, f.n. 1: "Thus Byles, J., in *Shuttleworth v. Le Fleming* (1865), 687, 703: 'I suppose "within the equity" means the same thing as "within the mischief" of the statute' (which scilicet, was not Plowden's meaning)."

NASHVILLE & K. R. Co. v. DAVIS

Supreme Court of Tennessee, 1902. 78 S.W. 1050.

WILKES, J. This is an action for damages against the railroad company for running over and killing three geese of the value of \$1.50. The owner of the geese lived about one mile from the railroad, but permitted them to run at large, and they went upon the railroad track near a public crossing. The engineer blew the whistle and rang the bell for the crossing, but there is no proof that he rang the bell or sounded the alarm for the geese. Whether the geese knew of this failure to whistle for them does not appear. We think there is no evidence of recklessness or common-law negligence shown in the case, and the only question is whether a goose is an animal or obstruction in the sense of the statute (section 1574, subsec. 4, Shannon's Compilation), which requires the alarm whistle to be sounded, and brakes put down, and every possible means employed to stop the train and prevent an accident when an animal or obstruction appears on the track. It is evident that this provision is designed, not only to protect animals on the track, but also the passengers and employes upon the train from accidents and injury. It would not seem that a goose was such an obstruction as would cause the derailment of a train, if run over. It is true, a goose has animal life, and, in the broadest sense is an animal; but we think the statute does not require the stopping of trains to prevent running over birds, such as geese, chickens, ducks, pigeons, canaries, or other birds that may be kept for pleasure or profit. Birds have wings to move them quickly from places of danger, and it is presumed that they will use them (a violent presumption, perhaps, in the case of a goose, an animal which appears to be loath to stoop from its dignity to even escape a passing train). But the line must be drawn somewhere, and we are of the opinion that the goose is a proper bird to draw it at. We do not mean to say that in the case of recklessness and common-law negligence there might not be a recovery for killing geese, chickens, ducks, or other fowls, for that case is not presented. Snakes, frogs, and fishing worms, when upon railroad tracks, are, to some extent, obstructions; but it was not contemplated by the statute that for such obstructions as these trains should be stopped, and passengers delayed.

We are of the opinion that there is error in the court below giving judgment for the plaintiff, and the judgment is reversed, and the case having been heard without a jury, the suit is dismissed, at the plaintiff's cost.

SANDERSON v. HARTFORD EASTERN RY. CO.

Supreme Court of Washington, 1930. 150 Wash. 472, 291 P. 241.

BEALS, J. Robert Sanderson, Sr., the plaintiff in this action, recovered judgment upon the verdict of a jury against defendant for personal injuries suffered by him as the result of a collision between an automobile in which plaintiff was riding, the property of and driven by plaintiff's son, Samuel Sanderson, and a gasoline-driven motor car operated by defendant on its railway track in Snohomish county; the accident occurring at the point where the main highway . . . crosses defendant's railway.

Appellant railway contends that the court erred in instructing the jury as to the law upon certain phases of the case.

Section 2528, Rem.Comp.Stat., reads as follows: "Every engineer driving a locomotive on any railway who shall fail to ring the bell or sound the whistle upon such locomotive, or cause the same to be rung or sounded at least eighty rods from any place where such railway crosses a traveled road or street on the same level (except in cities), or to continue the ringing of such bell or sounding of such whistle until such locomotive shall have crossed such road or street, shall be guilty of misdemeanor."

Section 2303, Rem.Comp.Stat., defines the word "railway" in the following terms: "The term 'railway' or 'railroad' shall include all railways, railroads and street railways, whether operated by steam, electricity or any other motive power."

In the case at bar the court instructed the jury as follows:

"One of the statutes of this state provides that every engineer driving a locomotive on any railway who shall fail to ring the bell or sound the whistle upon such locomotive, or cause the same to be rung or sounded, at least eighty rods from any place where such railway crosses a traveled road or street on the same level, or to continue the ringing of such bell or sounding of such whistle until such locomotive shall have crossed such road or street, shall be guilty of a misdemeanor.

"I instruct you that the law is not satisfied with a mere formal observance of its requirements, but the statute which I have just quoted to you requires that the whistle or bell with which the locomotive is equipped must be of a size and character reasonably suited to warn travelers at railroad crossings of the approach of a train and that the bell or whistle must be sounded in such a manner as to give reasonable warning of such approach. And I instruct you that any violation of this statute, as I have just explained its provisions, would be negligence, as a matter of law, for which the railroad company would be liable in damages to anyone injured as a natural and proximate result."

Appellant does not contend that the horn of the gas car which it was operating along the track was sounded as far back from the crossing as is required by the statute above quoted. Testimony was introduced by appellant to the effect that the horn was sounded at a point approxi-

mately 700 feet from the crossing, and in this connection appellant requested the court to charge the jury as follows:

"You are instructed that the burden of proving that the defendant was negligent rests upon the plaintiff. If the motorman in charge of the car which collided with the automobile sounded his horn in sufficient time before the car reached the crossing to have enabled the driver of the automobile to stop before going on the track, in that event the defendant was not guilty of negligence, and your verdict should be for the defendant."

Appellant excepted to the instruction given by the trial court and to the refusal of the court to give the requested instruction, and argues here that the court committed reversible error in giving the instruction complained of and in failing to give the requested instruction. Appellant contends that a gas-driven motor car, driven along a railway track, is not a locomotive, and that the section of the statute above quoted has no application to the situation here presented. While it is true that the word "locomotive" generally suggests the idea of a large engine propelled by steam along a railway, we find no reason for holding that the statute is limited in its application to such a machine. The purpose of the section is clear; it requires a certain warning to be given of the approach to a crossing of a train moving along a railway track. The statute was passed for the benefit and protection of the traveling public, and should not be strictly construed so as to limit or restrict its manifest purpose. Appellant, having chosen to operate trains on its railway propelled by gasoline-driven motors, must be held, in the operation of such trains, to compliance with the statute now being considered. A railway track is in itself some notice to the traveling public that cars may be moving thereon, but the statute requiring the ringing of a bell or the sounding of a whistle when a train is approaching a grade crossing is well known, and these familiar sounds are listened for by persons approaching the track with the intention of crossing the same. To permit a person operating cars upon a track to employ, in propelling its cars, an engine driven by some power other than steam, and thus escape the operation of the statute, would have the effect of increasing the already considerable danger at grade crossings and subject the traveling public to an increased hazard. The sounding of a bell or whistle immediately suggests the approach of cars along the railway, while the sounding of an automobile horn carries no such intimation, but rather intimates the approach of an automobile along the highway. The authorities cited by appellant in support of its contention that a gas-driven car is not a locomotive are not applicable to the situation here presented. The trial court was correct in applying the statute above quoted, and in refusing to submit to the jury, as requested by appellant, the question of whether or not appellant's employee in charge of the gas car sounded his horn in sufficient time to enable the driver of the automobile to stop before reaching the track.

Finding no error in the record, the judgment appealed from is affirmed.

NOTES

1. In *Smith v. A. T. & S. F. Ry. Co.*, 145 Kan. 615, 66 P.2d 562 (1937), the principal case was distinguished on the ground that the "word 'whistle' is not modified by use of the word 'steam.'" The word was so modified in the *Smith Case* and it was found that it had remained unchanged through statutory revisions made in periods when the use of other motive power than steam was becoming common. The court refused to construe the statute "to require that a steam whistle, as distinguished from an . . . air horn must be placed on a railroad train propelled by an electric motor. . . ."

2. "While the language of . . . (the act) is clear and free from ambiguity, and for this reason there is nothing to construe, still, to carry out the true meaning and intent of the Congress, which enacted it and to understand what that intent was, it is proper to ascertain the mischief supposed to prevail at the time and which it was sought to remedy by the enactment of that statute." *Trieber, D.J.*, in *United States v. Lewis*, 192 F. 633, 639 (D.C.Mo.1911).

3. See *Commonwealth v. Barney*, 115 Ky. 475, 74 S.W. 181 (1903).

CAMINETTI v. UNITED STATES

Supreme Court of the United States, 1916.

242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442, L.R.A.1917F, 502, Ann.Cas.1917B, 1168.

[The case appears *supra*, p. 691.]

NOTES

1. See discussion of the principal case and *Cleveland v. United States*, *supra* p. 823, in Note: "Interstate Immorality: the Mann Act and the Supreme Court, 56 Yale L.J. 718 (1947).

2. In *Southern Ry. Co. v. Machinists' Local Union*, 111 F. 49 (C.C.Tenn.1901), the court held that strikers who attempted to induce apprentices to go on strike were liable to penalty under the following act:

"Section 1. That hereafter it shall not be lawful for any person in this state knowingly to hire, contract with, decoy or entice away, directly or indirectly, any one, male or female, who is at the time under contract or employ of another; and any person so under contract or in the employ of another leaving their employ without good and sufficient cause, before the expiration of the time for which they were employed, shall forfeit to the employer all sums due for service already rendered, and be liable for such other damages the employer may reasonably sustain by such violation of the contract."

The court said, in part: "The only cases where the supreme court of Tennessee has considered this statute, so far as counsel or the court are advised, are those of *McCutchin v. Taylor*, 11 Lea. 259, and *Morris v. Neville*, Id. 271. By these cases the statute was most rigidly enforced against those who had decoyed and enticed away the laborers. They were negro farm laborers in both cases,—certainly in one case, and presumably in the other; and I have no doubt, as counsel argue, that this statute was intended solely for that class of laborers,—agricultural farm hands,—and possibly to prevent housewives from decoying or enticing away each other's cooks or other servants. But this nowhere appears on the face of the statute, or otherwise in any other way, than as an inference to be drawn from what counsel and the court know of the political and industrial conditions of this section of the country. It may be conceded that it is not at all likely that a Ten-

nessee legislature intended to make by this statute a law against strikes and strikers and the labor unions. See Acts Tenn.1901, p. 146, c. 104. But this consideration cannot control the courts in the construction of the statute, if it be broad enough in the language used to cover the case of strikes and the labor unions. If a legislature intends to limit its enactment, they must do so by the terms of the act itself, and no other limitation is authoritative where the language is unambiguous and construes itself. It is not permissible to go outside a statute plain in its words, as covering all labor contracts and laborers, and to say, on any consideration whatever, that there was an intention to limit it to a particular class of laborers, white or black, or however else such classification may be made, as of agricultural or industrial workmen; not when the subject-matter and the language used comprehend both these and all other classes. Particularly is this so under constitutions forbidding race and class distinctions. If the legislature intended to limit this act to farm laborers, they should have said so, if they have the constitutional power to so limit such an act, as to which I express no opinion, because the act expresses no such limitation, and we cannot add it to the words of the act."

CABELL v. MARKHAM

Circuit Court of Appeals of the United States, Second Circuit, 1945.
148 F.2d 737.

L. HAND, CIRCUIT JUDGE. This appeal depends upon the meaning of a part of the proviso to § 9(e) of the Trading with the Enemy Act, as amended on March 10, 1928, 50 U.S.C.A. Appendix, § 9(e), which we quote in the margin.¹ The plaintiff filed a complaint under § 9(a) of that act, alleging that he was a creditor of an Italian insurance company, whose assets in this country the predecessor in office of the defendant, Markham, had seized, as Alien Property Custodian; and that he had presented his claim in due form to the Custodian, who refused to recognize it. The defendants moved to dismiss the complaint because of its insufficiency in law, on the ground that the claim had not been in existence before October 6, 1917, and had not been filed before the date of the enactment of the Settlement of War Claims Act of 1928. The judge held that, since both these facts appeared in the complaint, the proviso of § 9(e) just quoted covered the situation; and for this reason he dismissed the complaint.

When the Trading with the Enemy Act was first passed on October 6, 1917, it contained the substance of what is now subdivision (a), but nothing more. It was amended again and again, but subdivision (e) was not added until 1920 (41 St. L. 980), though from the first it provided that no debt should be paid which had not been "owing" before October 6, 1917. The addition that the claim should be presented before March 10, 1928, dates from the amendment of that year (45 St.L.

¹ "nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder; nor shall a debt be allowed under this section unless notice of the claim has been filed, or application therefor has been made, prior to the date of the enactment of the Settlement of War Claims Act of 1928."

271). The statute was not re-enacted when the present war broke out; nor was that necessary, for it automatically went into effect again. This appears, for example, from the definition of the phrase, "beginning of the war," in § 2, 50 U.S.C.A. Appendix, § 2 ("the day on which Congress has declared or shall declare war"); from § 302 of Title III of Chapter 593 of Laws of the First Session of the 77th Congress, 55 St.L. p. 839, 50 U.S.C.A. Appendix, § 617, which assumes that it had not been in force before December 8, 1941, and that it went into effect again at once thereafter; and because § 5(b) was amended without mention of any other part. 55 St.L. 839, 840, 50 U.S.C.A. Appendix, § 616. For this reason it seems proper for purposes of interpretation to interpret it as though it had been enacted on December 8, 1941, when the present war was declared. Were that literally the case, we should be faced with a statute, subdivisions (a) and (e) of which flatly contradicted each other. Subdivision (a) provides that "any person . . . to whom any debt may be owing . . . may file . . . a notice of his claim . . . and the President . . . may order the payment . . . of the money . . . held." If the President does not order payment, the "said claimant may institute a suit in equity . . . to establish the . . . debt so claimed, and if so established the court shall order the payment . . . to which the . . . claimant is entitled." This language is mingled with that giving a remedy for property mistakenly seized, and it is unnecessary to labor the point that it was intended to put creditors upon an equal footing with owners. Indeed, although we assume it to be true that for constitutional purposes it was not necessary to allow the alien's creditors any recourse to the seized property, since the alien himself remains liable; for practical purposes there is little difference between debts and claims to property.

It is at least arguable that the whole of subdivision (e) is limited to seizures made during the first war. It begins with a provision that "a citizen or subject of any nation which was associated with the United States in the prosecution of the war" may recover his property or collect his debt only in case that nation gave reciprocal rights to citizens of the United States. The use of the preterite is significant, particularly when coupled with the word, "associate," which it will be remembered was chosen during the last war in sedulous avoidance of any implication that we had "allies." If this be true, it would be indeed unreasonable not to confine the proviso similarly: that is, to read it otherwise than as limited to seizures made during that war. If we do not so read it, the result is really nonsense, for the remedy given in subdivision (a), which is prospective, is completely defeated by subdivision (e). Nobody can seriously believe that a general plan designed to be successively suspended and revived, as peace and war should alternate, was meant to be permanently mutilated by a statute of limitation expressly made applicable to only the first of its phases. The defendants have no answer except to say that we are not free to depart from the literal meaning of the words, however transparent may be the resulting stultification of the scheme or plan as a whole.

Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute.

As Holmes, J., said in a much-quoted passage from *Johnson v. United States*, 163 F. 30, 32, 18 L.R.A., N.S., 1194: "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." . . .

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. Since it is utterly apparent that the words of this proviso were intended to be limited to seizures made during the last war, and could not conceivably have been intended to apply to seizures made when another war revived the Act as a whole from its suspension, it does no undue violence to the language to assume that it was implicitly subject to that condition which alone made the Act as a whole practicable of administration.

Judgment reversed.

[On certiorari the judgment of the United States Circuit Court of Appeals for the Second Circuit was affirmed by the Supreme Court of the United States in *Markham v. Cabell*, 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945).]

NOTES

1. *Sandy v. Walter Butler Shipbuilders*, 221 Minn. 215, 21 N.W.2d 612 (1946), cites the principal case. The court construes portions of the Workmen's Compensation Act of 1943 where a literal meaning would have limited the coverage of that act, to have a broader meaning since "The obvious purpose of the 1943 act was to broaden the scope and enlarge the field within which such occupational risks were to be covered."

2. In *Brooklyn Nat. Corp. v. Commissioner of Internal Revenue*, 157 F.2d 450 (2 Cir., 1946), Learned Hand, J., after holding that the plain meaning of the language of the act when applied to the facts resolved the issue in accordance with the purpose of Congress, said at p. 451: "True, there is often no surer way to misconceive the meaning of a statute or any other writing than to construe it verbally; indeed, interpretation is the art of proliferating a purpose which is meant to cover many occasions so that it shall be best realized upon the occasion in question. However, although there are no certain guides, the colloquial meaning of the words is itself one of the best tests of purpose, and situations of which *Markham v. Cabell*, is the last example are the exception. We have no doubt that this is not a situation in which it would be proper not to follow the literal meaning of the words."

The same judge in *Central Hanover B. & T. Co. v. Commissioner of Internal Revenue*, 159 F.2d 167 (2 Cir., 1947), said at p. 169: "There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a court ever less likely to do its duty

than when, with an obsequious show of submission, it disregards the overriding purpose because the particular occasion which has arisen, was not foreseen. That there are hazards in this is quite true; there are hazards in all interpretation, at best a perilous course between dangers on either hand; but it scarcely helps to give so wide a berth to Charybdis's maw that one is in danger of being impaled upon Scylla's rocks."

See Cox, "Judge Learned Hand and the Interpretation of Statutes," 60 Harv.L. Rev. 370 (1947).

3. For a good illustration of the technique of the "mischief rule" approach and the use of legislative history to establish the purpose of the statute, see *Wallingford & Arango v. McCarty*, 69 F.Supp. 1000 (D.C.Canal Zone 1940).

JUDD v. LANDIN

Supreme Court of Minnesota, 1942. 211 Minn. 465, 1 N.W.2d 861.

JULIUS J. OLSON, JUSTICE. Action to recover damages for personal injuries. Defendants Robert E. and Allyn K. Ford are the owners and lessors of Hotel Marquette in Minneapolis; defendant Woman's Christian Association of Minneapolis (hereafter referred to as W.C.A.) has been the lessee over a term of years; and defendant Virginia R. Landin is the sublessee of W.C.A. Plaintiff recovered a verdict for \$1,500. The Fords and W.C.A. separately moved for judgment notwithstanding. Both motions were granted, and plaintiff appeals from the judgments.

During the afternoon of July 10, 1938, plaintiff, a guest at the hotel, left her room on the third floor to go to the street. When about halfway down the stairway between the third and second floors, the heel of her left shoe caught in a protruding slit in the rubber stair tread, causing her to trip and fall. In falling, she reached out with her right hand for something to avert her fall, but, there being no handrail on that side of the stairway, she fell violently against the floor of the stair landing below and was seriously injured.

The hotel was built during or prior to 1890, and for a year or more prior to February, 1931, had been vacant. During that month the Fords executed a lease of the building for a period of ten years, effective May 1, to the W.C.A., to be used as a club or hotel. By its terms the Fords agreed that "any changes required by present or future building ordinances will be complied with by owners." Suitable alterations and repairs were to be made to put the property in shape for its intended use. The estimated cost of alterations and repairs was stated to be \$25,000. The Fords applied for and obtained from the building inspector's office a permit to make the improvements. The work progressed under the inspector's directions, with frequent inspection. Although an official record of the improvements including plans and specifications, was to be filed and kept in his office, "there were no plans filed for this particular job."

The stairway on which plaintiff fell was 50 inches wide. When these improvements were made the 1916 building code was applicable. By § 111, it was provided that "stairways which are more than three

feet six inches (3' 6") wide shall have not less than two handrails." The 1934 code provides (§ 604) that "the following general rules shall govern in all cases." And § 604.1 specifies that "handrails shall be provided on both sides of all stairs three feet six inches (3' 6") or more in width in all buildings except single family dwellings." After completion of the work, W.C.A. took over the premises and remained in possession under its lease until June 1935, when it sublet the premises, with consent of the owners, to defendant Landin and one Marguerite Hauser, who later assigned her interest to Miss Landin.

By § 3101 of the 1934 code, adopted April 3, 1934, the 1916 code was expressly repealed. By § 107.2 of the new code, it is provided: "Existing buildings may be maintained in their present condition and occupancy *except that such changes as are specifically required hereby* or may become necessary for safety, shall be made when ordered by the Inspector of Buildings." (*Italics supplied.*)

That the requirement in respect to two handrails has not been complied with here is conceded. Therefore, plaintiff claims, as the basis for imposing liability upon all defendants, that they were negligent in failing to install such handrails, and such negligence was the proximate, or a contributing, cause of plaintiff's accidental fall and consequent injuries. She does not claim that respondents are responsible for the condition of the rubber stair treads, since these oftentimes become frayed or torn and as such must be replaced from time to time.

Respondents contend that only the 1934 code is applicable in this action, and that, since the building inspector made no affirmative order requiring installation of a second handrail (§ 107.2), there was no duty imposed upon them to install it. So the first issue to be determined is whether the handrail sections of the codes to which we have referred imposed a duty upon respondents to comply therewith, absent official direction from the building inspector.

1. In construing legislative enactments, it is well to bear in mind that (*Winters v. City of Duluth*, 82 Minn. 127, 129, 84 N.W. 788, 789), "canons of construction are not the masters of the courts, but merely their servants, to aid them in ascertaining the legislative intent"; and when it is ascertained the statute must be so construed as to give effect to such intention, even if it seem contrary to such rules and the strict letter of the statute."

We think it is clear from the terms of both codes that the legislative intent—its real purpose—was to prescribe minimum requirements to safeguard and protect from injury guests and occupants of buildings governed thereby which reasonably might result from defective construction or unsafe conditions.

2. Since § 101 of the 1934 code provides that "this ordinance is . . . hereby declared a *remedial ordinance*, and is to be construed so as to secure the beneficial purposes intended" (*italics supplied*), it is entitled to such fair and "large" construction as will meet the essential legislative purpose. As said in *State ex rel. City of Minneapolis v. St. Paul M. & M. Ry. Co.*, 98 Minn. 380, 397, 108 N.W. 261, 266, 28

L.R.A.,N.S., 298, 120 Am.St.Rep. 581, 8 Ann.Cas. 1047: "It is an old and unshaken rule in the construction of statutes that the intention of a remedial statute will always prevail over the literal sense of its terms, and therefore when the expression is special or particular, but the reason is general, the expression shall be deemed general.' . . . A 'large construction is to be given to statutes having for their end the promotion of important and beneficial public objects.' "

There certainly is nothing "to justify our looking upon the law with strictness or aversion." *State ex rel. City of St. Paul v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 190 Minn. 162, 164, 251 N.W. 275, 276.

3. The adoption of these codes was induced by public considerations of safety. The motivating cause was to protect from injury those inhabiting defective or unsafe structures. The framers of these codes realized that they were required to provide rules and regulations for new structures as well as old ones which had been or were to be rehabilitated. Courts therefore should be careful not to apply such (98 Minn. page 396, 108 N.W. page 266, 28 L.R.A.,N.S., 298, 120 Am.St. Rep. 581, 8 Ann.Cas. 1047) "a rigid and literal reading [as] would in many cases defeat the very object of the statute and exemplify the maxim that 'the letter killeth, while the spirit keepeth alive.' "

4. Both §§ 107.2 and 604.1 of the 1934 code should be considered and interpreted together, since it is the duty of courts, even where a legislative act "is imperfectly drawn . . . to ascertain the legislative purpose from a consideration of the act as a whole, and to interpret it, if possible, so that it will accomplish" that purpose. "To bring this about obvious mistakes and omissions may be corrected or supplied, and contradictory expressions, and language of doubtful import should be given a meaning consistent with the legislative intention as disclosed by the act taken as a whole." *Kempien v. Board of County Com'rs*, 160 Minn. 69, 72, 199 N.W. 442, 443; *State ex rel. Maryland Cas. Co. v. District Court*, 134 Minn. 131, 158 N.W. 798.

5. Since § 604.1 expressly requires two handrails on stairways of the width here presented, we think it logically follows that it properly applies to the building in question. Such requirements should not be denied by any technical or mere fanciful interpretation of § 107.2 which has for its basis only a misplaced comma, 6 Dunnell, Dig. & Supplement § 8974; nor will bad grammar alone vitiate a statute, *Id.* § 8972. The net result of such narrow interpretation would be to deny recovery here to a guest in an old hotel, which is required to compete with others built later, and to impose such liability upon the latter only because it has a newer building. Such a deviation from the obvious intent of the framers of these codes would be to give these sections a meaning inconsistent with legislative purpose. We think it must be held that § 604.1 affirmatively requires two handrails and that such a change is "specifically required" thereby. . . .

The judgments are reversed. Rehearing denied.

NOTES

1. The appellant's brief in *Judd v. Landin* contains the following:

"The public policy underlying these building codes is too obvious to need much elaboration. The purpose was to bring all building operations, including the construction of new buildings and the repair and alteration of old buildings, under the direct supervision of the building department for the safety and protection of the occupants of such property, and the public in general. For practical reasons it has, of course, been necessary to make certain exceptions in the case of existing buildings which still have some usefulness. The fact that such buildings are permitted to be maintained without the safety precautions provided by the codes has been the cause of numerous accidents sometimes resulting in the loss of many lives. We have had several of such catastrophes in the city of Minneapolis in recent years.

"While the owner of such property is permitted to maintain it without full compliance with the code he should never be permitted to repair, alter or change such property without the closest supervision. In connection with any such operations he should be made to comply, in so far as practical, with all requirements of the code. Any other policy would only serve to perpetuate the inherent danger lurking in such structures. That is why the 1934 Code grants no exemptions or privileges to existing buildings where the owner has attempted to perform work on such buildings without procuring a proper permit therefor.

"This case is a fair example of what can happen when any evasion of the law is resorted to. If proper plans for this remodeling work had been submitted to the engineers in the building department and there had been any reasonable inspection of this work it seems incredible that the installation of a second handrail on this stairway would not have been required. Here, however, the owners, through their contractor acting as their agent, were permitted to proceed in violation of the ordinance. While this was done with the consent of the inspector, it was obviously for the benefit of the owners and their contractor. It gave them more or less of a free hand in this work, and they were not tied down to any scrupulous observation of the law."

The record discloses no evidence introduced at the trial tending to establish the policy and purpose of the codes.

2. In a petition for rehearing the main argument of the respondent in *Judd v. Landin* was as follows:

"I. The decision of the Court . . . is based upon the point that Section 604.1 of the Minneapolis Building Code enacted in 1934 applies to all buildings, existing buildings as well as new buildings. This point was never raised, either at the trial of the case or upon the appeal thereof and respondents (petitioners herein) have never had an opportunity to be heard with respect to said point. This point comes as a bolt from the blue so far as respondents are concerned.

". . . For the reasons set forth in the following subsections of this Section I it is respectfully submitted that there is a strong reason to believe that the Court has erred in its decision in this case.

"a. The decision of the Court in the above entitled appeal assumes that Section 604.1 of the Minneapolis Building Code adopted in 1934 and other specific requirements of that Code *apply generally* to all buildings, existing buildings as well as new buildings in the absence of limiting or qualifying language directly within each such section, and that said Section 604.1 and other general requirements of the Code therefore would apply to existing buildings, notwithstanding the express provisions of Section 107.2 of the Act.

"(1) It would seem that such interpretation is contrary to the express language of the Code itself in section 107 and the several subsections of said section, because said Section 107 of the Code unequivocally limits the application of the general

provisions of the Code to *new buildings* 'unless otherwise specified' and then sets forth in the other subdivisions of said Section 107 the situations in which the general requirements of said Code *may become* applicable to 'existing buildings.'

"It is respectfully submitted that by the . . . language, which appears almost at the very beginning of the Code, the City Council of the City of Minneapolis unmistakably expressed its intention that the general requirements of the Code should be inapplicable to existing buildings except in the particular situations specified in the subsections of Section 107.

"b. That it was not the intent of the City Council of the City of Minneapolis that Section 604.1 should apply to existing buildings is further confirmed by a subsequent specific provision in Part 6 of said 1934 Building Code. (In this connection, the Court's attention is called to the fact that the Code is divided into definite parts, and at the beginning of each part there is a heading which indicates the subject-matter covered by such part. The subject-matter of Part 6 is 'Classification of Buildings and General Requirements.') Following Section 604 and its subdivisions in said Part 6 there appears Section 610, which expressly refers to 'existing buildings,' and the inescapable effect of which is to make Section 604 and its subdivisions, including Section 604.1, inapplicable to existing buildings. (In this connection it should be noted that in the tenth section of each part, beginning with Part 6 and up to and including Part 12, there is a specific provision with respect to the requirements for 'Existing Buildings'.) Said Section 610 reads as follows:

"Section 610. Existing Buildings. The requirements of this code as to existing buildings are given in the tenth section of the Part governing the occupancy thereof."

Was this the most effective approach by which respondent could have attempted to convince the court that it might have erred in the principal case? If not, what argument would you have presented?

G. *The Golden Rule Approach*

THE GOLDEN RULE

"The rule by which we are to be guided in construing acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done." Parke, B., in *Perry v. Skinner*, 2 M. & W. 471, 476 (1837).

NOTES

1. In *Grey v. Pearson*, 10 E.R. 1216 (House of Lords, 1857), Lord Wensleydale, after enunciating the golden rule (at p. 1234) refers to the statement of the rule by Burton, J., in *Warburton v. Loveland*, 1 Hudson & Brooke (Ireland) 1828, at top of 648, who said:—

"However, it is, for the present, sufficient to say, that no necessity for adopting it is shown; and I apprehend it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or any declared purpose of the statute; or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such an inconvenience, but no farther."

(This case went to the House of Lords, 2 Dow & C. 493). The decision was written a year before Baron Parke became a Judge.

Blackstone sets out what seems to be the same rule. After having stated that "words are generally to be understood in their usual and most known signification" (Vol. 1, 1st ed. p. 59), he then says (p. 60)—

"As to the effects and consequence, the rule is, that where words bear either none, or a very absurd signification if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned in Puffendorf, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity', was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit'.

2. See *The People v. Commissioners of Taxes of New York*, 95 N.Y. 554 (1884), esp. at 558-559.

3. J. A. Corry, "Administrative Law and the Interpretation of Statutes", 1 U. Toronto L.J. 286, 299, 301 (1936), says: "The golden rule conceded full effect to the literal meaning of the words except where that meaning led to an absurdity or manifest injustice. In such case, the words might be modified so as to avoid a result which the legislature could never have intended. But it must have been an absurdity so great as to make perfectly clear that the legislature did not intend it. The rule was designed to avoid the harshness of literal interpretation and at the same time prevent the courts from legislating. . . .

"The doctrine of literalness can never be applied successfully to general words. For they always include something more than the scope and object of the statute require and so it leads to ridiculous results. General words have significance over a wide range of human experience. No statute ever purports to deal with more than a narrow sector of it. Judges are torn between a feeling of obligation to adhere to the doctrine and a feeling of revolt against what they regard as an absurdity and injustice."

STATE v. CLARK

New Jersey Supreme Court of Judicature, 1860. 29 N.J.L. 96.

WHEPLEY, J. The section of the act upon which this indictment was found provides that if any person or persons shall willfully open, break down, injure, or destroy any fences, rails, or enclosures belonging to or in the possession of any other person or persons, or cut down, injure, or destroy the wood, timber, trees, herbage, grass, or hay standing or growing upon the lands of any other person or persons, or shall dig up, pull up, injure, destroy, or carry off the vegetables standing, growing, or being in or upon the lands of any other person or persons, he shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by imprisonment in the county jail, not less than two months, nor more than six, or by fine, not exceeding three hundred dollars, or both, at the discretion of the court in which such offence shall be tried.

The 70th section of the act to which this is a supplement, makes it an indictable offence willfully, unlawfully, and maliciously to set fire to, or burn or destroy, any fences, piles of wood, boards, or other lumber.

From the different phraseology employed in the two sections, it is evident the legislature intended, by the act of 1855, to render punish-

READ & MACDONALD U.C.B.Leg.

able by indictment mischief and injuries to property of the kind described in both sections which were not reached by the 70th section. Under that the crime was not complete, unless the act was malicious as well as willful and unlawful. To destroy a fence by breaking it down, if for the purpose of honestly asserting a right to the *locus in quo*, and not out of wantonness or malice, was not within the statute.

The act of 1855, in terms, makes the willful opening, breaking down, or injuring of any fences belonging to or in the possession of any other person a misdemeanor. In what sense is the term willful used? In common parlance, willful is used in the sense of intentional, as distinguished from accidental or involuntary. Whatever one does intentionally he does willfully. Is it used in that sense in this act? Did the legislature intend to make the intentional opening of a fence for the purpose of going upon the land of another indictable, if done by permission or for a lawful purpose, or the intentional cutting down of any timber upon land in the possession of another, by his permission, or the intentional pulling up of any vegetable growing on the land of another, by his permission, or the intentional carrying off of the vegetables being on the land of another, by his permission, or the entry of an officer to execute a writ of possession, a misdemeanor? We cannot suppose such to have been the actual intent. To adopt such a construction would put a stop to the ordinary business of life. The language of the act, if construed literally, evidently leads to an absurd result.

If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed. 1 Kent's Com. 462; Commonwealth v. Kimball, 24 Pick. 370; United States v. Fisher, 2 Cranch 400; 1 Bl.Com. 60.

No one but a trespasser can be amenable to the provisions of the act. Any other construction of the act involves us in inextricable confusion and absurdity.

If this be the sound construction, then any evidence that would constitute a lawful defence in an action of trespass would be competent upon the trial of the indictment. The evidence offered by the defendant was of that character, and should have been received.

NOTES

1. In *The People v. Admire*, 39 Ill. 251 (1866), the court departed from the plain meaning of the language of the statute of wills to the extent necessary to avoid requiring a demand on a non-existent administrator. The court said: "The law is not so unreasonable as to require the performance of impossibilities, and when the legislatures use language so broad as apparently to lead to such results, the courts must say . . . that the legislatures cannot have intended to have included those cases. . . ."

2. In *Altringham Electric Supply Co. Ltd. v. Sale Urban District Council*, 154 L.T.R. 379 (1936), the House of Lords finally rejected the Golden Rule as a permissible approach. After finding that the meaning of the language was plain as

applied to the facts, Lord MacMillan said: ". . . By what criterion are your Lordships to judge whether a particular enactment, if literally read, is so absurd that Parliament cannot have intended it to be so read and that the courts ought not to give effect to its plain meaning? I agree with Lord Bramwell who said that the phrase which I have quoted 'opens a very wide door' and adds: 'I should like to have a good definition of what is such an absurdity that you are to disregard the plain words of an Act of Parliament. It is to be remembered that what seems absurd to one man does not seem absurd to another' . . ."

"I do not doubt that, if the language of an enactment is ambiguous and susceptible of two meanings, one of which is consonant with justice and good sense while the other would lead to extravagant results, a court of law will incline to adopt the former and to reject the latter, even although the latter may correspond more closely with the literal reading of the words employed. . . ."

His Lordship then quoted the following statement of Lord Halsbury in *Commissioners of Income Tax v. Pemsel*, [1891] A.C. 531, 549 with approval: "But I do not think it is competent to any court to proceed upon the assumption that the Legislature has made a mistake. Whatever the real fact may be, I think a court of law is bound to proceed upon the assumption that the Legislature is an ideal person that does not make mistakes. It must be assumed that it has intended what it has said, and I think any other view of the mode in which one must approach the interpretation of a statute, would give authority for an interpretation of the language of an Act of Parliament which would be attended with the most serious consequences."

3. In Hopkins, "The Literal Canon and the Golden Rule," 15 Can.Bar Rev. 689, (1937), the author approves the rejection of the Golden Rule in the principal case and its relegation to the status of a mere canon to be used only as an aid in resolving ambiguity. He says at page 696: "In our constitutional theory the function of innovation rests primarily with legislative bodies. It is true that the final word in law-making must rest with the courts and that the exercise of any conscious mental process involves an element of discretion: yet, if the assignment of legislative power to parliament is to be otherwise than fictional, the process of interpretation must be divorced so far as may be from that of legislation. What must be sought for by the courts are criteria of meaning as objectivized and impersonal as can be found, so that the initial discretion inherent in legislation will be impaired as little as possible by a supervening discretion in interpretation." Assuming the validity of his argument, in so far as it is founded on the supremacy of parliament doctrine, is it tenable in the United States where that doctrine does not prevail? See Radin, "A Short Way with Statutes," 56 Harv.L.Rev. 388, esp. 394-307 (1942).

4. See "Interpretation Without Tears", 10 Austr.L.J. 130 (1936).

CHUNG FOOK v. WHITE

Supreme Court of the United States, 1924.

264 U.S. 443, 44 S.Ct. 361, 68 L.Ed. 781.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Chung Fook is a native-born citizen of the United States. Lee Shee, his wife, is an alien Chinese woman, ineligible for naturalization. In 1922 she sought admission to the United States, but was refused and detained at the immigration station, on the ground that she was an alien, afflicted with a dangerous contagious disease. No question is

raised as to her alienage or the effect and character of her disease; but the contention is that, nevertheless, she is entitled to admission under the proviso found in section 22 of the Immigration Act of February 5, 1917, 39 Stat. 891, c. 29 (Comp.St.1918, Comp.St.Ann.Supp.1919, § 4289¼¹). The section is copied in the margin.¹

A petition for a writ of habeas corpus was denied by the federal District Court for the Northern District of California, and upon appeal to the Circuit Court of Appeals, the judgment was affirmed. 287 F. 533.

The pertinent words of the proviso are:

"That if the person sending for wife or minor child is naturalized, a wife to whom married or a minor child born subsequent to such husband or father's naturalization shall be admitted without detention for treatment in hospital. . . ."

The measure of the exemption is plainly stated and, in terms, extends to the wife of a naturalized citizen only.

But it is argued that it cannot be supposed that Congress intended to accord to a naturalized citizen a right and preference beyond that enjoyed by a native-born citizen. The court below thought that the exemption from detention was meant to relate only to a wife who by marriage had acquired her husband's citizenship, and not to one who, notwithstanding she was married to a citizen, remained an alien under section 1994, Rev.Stats. (Comp.St. § 3948):

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

To the same effect, see *Ex parte Leong Shee* (D.C.) 275 F. 364. We are inclined to agree with this view; but, in any event, the statute plainly relates only to the wife or children of a naturalized citizen and we cannot interpolate the words "native-born citizen" without usurping the legislative function. [Citing cases.]

The words of the statute being clear, if it unjustly discriminates against the native-born citizen, or is cruel and inhuman in its results,

¹"Sec. 22. That whenever an alien shall have been naturalized or shall have taken up his permanent residence in this country, and thereafter shall send for his wife or minor children to join him, and said wife or any of said minor children shall be found to be affected with any contagious disorder, such wife or minor children shall be held, under such regulations as the Secretary of Labor shall prescribe, until it shall be determined whether the disorder will be easily curable or whether they can be permitted to land without danger to other persons; and they shall not be either admitted or deported until such facts have been ascertained; and if it shall be determined that the disorder is easily curable and the husband or father or other responsible person is willing to bear the expense of the treatment, they may be accorded treatment in hospital until cured and then be admitted, or if it shall be determined that they can be permitted to land without danger to other persons, they may, if otherwise admissible, thereupon be admitted: Provided, that if the person sending for wife or minor children is naturalized, a wife to whom married or a minor child born subsequent to such husband or father's naturalization shall be admitted without detention for treatment in hospital, and with respect to a wife to whom married or a minor child born prior to such husband or father's naturalization the provisions of this section shall be observed, even though such person is unable to pay the expense of treatment, in which case the expense shall be paid from the appropriation for the enforcement of this act."

as forcefully contended, the remedy lies with Congress and not with the courts. Their duty is simply to enforce the law as it is written, unless clearly unconstitutional.

Affirmed.

NOTES

1. In *DeRuiz v. DeRuiz*, 66 App.D.C. 370, 68 F.2d 752 (1936), in refusing to extend the words of the act beyond their plain meaning, Van Orsdel, J., said at pp. 753-754:

"In *Sturges v. Crowninshield*, 4 Wheat. 122, 202, 4 L.Ed. 529, Chief Justice Marshall announced the following rule which has been generally followed by the courts of this country: 'Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent, unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words, is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.'

"The difficulty which confronts the courts in their attempt to apply Marshall's rule and find justification for giving the words of a statute a meaning which literally they do not bear in order to escape absurd consequences, so nearly approaches the twilight zone between the exercise of judicial power and legislative power as to call for great care in avoiding usurpation of the latter.

"Nor should we be controlled by the argument that hardship may result in this and similar cases from a strict interpretation of the words . . ., since the language is plain and the courts must follow it. In *Commissioner of Immigration v. Gottlieb*, 265 U.S. 310, 313, 44 S.Ct. 528, 68 L.Ed. 1031, the court said: 'The case, as the evidence shows, is one of peculiar and distressing hardship, and it is not unnatural that any appropriate canon of construction should be laid hold of to justify a conclusion favorable to respondents. But if the plain words of the statute are against such a conclusion, leaving no room for construction, the courts have no choice but to follow it, without regard to the consequences.' "

2. Observe disregard of practical results of literal interpretation, in *Zazove v. United States*, 162 F.2d 443 (1947).

AMERICAN TRUCKING ASS'NS v. UNITED STATES

District Court of the United States for the District of Columbia, 1939.
21 F.Supp. 35.

GRONER, C. J. The main question we have to answer is whether defendant, Interstate Commerce Commission, has jurisdiction and power under Sec. 204(a) (1) and (2) of the Motor Carrier Act of 1935 to establish reasonable requirements with respect to qualifications and maximum hours of service for all employees of common and contract carriers by motor vehicle.

Plaintiff, American Trucking Associations, Inc., is an organization of motor carriers subject to regulation under the Act, and its principal place of business is in the District of Columbia. The other plaintiffs

are common carriers by motor vehicle in interstate commerce, likewise subject to regulation.

The Motor Carrier Act, which is Part II of the Interstate Commerce Act, contains a declaration of policy, as follows:

"Sec. 202 [§ 302]. (a). It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part [chapter]."

The duties and powers of the Commission are described in Sec. 204 (a):

"(1) To regulate common carriers by motor vehicle as provided in this part [chapter], and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this part [chapter], and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of sections 204 [304] (d) and (e), 205 [305], 220 [320], 221 [321], 222 [322] (a), (b), (d), (f), and (g), and 224 [324] of this part [chapter]."

Shortly after the passage of the Act, the Commission established qualifications and maximum hours for drivers of motor vehicles operated by common and contract carriers. It left undecided the extent of its jurisdiction over other employees. Subsequently, and after the passage in 1938 of the Fair Labor Standards Act, the Commission again instituted proceedings to determine the previously undetermined

extent of its jurisdiction. It concluded that its power over employees was limited to the promotion of safe operation, in consequence of which it had jurisdiction to establish hours of work and qualifications of drivers, but of no other employees.

Plaintiffs filed their petition June 9, 1939, asking the Commission to hear evidence and establish regulations as to all employees. The Commission declined to do so, adhered to its former ruling, and declared that any further consideration would be futile, since it had no power to do the things asked. This action was then begun against the United States and the Commission. The Administrator of the Wage and Hour Division was allowed to intervene. . . .

At the hearing counsel stated that, if the Act be construed as plaintiffs insist, the Commission will have to prescribe qualifications and hours for stenographers, clerks, accountants, mechanics, solicitors, and other employees of whose duties and qualifications it has no special knowledge; in this function its determination would not be based upon considerations of transportation—on which it is held to be expert—but upon social and economic considerations, matters on which it is not qualified or equipped, and which would entail the performance of a duty wholly foreign to its normal activities. But even if this be granted, we think there is no doubt that Congress had the power to impose the challenged duty. And the answer to the query cannot be found in the fact of inconvenience to the Commission,⁶ but must be first looked for in the language of the statute. If the words are clear, there is no room for construction.

"To search elsewhere for a meaning either beyond or short of that which they disclose is to invite the danger, in the one case, of converting what was meant to be open and precise, into a concealed trap for the unsuspecting, or, in the other, of relieving from the grasp of the statute some whom the Legislature definitely meant to include." *Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245, 253, 49 S.Ct. 112, 113, 73 L.Ed. 311, 60 A.L.R. 1060.

This rule has been applied even where the literal meaning leads to a hard or unexpected result. *Crooks v. Harrelson*, 282 U.S. 55, 60, 51 S.Ct. 49, 75 L.Ed. 156; *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333, 59 S.Ct. 191, 83 L.Ed. 195. Statutes have been annulled by construction only where the effect of giving the words their clear meaning would "offend the moral sense . . . [involve] injustice, oppression, or absurdity". *United States v. Goldenberg*, 168 U.S. 95, 103, 18 S.Ct. 3, 4, 42 L.Ed. 394; *Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245, 253, 254, 49 S.Ct. 112, 73 L.Ed. 311, 60 A.L.R. 1060.

Guided by this rule, we find that Congress in the first section of the Act declared the definite policy to regulate motor transportation (1) so as to foster sound economic conditions in the public interest; (2)

⁶ *United States ex rel. Kansas City Southern R. Co. v. Interstate Commerce Comm.*, 252 U.S. 178, 40 S.Ct. 187, 64 L.Ed. 517.

to promote adequate, economical, and efficient service and reasonable charges; (3) to prevent unjust discriminations, undue preferences or advantages; (4) to avoid destructive competition; (5) to coordinate transportation by motor carriers and other carriers; (6) to develop and preserve a highway transportation system adapted to the needs of commerce and the national defense. The stated objects demonstrate beyond question that Congress has preempted the entire field. To the achievement of the ends sought, Congress provided that it should be the duty of the Commission to regulate carriers by establishing reasonable requirements with respect to (a) service; (b) transportation of baggage and express; (c) uniform systems of accounts, records, and reports; (d) qualifications and maximum hours of service of employees; (e) safety of operation and equipment.

In (d) the word "employees" is inclusive. There is nothing in its use or in its relation to other words in the section which, considered in the ordinary sense, can be said to indicate only a particular class of employees. If Congress had intended to distinguish between those employees engaged in the actual operation of motor vehicles and those engaged in other work, it could have done so, as it did in a former statute,⁷ by the addition of less than half a dozen words. Hence, to read that limitation into the section would be not only to disregard the letter of the law but to find, without guide or compass in the Act, a legislative intent to that end. To the contrary, such guide as there is—outside the distinct and definite meaning of the words—supports the view that Congress used the language of the section advisedly, and meant precisely what it said. For the third paragraph of Sec. 204, which concerns *private* carriers, expressly limits the power of the Commission over qualifications and hours to those employees whose work relates to safety of operation. This distinction between the two classes of carriers is convincing of a definite purpose, and the reason for it is obvious: private carriers are defined to be persons who transport for themselves—in furtherance of a commercial enterprise—or as bailees, their own or another's property in interstate commerce.⁸ As to such carriers, Congress properly concluded that to bring *all* their employees under the Commission's jurisdiction—as well those engaged in the manufacturing or commercial end of the business, and having in themselves no direct relation to motor transportation—would create an anomalous situation, as it would.

Unless what has been said is incorrect, nothing remains except to ascertain whether, in giving effect to the words of the statute, we

⁷ In the Hours of Service Act, 34 Stat. 1415, 45 U.S.C. § 61, 45 U.S.C.A. § 61, Congress by definition limited the word "employees" to "persons actually engaged in or connected with the movement of any train".

⁸ Sec. 203(a) (17). The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

create a situation so "glaringly absurd" as to impel the conclusion Congress could not have intended such a result. With due deference to the dilemma of the Commission we are unable to say that this is true. At the time of the passage of the statute, the Fair Labor Standards Act had not been passed or even considered by Congress, but there was in effect a law known as the "National Industrial Recovery Act",⁹ under which codes were established to regulate the hours of service of all classes of employees of motor carriers. The Motor Carrier Act expressly provided that it should supersede the provisions of the former codes.¹⁰ There was also in effect in a majority of the states some sort of legislation covering, with diversity of detail and lack of uniformity, hours of service of employees, including drivers of motor vehicles. It is not unreasonable, in these circumstances, to assume that Congress, aware of the problem as it applied to interstate commerce and the advisability of uniformity, chose to place upon the Commission the details of its solution. Certainly, aside from the consumption of the Commission's time, there is nothing glaringly absurd in this, nor reason to suppose a better agency could be found for the purpose. The Commission's fear that it may be called upon to establish qualifications for executive officials, solicitors, and lawyers, is overstrained. None of these classes is within the category of "employees" as that word is used in public service or labor legislation. The hearings before the committees of Congress developed that the percentage cost of labor was equal to nearly half the total gross revenue of motor carriers, and the special attention of Congress was directed by representatives of the unions to the labor aspect as applied to the problems of uniformity and stabilization, because of widely diversified business organization, absence of labor organization in some regions, and the claimed unreasonable practices of many operators.

And it is easy to see that stabilization of labor conditions as applied to this industry is an important, and indeed a necessary, part of the establishment of rates and general business regulation, matters as to which the Commission admittedly is expert, and these objectives appear as part and parcel of the purposes of the legislation. In this aspect, it is reasonable to conclude that Congress had them in mind when later, upon the passage of the Fair Labor Standards Act, it provided specifically that Sec. 7 thereof¹¹—which establishes maximum hours of service—should not apply "with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 [304 of Title 49] of the Motor Carrier Act, 1935 or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act." 29 U.S.C.A. § 213(b). The necessity of separate provisions for the exemption of employees of the two classes of carriers is manifest. There are no private carriers

⁹ 48 Stat 195, 15 U.S.C.A. § 701 et seq.

¹⁰ Sec. 204(b), 49 U.S.C.A. § 304(b).

¹¹ 29 U.S.C.A. § 207.

by rail subject to the Commission's jurisdiction. Congress, therefore, used inclusive language as to the employees of railroads. There are, however, many private motor carriers who are subject to a limited regulation by the Commission, and this is true for reasons which we have already explained. Their employees not subject to the jurisdiction of the Commission would, by the use of the language employed in the case of railroads, have been left outside of the provisions of the Fair Labor Standards Act. It was obviously the recognition of this fact alone that induced the use of different language in each instance.

In the view we take, the language of the disputed section is so plain as to permit only one interpretation, and we find nothing in the Act as a whole which can with any assurance be said to lead to a different result. The circumstances under which the section was placed in the bill may possibly have created a situation not contemplated by its sponsors, but to say that this is true would be pure speculation, in which we have no right to indulge and upon which we can base no conclusion. We are, therefore, obliged to hold that the Commission was mistaken in limiting its powers to the drivers of trucks and buses.

NOTES

1. In *Leader v. Duffey*, 13 App.Cas. 294 (1888), Lord Halsbury, L.C., in the course of his opinion in which he gave effect to what he considered to be the plain meaning of the words of a power of appointment, declared at p. 301: ". . . Whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. . . . It appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption so made". Is this criticism valid, and, if so, is the means of avoiding such a circle offered by any of the approaches to statutory construction other than the literal approach?

2. See Julius Stone, "The Province and Function of Law" (1946), 193-195, where the author remarks concerning the decision of the House of Lords in *Liversidge v. Anderson*, [1942] A.C. 207: "Theoretically the canons of construction forbade consideration of policy until the words were found doubtful or ambiguous. What is here interesting is that despite these canons, assessments of policy seemed to base both the minority and majority decisions ab initio, in determining the very question whether there was ambiguity." Cf. the technique of the Supreme Court of the United States in *United States v. American Trucking Ass'ns*, *infra*.

UNITED STATES v. AMERICAN TRUCKING ASS'NS

Supreme Court of the United States, 1940.
310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345.

Appeal from the District Court of the United States for the District of Columbia.

MR. JUSTICE REED delivered the opinion of the Court. . . .

In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that in-

tention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, "excepting as a different purpose is plainly shown."

The language here under consideration, if construed as appellees contend, gives to the Commission a power of regulation as to qualifications and hours of employees quite distinct from the settled practice of Congress. That policy has been consistent in legislating for such regulation of transportation employees in matters of movement and safety only. The Hours of Service Act imposes restrictions on the hours of labor of employees "actually engaged in or connected with the movement of any train." The Seamen's Act limits employee regulations under it to members of ships' crews. The Civil Aeronautics Authority has authority over hours of service of employees "in the interest of safety." It is stated by appellants in their brief with detailed citations, and the statement is uncontradicted, that at the time of the passage of the Motor Vehicle Act "forty states had regulatory measures relating to the hours of service of employees" and every one "applied exclusively to drivers or helpers on the ve-

hicles." In the face of this course of legislation, coupled with the supporting interpretation of the two administrative agencies concerned with its interpretation, the Interstate Commerce Commission and the Wage and Hour Division, it cannot be said that the word "employee" as used in Section 204(a) is so clear as to the workmen it embraces that we would accept its broadest meaning. The word, of course, is not a word of art. It takes color from its surroundings and frequently is carefully defined by the statute where it appears.

We are especially hesitant to conclude that Congress intended to grant the Commission other than the customary power to secure safety in view of the absence in the legislative history of the Act of any discussion of the desirability of giving the Commission broad and unusual powers over all employees. The clause in question was not contained in the bill as introduced.³⁰ Nor was it in the Coordinator's draft.³¹ It was presented on the Senate Floor as a committee amendment following a suggestion of the Chairman of the Legislative Committee of the Commission, Mr. McManamy.³² The committee reports and the debates contain no indication that a regulation of the qualifications and hours of service of all employees was contemplated; in fact the evidence points the other way. The Senate Committee's report explained the provisions of Section 204(a) (1), (2) as giving the commission authority over common and contract carriers similar to that given over private carriers by Section 204(a) (3).³³ The Chair-

³⁰ S. 1629, 74th Cong., 1st Sess.

³¹ S. Doc. 152, 73rd Cong., 2nd Sess., p. 352, § 304(a) (1).

³² See the testimony of Mr. McManamy in Hearings on S. 1629 before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., pp. 122, 123:

"The regulation of the hours of service of bus and truck operators is far more important from a safety standpoint than the regulation of the hours of service of railroad employees because the danger is greater. . . . This could be accomplished by inserting in section 304(a) (1) and (2), lines 9 and 15, page 8, following the word 'records' in both lines, the words which appear in S. 394, as follows: 'qualifications and maximum hours of service of employees.'"

The clause in question came from § 2(a) (1) of S. 394, 74th Cong., 1st Sess., a subsection otherwise substantially like the corresponding subsection in S. 1629.

Senator Wheeler, Chairman of the Committee on Interstate Commerce and sponsor of the bill, explained the provision on the floor of the Senate:

" . . . the committee amended paragraphs (1) and (2) [of § 204] to confer power on the Commission to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of common and contract carriers. . . . This suggestion came to us, I think, from the chairman of the legislative committee of the Interstate Commerce Commission. . . .

"In order to make the highways more safe, and so that common and contract carriers may not be unduly prejudiced in their competition with peddler trucks and other private operators of motor trucks, a provision was added in subparagraph 3 giving the Commission authority to establish similar requirements with respect to the qualifications and hours of service of the employees of such operators. . . ."

79 Cong.Rec. 5652.

³³ S.Rep. 482, 74th Cong., 1st Sess. The report stated: "No regulation is proposed for private carriers except that an amendment adopted in committee authorizes the Commission to regulate the 'qualifications and maximum hours of service of employees and safety of operation and equipment' of private carriers of property by motor vehicle in the event that the Commission determines there is need for such regulation. Other amendments adopted by the committee confer like authority upon the Commission with respect to common and contract carriers." Safety of operation and equipment was in the original bill.

man of the Senate Committee expressed the same thought while explaining the provisions on the floor of the Senate.³⁴ When suggesting the addition of the clause, the Chairman of the Commission's Legislative Committee said: ". . . it relates to safety."³⁵ In the House the member in charge of the bill characterized the provisions as tending "greatly to promote careful operation for safety on the highways," and spoke with assurance of the Commission's ability to "formulate a set of reasonable rules . . . including therein maximum labor-hours service on the highway."³⁶ And in the report of the House Committee a member set out separate views criticizing the delegation of discretion to the Commission and proposing an amendment providing for an eight-hour day for "any employee engaged in the operation of such motor vehicle."³⁷

The Commission and the Wage and Hour Division, as we have said, have both interpreted Section 204(a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new."³⁸ Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress.³⁹

It is important to remember that the Commission has three times concluded that its authority was limited to securing safety of operation. The first interpretation was made on December 29, 1937, when the Commission stated: ". . . until the Congress shall have given us a more particular and definite command in the premises, we shall limit our regulations concerning maximum hours of service to those employees whose functions in the operation of motor vehicles make such regulations desirable because of safety considerations."⁴⁰ This expression was half a year old when Congress enacted the Fair Labor Standards Act with the exemption of Section 13(b) (1). Seemingly the Senate at least was aware of the Commission's investigation of its powers even before its interpretation was announced.⁴¹ Under the circumstances it is unlikely indeed that Congress would not have explicitly overruled the Commission's interpretation had it intended to exempt others than employees who affected safety from the Labor Standards Act.

³⁴ See last paragraph of remarks of Senator Wheeler, note 32 *supra*.

³⁵ Hearings, note 32 *supra*.

³⁶ 79 Cong.Rec. 12206.

³⁷ H.R.Rep. No. 1645, 74th Cong. 1st Sess.

³⁸ *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 358, 77 L.Ed. 796.

³⁹ *Hassett v. Welch*, 303 U.S. 303, 310, 58 S.Ct. 559, 563, 82 L.Ed. 858.

⁴⁰ *Ex parte No. MC-2*, 3 M.C.C. 665, 667.

⁴¹ 81 Cong.Rec. 7875.

It is contended by appellees that the difference in language between subsections (1) and (2) and subsection (3) is indicative of a congressional purpose to restrict the regulation of employees of private carriers to "safety of operation" while inserting broader authority in (1) and (2) for employees of common and contract carriers. Appellants answer that the difference in language is explained by the difference in the powers. As (1) and (2) give powers beyond safety for service, goods, accounts and records, language limiting those subsections to safety would be inapt.

Appellees call our attention to certain pending legislation as sustaining their view of the congressional purpose in enacting the Motor Carrier Act. We do not think it can be said that the action of the Senate and House of Representatives on this pending transportation legislation throws much light on the policy of Congress or the meaning attributed by that body to Section 204(a). Aside from the very pertinent fact that the legislation is still unadopted, the legislative history up to now points only to a hesitation to determine a controversy as to the meaning of the present Motor Carrier Act, pending a judicial determination.⁴²

One amendment made to the then pending Motor Carrier Act has relevance to our inquiry. Section 203(b) reads as set out in the note below.⁴³

⁴² The pending legislation is S. 2009, 76th Cong., 1st Sess., 84 Cong.Rec. 3509. As to the point here under discussion, the report of the Senate Committee said: "Paragraph (1) of section 34 of the bill is based on the provisions of subparagraphs (1), (2), and (3) of section 204(a) of the Motor Carrier Act. In the original draft, there was inserted at the beginning of the paragraph the clause 'in order to promote safety of operations,' thus making clear that the Commission's power to regulate qualifications and maximum hours of service of employees is confined to those who have anything to do with safety of operation. This is a question with respect to which considerable doubt seems to have arisen under the wording of the present law. Upon the strenuous objection of the truckers claiming conflict between this law and the Fair Labor Standards Act, the bill [i. e., the committee amendment] restores the law to the present provisions of the Motor Carrier Act." S.Rep. No. 433, 76th Cong., 1st Sess., p. 24. The bill passed the Senate. The House bill left § 204(a) (1), (2) and (3) of the present act unchanged. 84 Cong.Rec. 9450; H.R.Rep. No. 1217, 76th Cong., 1st Sess., 84 Cong.Rec. 10125. While the bills were in conference the Chairman of the Legislative Committee of the Interstate Commerce Commission sent to the chairmen of the House and Senate Committees a letter on the House and Senate bills which suggested that both bills explicitly limit the Commission's jurisdiction over qualifications and hours of service of employees to considerations of safety. The letter stated: "While the subsection [in the Senate bill] follows the existing language of section 204 . . . , a controversy has arisen in regard to the meaning of that language. . . . This controversy has now reached the Supreme Court. We think it may well be determined in this new legislation. In our judgment, if restrictions on hours of labor for social and economic reasons are to be imposed, this should be done by Congress, and no duty in that respect should be delegated to the Commission, which has no experience which particularly fits it for the performance of such a duty. Our authority over qualifications and hours of service of employees should, therefore, be confined to the needs of safety in operation. . . ." On April 26, 1940, the House conferees reported to the House a compromise bill agreed on by the conference committee which left § 204(a) (1), (2), and (3) of the Motor Carrier Act unamended. 86 Cong.Rec. 7847; H.R.Rep. No. 2016, 76th Cong., 3d Sess. On May 9, 1940, the House because of disagreement with sections of this bill not here relevant voted to recommit the bill to the conference committee. 86 Cong.Rec. 8986.

⁴³ "(b) Nothing in this part, *except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation* ~~or~~

The words, "except the provisions of section 204 [304] relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment," italicized in the note, were added by amendment in the House after the passage of S. 1629 in the Senate with the addition of the disputed clause to Section 204(a) (1) and (2).⁴⁴ It is evident that the exempted vehicles and operators include common, contract and private carriers. It seems equally evident that where these vehicles or operators were common or contract carriers, it was not intended by Congress to give the Commission power to regulate the qualifications and hours of service of employees, other than those concerned with the safety of operations.

Our conclusion, in view of the circumstances set out in this opinion, is that the meaning of employees in Section 204 (a) (1) and (2) is limited to those employees whose activities affect the safety of operation. The Commission has no jurisdiction to regulate the qualifications or hours of service of any others. The decree of the district court is accordingly reversed and it is directed to dismiss the complaint of the appellees. It is so ordered.

Reversed with directions.

standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer, and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm; or (4b) motor vehicles controlled and operated by a co-operative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended; or (5) trolley busses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service; or (6) motor vehicles used exclusively in carrying livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof); or (7) motor vehicles used exclusively in the distribution of newspapers; nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202, shall the provisions of this part, *except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment* apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business."

⁴⁴ H.R.Rep. No. 1645, 74th Cong., 1st Sess.

THE CHIEF JUSTICE, MR. JUSTICE McREYNOLDS, MR. JUSTICE STONE and MR. JUSTICE ROBERTS are of opinion that the decree should be affirmed for the reasons stated in the opinion of the district court, 31 F.Supp. 35.

NOTES

1. The principal case was cited and distinguished in *Fides, A. G. v. Commissioner of Internal Revenue*, 137 F.2d 731 (4 Cir., 1943) (cert. denied 320 U.S. 797, 64 S.Ct. 206, 88 L.Ed. 481), which said in dicta: "General terms describing a class of persons subject to a statute should be limited when a strictly literal (and purely analytic) application would encompass absurd results and would defeat . . . the clear and manifest purpose of the statute. . . . And statutes should be construed in the newness of the spirit, not in the oldness of the letter."

2. See application of the principal case in *Price v. Quill*, 46 A.2d 311 (D.C.Mun. App.1946).

3. See *Sternberg Dredging Co. v. Walling*, 158 F.2d 678 (C.C.A.Mo.1947).

BEACH v. UNITED STATES

United States Court of Appeals for the District of Columbia, 1944.
79 App.D.C. 208, 144 F.2d 533.

GRONER, C. J. Appellant was indicted and convicted in the District Court of the United States for the District of Columbia of violation of the Mann White Slave Act. The evidence disclosed that she was the operator of a house of prostitution in the City of Washington and on the day in question accompanied one of the inmates of the house to the Hamilton Hotel, some four blocks away, for purposes of prostitution. The trip from the house to the hotel was made in a taxicab, appellant paying her own and her companion's fare.

The question we must decide is whether the Mann Act ¹ is applicable in a prostitution case involving transportation solely within the District of Columbia.

We are obliged, at the outset, to admit that the literal language of the Act justifies the judgment below and its affirmance by this court. But as Mr. Justice Frankfurter recently remarked, "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification."² And this, he said, is true, because "A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning."

¹ 18 U.S.C.A. § 398.

² *United States v. Monia*, 317 U.S. 424, 431, 63 S.Ct. 409, 412, 8 L.Ed. 376 (dissent).

Long before the Mann Act, which, as everyone knows, was passed in an effort to put an end to commercialized interstate vice, Congress had legislated for the District of Columbia with relation to the subjects covered in that Act. And at the time of passage of the Act a local law of the District fitted like a glove the offence charged in the indictment we are now considering. By its terms it was made unlawful for "any prostitute" (which expression is descriptive of appellant in this case) to invite or persuade any person to go with her to any house or building for the purpose of prostitution.³ At the time of the passage of the Mann Act, perhaps the same day, since both Acts were approved June 25, 1910, Congress passed a local pandering statute,⁴ making it a misdemeanor to entice or force any woman to go to a house of assignation, which is this case, except that here the "victim", herself a professional prostitute, went to the assignation willingly and expectantly. In the debate on a bill punishing pandering in the District of Columbia, Congressman Mann objected stating: "The bill which has already passed the House (referring to the Mann Act), and which I introduced, covers this entire subject in the District of Columbia."⁵ Congressman Borland, who had introduced the District bill, replied: "I will say to the gentleman that it does not. The bill that passed the House was designed to regulate the national part of it, so far as it affected interstate commerce, and could regulate nothing else. This is a local bill, as much as a bill of a state legislature regulating police power."⁶ In the debate on the Mann Act, Congressman Sims, one of its leading exponents and a member of the District Committee, stated on the floor that the suggestion had occurred to him that the Mann Act should include "at least the maintaining of a house for such purposes in the District of Columbia." He went on to say: "We discussed that informally. Some members of the Committee thought it might be regarded as an unfavorable amendment to the bill itself. I called up Major Sylvester (Superintendent of Police) and talked with him about the matter, and asked him if he thought such legislation as I proposed would be of benefit to the District. He said it would not be of any benefit whatever. He said he thought at present that the matter was in the best condition for police control, and inasmuch as the gentleman whose duty it is to enforce laws governing such matters in the District so expressed himself, I thought it was my duty not to set up my individual judgment as against his. Therefore, I did not offer the amendment, and I would not vote for it now, believing as I do, that it would not help the measure, and neither would it help the conditions in the District of Columbia."⁷

But of far more significance than these expressions of individual opinion by members of Congress is the definite congressional purpose,

³ Sec. 177, Title 6, D.C.Code, 1929.

⁴ Sec. 179, Title 6, D.C.Code, 1929, Ch. 404, 36 Stat. 833.

⁵ 45 Cong.Rec. 3138.

⁶ 45 Cong.Rec. 3138.

⁷ 45 Cong.Rec. 1040.

evidenced by legislative bills introduced and passed from time to time after the enactment of the Mann Act, to cover the local situation and to reach every aspect of the offence defined in that Act,—and which in addition cover completely the whole subject of prostitution, however committed, in the District of Columbia. One section of the present law prohibits the offence itself;⁸ another, the offence of operating a house of prostitution;⁹ another, the act of procuring a person to live in prostitution;¹⁰ or procuring a person for acts of prostitution;¹¹ or procuring a person for the immoral enjoyment of a third person;¹² another, for inviting or inducing a person to go with him or her for purposes of prostitution anywhere in the District, or to a residence, or any other house or building (including a hotel), or to accompany or follow him or her to any place whatever within the District, including parks or elsewhere, for purposes of prostitution;¹³ and finally the Pandering Act itself,¹⁴ which makes it a felony for any person in the District of Columbia to induce any female to reside in a house of prostitution, to engage in prostitution, or to reside with any other person for the purpose of prostitution. So complete is the coverage that about the only place in which the act can be done without running athwart the local law is in an anchored balloon.

It is, we think, too clear for argument that Congress in the enactment of these local laws designed and intended them to cover the entire local field, and neither at the time of the passage of the Mann Act, nor since, considered it—except in its interstate aspect—to apply to the District of Columbia. Any other conclusion would, it seems to us, convict Congress of doing the wholly useless and unnecessary thing of repeatedly giving thought and attention to the passage of local laws paralleling in every essential aspect the provisions of the Mann Act, and in many respects going well beyond its provisions. In this view it is proper to bear in mind the well-considered Supreme Court dictum in the recent case of *Mortensen v. United States*,¹⁵ in which Mr. Justice Murphy, speaking for the Court, said: “We do not here question or reconsider any previous construction placed on the Act which may have led the federal government into areas of regulation not originally contemplated by Congress. But experience with the administration of the law admonishes us against adding another chapter of statutory construction and application which would have a similar effect and which would make possible even further justification of the fear expressed at the time of the adoption of the legislation that its broad provisions ‘are liable to furnish boundless opportunity to hold up and

⁸ § 22—2702, D.C.Code 1940.

⁹ § 22—2712, D.C.Code 1940.

¹⁰ § 22—2707, D.C.Code 1940.

¹¹ §§ 22—2709, 22—2710, D.C.Code 1940.

¹² § 22—2711, D.C.Code 1940.

¹³ § 22—2701 D.C.Code 1940.

¹⁴ § 22—2705 D.C.Code 1940.

¹⁵ 322 U.S. 369, 64 S.Ct. 1037, 1041.

blackmail and make unnecessary trouble, without any corresponding benefits to society.'"

It is difficult to think that this language was inadvertent, when it so plainly admonishes us not to impose on the Mann Act a new phase of construction which, with no corresponding benefits to society, will open wider than it is the door to blackmailing.

Considered then in that light, we think it not only proper but mandatory to apply here the rule announced by the Supreme Court in *Holy Trinity Church v. United States*, 143 U.S. 457, 472, 12 S.Ct. 511, 516, 36 L.Ed. 226, in which the literal construction of a statute, just as plain as the one we are considering, was rejected because—"It is the duty of the courts, under these circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

In that case, as in this, the statute was the result of a definite evil, to control which the legislature, the Supreme Court said "used general terms with the purpose of reaching all phases of that evil; and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against."

We think we should also give weight to the canon of statutory construction not long ago referred to by Mr. Justice Stone in the case of *United States v. Katz*, 271 U.S. 354, 357, 46 S.Ct. 513, 514, 70 L.Ed. 986, as follows: "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

In the spirit of that principle, when we come to examine the consequences of the application of the Mann Act to pandering in the District, we at once confront an unhappy situation of divided authority between local and national prosecuting agencies. Such an undesirable situation would assuredly not make for responsible government; but apart from that, the line of division between the jurisdiction of local and national authorities would be based on the accidental circumstance of who induced the woman to ride in a taxi, or a street car, or a public elevator. The guilt or innocence of the accused would under the Mann Act depend upon the ludicrous circumstance whether the woman was "transported" by any means or in any manner without cost to herself. In every such case the offense which, had she walked, would have constituted a misdemeanor, would become at once a felony and an invitation to extortion and all similar kindred evils.

It does not appear from the record in this case why a prosecution of doubtful validity was brought under the Mann Act, when a conviction certainly could have been obtained on the same or less evidence under the local statutes.

Furthermore, once we apply locally the provisions of the Mann Act, we should also be required to accept the results implicit in the doctrine of the *Caminetti* case;¹⁶ and this, notwithstanding the Department of Justice has sought to avoid some of these by instructing district attorneys to exercise discretion in the prosecution of what are called "non-commercial" cases; and also, to avoid, as far as possible, prosecution of cases involving elements of blackmail. And this may be all very well as a national policy; but when we consider that not since the passage of the Mann Act has the prosecution of an offense of this nature been begun in the District of Columbia under that Act, and when we recognize, as we do, that this is true because of the preemption by Congress of the local field in the passage of local laws fully covering the whole subject, we think we should be slow to write-in this new chapter of literal interpretation contrary to what is shown to be the real Congressional purpose.

Reversed.

EDGERTON, ASSOCIATE JUSTICE (dissenting).

The question as I see it is whether we may amend an Act of Congress by striking out a clause which we think unfortunate. The Mann Act provides: "Any person who shall knowingly transport or cause to be transported . . . in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution¹ or debauchery . . . shall be deemed guilty of a felony"²

Since the words that Congress used in the Mann Act can mean only one thing it is unnecessary to consider their legislative history. But their legislative history confirms their deliberate use and their plain meaning. . . .

Of the intention of Congress, in every sense and by every test, to deal with transportation which does not cross the District line, there is in my opinion not the slightest doubt. It is true that words do not always mean what they superficially appear to say. Sometimes they are used in special and unfamiliar senses, and sometimes in entirely new senses. But with deference to my colleagues, I think this has nothing to do with the case since (1) the context, (2) the Committee reports, and (3) the debates in Congress all show that the words "in the District of Columbia" mean exactly what they say and there is no

¹⁶ *Caminetti v. United States*, 1917, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442, L.R.A.1917F, 502, Ann.Cas.1917B, 1168.

¹ The Committee reports indicate that Congress intended the Mann Act to cover only transportation for *compulsory* prostitution. But the Supreme Court interpreted the Act more broadly in the *Caminetti* case, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442, L.R.A.1917F, 502, Ann.Cas.1917B, 1168, and has not yet overruled that decision, although it has intimated that it may do so. *Mortensen v. United States*, 322 U.S. 369, 64 S.Ct. 1037. Since the intimation was tentative, this court is probably right in saying that we must apply to commercial prostitution the doctrine of the *Caminetti* case.

² 36 Stat. 825, § 2, 18 U.S.C.A. § 398.

evidence that they mean anything else. The court makes a case for the proposition that the inclusion of the District of Columbia in the Mann Act is unfortunate, but that is not the question. I submit this dissent not in defense of the Mann Act but in defense of the authority of Congress. Courts have often construed statutes in novel and questionable ways, but they have not often read an entire phrase completely out of a statute. They did not do so in any of the cases which this court cites. No euphemism can obscure the fact that this court does so when it imposes upon clear and simple words a construction which allows them no effect. It thereby substitutes for a constitutional and relatively democratic legislative process one that is neither democratic nor constitutional.

NOTES

1. On certiorari the decision of the Court of Appeals was reversed by the Supreme Court of the United States in *United States v. Beach*, 324 U.S. 193, 65 S.Ct. 602, 89 L.Ed. 865 (1944), on the ground that none of the enactments of local application to the District of Columbia speaks of "transportation" for immoral purposes and hence the Mann Act conflicts with no other legislation applicable to the District. The plain meaning, being in accord with the Act's legislative history showing its intended application, must be given effect.

2. A commentary on the principal case in the lower court appears in 13 U. of Kan. City L.Rev. 110 (1945).

PEOPLE v. MINTER

Appellate Department, Superior Court of California, 1948.
73 Cal.App.2d Supp. 994, 167 P.2d 11.

BISHOP, JUDGE. The defendant sold a pint of whiskey, and as he had no license, he stands convicted on the charge that, by the sale, he had exercised a privilege and performed an act which a person holding a license might exercise and perform under the authority of his license. In support of his appeal from the judgment of conviction the defendant argues that as the sale took place at an hour when a licensee could not legally make a sale, it follows that he had not done an act which a holder of a license might perform. . . .

Defendant's first contention is made possible by the backhanded manner in which the legislature has made it a misdemeanor to sell whiskey without a license. The offense is created in section 3 of the Alcoholic Beverage Control Act (Act 3796, Deering's General Laws, Stats. 1935, p. 1123, as amended) by these words: "No person shall exercise the privilege or perform any act or acts which a licensee under this act may exercise or perform under the authority of a license issued under this act unless such person is authorized to do so by a license duly issued pursuant to the provisions of this act. Any person violating any provision of this section shall be guilty of a misdemeanor . . ."

Later in the act, in section 59.6, we find that it is made a misdemeanor for an off-sale licensee to sell any alcoholic beverage after 8 o'clock p.m. or before 10 o'clock a.m. . . .

The sale which got the defendant into trouble occurred, all witnesses agreed, about 2 o'clock a.m. One of the witnesses had asked the defendant if he could sell him a bottle of good whiskey. The defendant, who was driving a cab, indicated that he could comply with the request. He drove to a place where two other bottles were later discovered, went to the rear of the premises, and returned with a pint bottle. He then drove a short distance before he stopped at a street light, stated the price was \$7.00, and in exchange for marked bills gave the witness a pint bottle, labelled "Old Crow Whiskey—100 Proof."

Defendant's first argument, which is that a sale of whiskey at 2 o'clock in the morning is neither performing an act nor exercising a privilege which a licensee might legally perform or exercise, has just enough foundation in the literal structure of the charge, and in the wording of section 3, upon which the charge was based, to make it plausible. However, to place the interpretation upon section 3 contended for by the defendant would result in permitting an unlicensed person to sell intoxicating liquor with impunity during the hours a licensed person is expressly forbidden to do so. Such an interpretation would be out of harmony with the injunction contained in the first section of the act, that "all provisions of this act shall be liberally construed for the accomplishments of these purposes," one of the purposes referred to having been earlier declared in the section to be "to eliminate the evils of unlicensed . . . selling . . . of alcoholic beverages." In addition to the rule of interpretation expressed in the act itself, we know that "Once the intention of the legislature is ascertained it will be given effect even though it may not be consistent with the strict letter of the statute (citing cases). In construing a statute it must be remembered that no law is to be construed in such a manner as to result in a palpable absurdity." *People v. Black*, 1941, 45 Cal.App.2d 87, 94, 113 P.2d 746, 750. . . .

WESTERN UNION TELEGRAPH CO. v. LENROOT

Supreme Court of the United States, 1945.
323 U.S. 490, 65 S.Ct. 335, 89 L.Ed. 414.

[The case appears *supra*, p. 729.]

MAX RADIN, A CASE STUDY IN STATUTORY INTERPRETATION

33 Calif.L.Rev. 219, 228 (1945).

It is . . . true that the consideration of the consequences of a decision has at all times been a controlling factor in the judicial process. Those courts who declare vigorously that they are completely indifferent to the consequences of what they decide, and would decide as they do though the heavens fell, merely mean that they do not really believe that the consequences will be seriously harmful. If

they meant what they said, and acted on it, they would be taking a long step toward the destruction of our judicial system.

NOTE

In *Jewish Kasher Provision Corp. v. Gottfried*, 63 N.Y.S.2d 160 (1946), the question was whether an employee's wrong in embezzling his employer's money by short-weighting the employer in delivery of meats so permeated a contract for restitution as to render it non-dischargeable by the employee's bankruptcy. In the course of his opinion answering the question affirmatively, Benjamin, J., said: "To aid in determining this question, counsel have been unable to furnish the Court with any authority in our State and as far as this Court knows the question is one of original impression in our jurisdiction.

"Section 103, subdivision a(4) of the Bankruptcy Act, 11 U.S.C.A., provides that debts which arise on a contract, express or implied, may be proved in bankruptcy. Section 17 of the Bankruptcy Act, 11 U.S.C.A. § 35, provides as follows:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . .

"(second) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or . . .

"(fourth) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity . . ."

"The intent of Congress with respect to these provisions must be determined in the light of the results sought to be achieved by the Congressional enactment. Statutory construction to be vital must necessarily involve more than a mere exercise in semantics. We are not concerned merely with form, choice of words or punctuation but must look beyond, to the substance. Certainly, it was never intended by Congress that persons guilty of larceny from their employers could be freed of their obligation to make restitution by a discharge in bankruptcy. On the contrary, the opposite purpose was expressly stated. The provisions relating to the discharge of contracts must be read in the light of the provisions preserving the obligation *ex maleficio*. The ultimate result can be arrived at only through a reasonable reconciliation of all of the appropriate provisions of the Bankruptcy Act."

"The position of the defendant, reduced to simple language, is that having induced the plaintiff to waive its right to immediate repayment and to agree to take payments in installments, that he may now by the relatively simple process of a discharge in bankruptcy evade the civil consequences of his original crime. Such a result places a premium upon cunning, intrigue and fraud to the complete discouragement of the sociological and humane values inherent in the forbearance of the employer.

"This Court would be unwilling to say that a humane employer who makes an agreement funding the obligation for the restoration of the stolen property in easy installments, thereby places himself in a position where his right of recovery may become barred. This Court would be extremely reluctant to place such a penalty upon the quality of mercy. Rather does it appear to the Court that to suffer such a result would be merely to encourage an additional item of fraud since the agreement of restitution, followed by a petition in bankruptcy, would then be a convenient subterfuge for the evasion of the original obligation. Such a result would tend to prevent and render impossible all reasonable attempts to achieve restitution by agreement.

"It is the opinion of the Court that the Bankruptcy Law was not intended to provide a mechanism to impose a second fraud upon the earlier one. Congress intended that obligations having an ordinary commercial inception be dischargeable while obligations *ex maleficio* continue in force and effect."

SECTION 3. INTRINSIC AND EXTRINSIC AIDS AND THE PROBLEM OF AMBIGUITY

A. *Introductory*

INTRODUCTORY NOTE

The elaborate apparatus of so-called intrinsic and extrinsic aids which fills most text-books on statutory interpretation has resulted mainly from judicial adherence to the literal approach. In case after case, having chosen the literal approach and read the letter of the text in reference to the found facts, and having adjudged the meaning to be ambiguous rather than plain, assistance was sought from the sources regarded as most likely to resolve the ambiguity in accordance with the "intention of the legislature". Concerning the modern use of intrinsic aids John Willis has said: "You will observe that your court always adopts a single uniform technique: it asks three questions; (1) what is the meaning of these words when read alone; (2) what is the meaning of these words when read together with the rest of the words of the Act; (3) what is the meaning of these words when read against the background of that part of human conduct with which the Act deals. Put more shortly it takes into account, (1) ordinary meaning, (2) context, (3) subject matter. You should not be too much impressed by this heartening phenomenon of judicial uniformity, or by the amount of space which judges devote to it in their opinions. No technique has much effect on final result—least of all this technique. If the court decides that the meaning of the words is 'plain', then, of course, . . . 'interpretation' is unnecessary and the technique is inapplicable. If, on the other hand, the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning, no man of sense would expect to find the question settled by a reference to such a vast and vague field as 'the rest of the words of the Act' or 'the part of human conduct with which the Act deals'. Examine the cases and you will see that the court, after discussing 'ordinary meaning', 'context', and 'subject matter', always concludes its opinion in one of two ways: either it refers to the 'object' of the Act, i.e., calls to its aid the 'mischief rule' . . . , or else it invokes one of the 'presumptions'." ¹

The intrinsic aids most often used today were considered supra in Chapter 6, Section 2, in relation to the problem of choice and arrangement of language for legislative drafting, and incidentally in connection with other topics (e.g. Chapter 5, Section 5). They should now be reviewed from the point of view of the counsellor and advocate, and the material is regrouped here accordingly.

In this Section the main emphasis is placed upon the use of aids extrinsic to the statute; an area of law in which is manifested one of

¹ Willis, "Statute Interpretation in a Nutshell", 16 Can.Bar Rev. 1, 4 (1938).

the most significant trends in the development of modern legal method.

O. W. HOLMES, THE THEORY OF LEGAL INTERPRETATION

12 *Harv.L.Rev.* 417, 418, 419-420 (1899); *Collected Papers* 203-204, 206-207; New York, 1920 (Harcourt, Brace and Howe).

It is true that in theory any document purporting to be serious and to have some legal effect has one meaning and no other, because the known object is to achieve some definite result. It is not true that in practice (and I know no reason why theory should disagree with the facts) a given word or even a given collocation of words has one meaning and no other. A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it there has a shade of significance more refined than any given in the word-book. But in this first step, at least, you are not troubling yourself about the idiosyncrasies of the writer, you are considering simply the general usages of speech. So when you let whatever galvanic current may come from the rest of the instrument run through the particular sentence, you still are doing the same thing. How is it when you admit evidence of circumstances and read the document in the light of them? Is this trying to discover the particular intent of the individual, to get into his mind and to bend what he said to what he wanted? No one would contend that such a process should be carried very far, but, as it seems to me, we do not take a step in that direction. It is not a question of tact in drawing a line. We are after a different thing. What happens is this. Even the whole document is found to have a certain play in the joints when its words are translated into things by parol evidence, as they have to be. It does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were. But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law. . . .

I have stated what I suppose to be our general theory of construction. It remains to say a few words to justify it. Of course, the purpose of written instruments is to express some intention or state of mind of those who write them, and it is desirable to make that purpose effectual, so far as may be, if instruments are to be used. The question is how far the law ought to go in aid of the writers. In the case of contracts, to begin with them, it is obvious that they express the wishes not of one person but of two, and those two adversaries. If it turns out that one meant one thing and the other another, speaking

generally, the only choice possible for the legislator is either to hold both parties to the judge's interpretation of the words in the sense which I have explained, or to allow the contract to be avoided because there has been no meeting of minds. The latter course not only would greatly enhance the difficulty of enforcing contracts against losing parties, but would run against a plain principle of justice. For each party to a contract has notice that the other will understand his words according to the usage of the normal speaker of English under the circumstances, and therefore cannot complain if his words are taken in that sense.

Different rules conceivably might be laid down for the construction of different kinds of writing. In the case of a statute, to turn from contracts to the opposite extreme, it would be possible to say that as we are dealing with the commands of the sovereign the only thing to do is to find out what the sovereign wants. If supreme power resided in the person of a despot who would cut off your hand or your head if you went wrong, probably one would take every available means to find out what was wanted. Yet in fact we do not deal differently with a statute from our way of dealing with a contract. We do not inquire what the legislature meant; we ask only what the statute means. . . .

CHARLES B. NUTTING, THE AMBIGUITY OF UNAMBIGUOUS STATUTES

24 Minn.L.Rev. 509-513 (1940).

. . . What is ambiguity? Resort to Webster produces the following: "Ambiguousness in meaning arising from language admitting of more than one interpretation; duplexity in meaning." Undaunted, we refer to "ambiguous," and discover that it indicates that which is "capable of being understood in either of two or more possible senses; equivocal." Light begins to dawn. A word is ambiguous if it has two or more possible *meanings*. But what is meaning? Immediately gloom descends once more. To formulate an adequate conception of "meaning" for the purposes of statutory interpretation is a task of surprising difficulty. "Words," say Ogden and Richards, "as everyone now knows, 'mean' nothing by themselves. . . ."¹ But this general knowledge seems not to have permeated some tribunals of last resort.²

¹The Meaning of Meaning (3d ed. 1930) 9. The authoritative character of this work, which has been used extensively in the preparation of the following article, may have been overemphasized, due to the present writer's inexperience in the field of semantics. It is intended, however, merely to cite it as representing an interesting and reasonable point of view, and to follow some of its implications as they relate to statutory interpretation.

²It is believed, for example, that much of the difficulty underlying the application of the contracts clause to legislation enacted under the "police power" is due to the assumption on the part of some courts that the word "contract" has a settled "meaning" which can easily be ascertained and applied. Cf. the following: "I necessarily conclude that the prohibition against the impairment of contracts by the legislature is so clear that it is only by an unwarranted judicial distortion

If words "mean" nothing by themselves, it seems the sheerest nonsense to assert that words are either ambiguous or unambiguous. Students of semantics seem to agree, though perhaps not all would adopt the same terminology, that a word has "meaning" when it symbolizes a referent.³ Words such as "fascism" or "democracy" have no "meaning" because they do not stand for any referent. The word "apple" may have "meaning" if it stands for a particular object, the existence of which may be verified. Complex symbols such as "contract," "ownership" and "title" may have "meaning" since they stand for a group of referents, each of which must be present.⁴ It might be said that a word is ambiguous if it stands for more than one referent. But this is against the rules. Quoting again from Ogden and Richards, "One symbol stands for one and only one referent."⁵ If a word is not a symbol it has no "meaning." If it is a symbol, it cannot be ambiguous. Therefore words either "mean" nothing or have but one "meaning." But Webster says that an ambiguous word is one which is "capable of being understood in either of two or more possible senses." This may indicate that if it is possible for hearers to find more than one referent for a word it is ambiguous. It is possible, though perhaps not reasonable, for hearers to make more than one reference when any word is pronounced. Thus, when the word "apple" is heard the reference "orange" or "tomato" may be made and so on, ad infinitum. Or, if the word "dog" is pronounced, reference to either "Rover" or "Spot" is possible. If this position is taken, all words become ambiguous. This tends to become discouraging, and

of its plain provisions that the moratory law could be upheld. The meaning of the constitutional provision is so clear that it is not subject to construction. The idea that an existing emergency could change its meaning is clearly disproved by a reading of the simple language contained in the provision itself. . . ." Carter, J., specially concurring in *First Trust Company v. Smith*, (1938) 134 Neb. 84, 129, 277 N.W. 762, 784. But if the word "contract" may "mean," among other things, an agreement entered into between parties in the light of existing laws, including the power of the legislature to act in furtherance of the general welfare, the invalidity of moratory legislation becomes less obvious. As to the "meaning" of the expression "freedom of contract," compare *Adkins v. Children's Hospital* (1923) 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, and *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 57 S.Ct. 587, 81 L.Ed. 703.

³ Ogden and Richards, *The Meaning of Meaning* (3d ed. 1930), especially Chapter V. "Referent" as here used, "means" the thing or things for which the word or symbol stands. See, passim, Stuart Chase, *The Tyranny of Words* (1938) and Goldberg, *The Wonder of Words* (1938) especially chapter XV. Cf. the use of "determinate" and "determinable" in Radin, "Statutory Interpretation" (1930) 43 *Harv.L. Rev.* 863.

⁴ These terms, of course, constitute a convenient type of shorthand which relieves lawyers from the necessity of indicating all of the elements which they include whenever it becomes desirable to describe the situation which they connote. When the word "contract" occurs, for example, lawyers will understand, subject to certain qualifications of the type mentioned in note 2, *supra*, that it includes the elements of legally competent parties, apparent mutual assent, consideration (where necessary), and lawful purpose. Each of these elements may be reduced further. The fact that the word is highly complex does not destroy its validity, but it becomes dangerous to use in situations where extreme precision is required. Cf. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale L.J.* 16.

⁵ Ogden and Richards, *The Meaning of Meaning* (3d ed. 1930) 88.

induces a type of verbal paralysis which is common to amateurs in the field of semantics.

Experts on statutory interpretation, however, have never studied semantics. This is perhaps a good thing. At any rate, certain basic assumptions seem to underly the interpretive process. One of these appears to be that "intention" has something to do with interpretation. In the case of private integrations⁶ it is usually said that words are to be interpreted in accordance with the "intention" of the parties.⁷ When statutes are involved, the "intention" of the legislature is said to control.⁸ This may indicate that the words of a contract or statute will be held by the courts to be symbols of the referents the parties or the legislature had in mind.⁹ This assumes first that the parties and the legislature did have referents in mind; second, that all the parties and all the members of the legislature had the same referents in mind; and third, that it is possible to discover what the referents are. In the case of integrations by private parties, it seems obvious that this idea is not to be taken seriously. Not the "subjective intent," but the "objective manifestations of intent" are considered by the courts.¹⁰ Thus, the fact that an integration is ambiguous in the sense that the parties actually had different referents in mind, or "meaningless" in the sense that the words used did not symbolize referents, becomes irrelevant in many cases. The court will select its own referents, and hold that the words are symbols of those referents. In other words

⁶ The term "integration" is here used as it is employed in the Restatement of the Law of Contracts of the American Law Institute (1932). "An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted." Sec. 228. In general the Restatement has been cited hereinafter in support of broad propositions which do not require detailed examination.

⁷ The following statement is typical: "Generally speaking, the cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles." 12 Am.Jur., Contracts, sec. 227. Compare the much more accurate statement in the Restatement of the Law of Contracts, sec. 280; "The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean." See also secs. 231, 233.

⁸ Again, a typical formulation is given instead of a cumulative citation of authorities: "In the interpretation and construction of statutes, the primary rule is to give effect to the intention of the legislature." 25 R.C.L., Statutes, § 216.

⁹ Compare: "A symbol refers to what it is actually used to refer to; not necessarily to what it ought, in good usage, or is intended by an interpreter, or is intended by the user to refer to." Ogden and Richards, *The Meaning of Meaning* (3d ed. 1930) 103.

¹⁰ "It is customarily said that mutual assent is essential to the formation of informal contracts, but it should further be stated that the mutual assent must be manifested by one party to the other, and except as so manifested is unimportant. In some branches of the law, especially in the criminal law, a person's secret intent is important, but in the formation of contracts it was long ago settled that secret intent was immaterial, only overt acts being considered in the determination of such mutual assent as that branch of the law requires." Williston and Thompson, *Contracts* (rev. ed. 1936) § 22. See *Restatement of the Law of Contracts*, § 20.

the court will declare that an integration "means" what it (the court) thinks it "means."¹¹ This will ordinarily be explained by the statement that the parties have made an objective manifestation of their intention in clear and unmistakable terms, and that they cannot vary those terms by the introduction of parol evidence to show their actual intention.¹²

However, on occasion, the court will not be satisfied as to what the referent is. In this case, the integration will be called "ambiguous" and an attempt will be made to determine the referent understood by the parties. Here, moral considerations seem to enter into the picture. If each party is innocent with respect to the existence of the "ambiguity," the words used will be held to symbolize the referent which each party had in mind. If it happens that the court is satisfied that each party had the same referent in mind, it will say that a "contract" is present; otherwise there will be no contract. On the other hand, if one of the parties was at fault with respect to the occurrence of the "ambiguity," then the referent the other party had in mind is selected as being the true one, and it will be said that there is a "contract" on the basis of the "meaning" attached by the innocent party.¹³ Therefore it appears that, dependent on such circumstances as have been indicated, a "contract" may "mean" what both parties think it "means," what neither party thinks it "means" or what one of the parties thinks it "means."

Much the same sort of thing is to be found if statutes rather than private integrations are considered. . . .

MAX RADIN, "STATUTORY INTERPRETATION"

43 Harv.L.Rev. 863, 868-869 (1930).

. . . A statute is neither a literary text nor a divine revelation. Its effect is therefore neither an expression laden with innumerable emotional overtones nor a permanent creation of infallible wisdom. It is a statement of a situation, or rather of a group of possible events within a situation, and as such is essentially ambiguous. This word is a pejorative expression in the mouths of most persons and seems to suggest that an ambiguous sentence can have two contradictory meanings; that, for example, it can permit what it seems to forbid. But of course that is not what the word "ambiguous" ought to suggest. A statement is ambiguous if there are two possible meanings—any two

¹¹ Perhaps this is not an entirely fair way of putting it. It is not intended to convey the suggestion that courts are often capricious or unreasonable. The "meaning" given an integration by the courts will usually coincide with that which would be given it by any other unbiased observer. But since the courts actually make the decisions, it is their "meaning" which is really adopted rather than that of a hypothetical reasonable man.

¹² Of course this does not take into account the possibility of reforming an integration in such a way as to make actual intent effective. See Restatement of Contracts, sec. 238(c).

¹³ Restatement of Contracts, sec. 233.

—and it can make no difference whether or not they partially contradict each other.

If therefore a group of events is described in a statute, there must at least be two which will fit that description, and since events are unique, any description of a group is almost by definition ambiguous. But although “unambiguous” and “plain” have been equated, the equation is not quite justified. It is still possible to find a plain statute, even though its meaning involves several things rather than one.

Mr. W. E. Johnson, whose *Logic* is one of the most considerable of recent contributions to this much-discussed subject, has given us in his differentiation of *determinables* and *determinates* a valuable instrument for presenting the meaning of statutes. The situation described in a statute is generally a determinable; that is to say, it is a statement which involves a number of possible events or individualizations, any one of which would be correctly described by that determinable. A determinable of this sort can be made more nearly determinate by reducing the number of possible individualizations, and it becomes quite determinate when it is so expressed that there is only one.

A statute which ratifies a particular past act by a named person deals with a determinate event. So does a private bill, granting a pension to a named person or divorcing a named couple. Such statutes are therefore themselves determinates. But they are very few compared with the statutes in general, and a still smaller number of such statutes are ever discussed in law. If they are so discussed, it certainly can be said of them that they are plain and unambiguous. But they may still be plain, though perhaps no longer unambiguous, if, being determinables, they are so nearly determinate that we can indicate almost at once all the ways in which they can become determinate. If there were a statute which provided that “when the President dies, the Vice-President shall at once *ipso facto* become President,” it would be a determinable, because there might be an indefinite number of future presidents and vice-presidents, but it would be plain enough, because the number of cases is after all much smaller than in almost any other statutory determinable. It will hardly be necessary to say that most of our most specific statutes fall considerably short of this ready determinability, and consequently no great limitation is imposed by the self-denying ordinance which renounces “interpretation” when the statute is plain. As a matter of fact, in most cases when courts say that a statute is plain and therefore needs no interpretation, they do so in the inverted fashion which marks so much of the judicial process. They have already interpreted, and they then declare that so interpreted the statute needs no further interpretation.

The act of interpretation, however, is not that of rendering a determinable quite determinate. The determinate involved is the actual issue in litigation. As soon as it is made apparent that the statutory determinable does or does not cover this determinate event, the act of interpretation is finished. It consists therefore in making a deter-

minable somewhat more nearly determinate. Our inquiry must then turn to the methods by which this is done. . . .

B. The Words

[The material on this topic appears in Chapter 6, Section 2, *supra*, pp. 800-808.]

C. The Context

[Review here the material in Chapter 6, Section 2, beginning with *Suwannee Fruit & Steamship Co. v. Fleming*, *supra*, p. 808, and ending on p. 837.]

HAWORTH v. CHAPMAN

Supreme Court of Florida, 1934. 113 Fla. 591, 152 So. 603.

[The case appears *supra*, p. 848.]

STATE v. CHICAGO & N. W. RY. CO.

Supreme Court of Nebraska, 1947. 147 Neb. 970, 25 N.W.2d 825.

[The case appears *supra*, p. 883.]

D. Statutes In Pari Materia

REX v. DOJACEK

Manitoba Court of Appeal, 1919. 48 D.L.R. 36.

[The case appears *supra*, p. 833.]

SPENCER v. THE STATE

Supreme Court of Indiana, 1853. 5 Ind. 41.

[The case appears *supra*, p. 995.]

SUWANNEE FRUIT & STEAMSHIP CO. v. FLEMING

United States Emergency Court of Appeals, 1947. 160 F.2d 897.

[The case appears *supra*, p. 808.]

OLD HOMESTEAD BAKERY v. MARSH

District Court of Appeal, California, 1928. 75 Cal.App. 247, 242 P. 749.

HART, J. . . . The purpose of this proceeding is to obtain a judicial determination of the question whether the provision of the state Motor Vehicle Act authorizing the imposition of a registration fee of \$50 for the registration of electric motor vehicles intended for use and used for the transportation of passengers for hire or the transportation of property is or is not, when measured by certain mandates of the state and federal Constitutions, a valid enactment. The position here of the petitioner is that it is in violation of the state Constitution, in that it imposes upon such motor vehicles a fee "in excess of that imposed upon any other automotive vehicles designed and used for the transportation of passengers for hire, or for the transportation of property," and is therefore discriminatory; that it is "based upon an unreasonable and arbitrary classification."

The provision to which the objections above stated are here interposed is in subdivision (b) of section 77 of the act of the Legislature of 1923, (Stats. 1923, p. 517 et seq.), the object of which, generally stated, is to regulate the use and operation of vehicles upon the public highways, and to provide for the registration and identification of motor vehicles, etc., and for the payment of registration fees therefor. Said subdivision reads:

"(b) A registration fee of ten dollars shall be paid for the registration of every electric passenger motor vehicle and a registration fee of fifty dollars shall be paid for the registration of every electric motor vehicle designed and used for the transportation of passengers for hire or for the transportation of property. Such fees shall be in addition to the fees specified in subdivision (a) of this section."

The preceding subdivision (a) provides for the payment of a registration fee of \$3 for the registration of every motor vehicle, trailer or semitrailer, except for such as are by the act expressly exempted from the operation of said subdivision.

The act of 1923 was intended to supersede the statute of 1913 (Stats. 1913, p. 639), which provided, in elaborate detail, rules and regulations governing the use and operation of motor vehicles over and upon the public highways of the state. Under said act registration fees for all motor vehicles, regardless of the kind of power by which they were operated, were rated upon the basis of the horsepower of the vehicle, and therefore, the amount of such fee which was required to be paid was according to the horsepower of the vehicle. That act, with some amendments thereto by subsequent Legislatures, remained the law until the passage of the act of 1923 above mentioned. Among the several changes made in the act of 1913 was that by the Legislature of 1915 (Stats. 1915, pp. 397, 401), whereby motor vehicles operated by electricity were, as to registration fees, removed from the general class of motor vehicles and set off in a class by themselves, or, in other words, the electric motor vehicles were taken from the horse power

basis for the charging of registration fees and the owners thereof required to pay for each such vehicle a flat registration fee of \$5. The gas vehicles were still retained by said act in their original class for registration fee rating purposes; that is to say, they were still subject to the horse power system of rating the registration fees. . . .

. . . . It may well be assumed that the plan adopted into the act of 1913 for the raising of revenue for highway purposes by prescribing graduated registration fees to be paid by owners of gas-propelled motor vehicles and a flat fee for electric motor vehicles was finally found to be entirely inadequate to the raising of such revenue in an amount each year which would satisfy the increased and the still growing financial exactions of highway improvement and upkeep, since it is true that the Legislature of 1923 passed an act establishing an entirely new system for the raising of revenue for said purpose, so far as gas and other fuel cars are concerned, by requiring, practically, the owners or operators of all such cars to pay to the state, in addition to nominal registration fees, 2 cents per gallon for all gas consumed in the operation thereof. Stats. 1923, p. 571. It is true that the license tax of 2 cents per gallon on all fuel gas sold and distributed by those engaged in the business of selling the same for motor vehicle purposes is not a direct license tax upon those owning or using such vehicles; yet that the act operates indirectly to impose upon the owners or operators of such vehicles a tax of 2 cents on every gallon of gas that they purchase for use in propelling motor vehicles is, from the very nature and logic of the situation, indisputably true. This proposition irresistibly follows from the fact that taxes assessed against the goods and wares of the vendor thereof and by him paid are always included in so-called "overhead expenses," and, of course, constitute an element in the fixing of the market value of the goods, or, at all events, is an element of the cost of the goods to the consumer, and that the tax upon such gas provided by the act was intended by the Legislature to be substituted for and in lieu of the license tax on motor vehicles propelled by means of gas, and graded according to the horse power standard, as provided by the act of 1913, is plainly shown by the provisions or the language thereof. . . .

The Attorney General, representing the respondent, insists that, to determine whether the Legislature, in providing for the raising of revenue for highway improvement purposes by imposing upon owners or other persons operating motor vehicles over and upon the highways of the state certain license fees or taxes, has or has not discriminated in favor of gas propelled as against electric-propelled motor vehicles, the two statutes of 1923—the one dealing with automotive highway traffic and other matters pertaining to the use of motor vehicles, and the other levying a fuel gas tax of 2 cents per gallon, to be paid by all persons operating such vehicles propelled by gas—must be read and considered together as being in *pari materia*. This position is vigorously assailed by counsel for the petitioner. They assert that the doctrine of *in pari materia*, being a mere rule of construction, may appropriately be invoked only where there are two or more statutes dealing with cognate or interrelated subjects, and one contains words of such dubious or

doubtful meaning as to make it uncertain what the Legislature intended to say by the use of such words; that in such case such statute may be read and considered with such other statute or statutes to ascertain the true meaning of such words or the intent of the Legislature in so using them. In other words, and in brief, the position of petitioner's counsel is that the application of the rule referred to is limited to the ascertainment of the meaning of ambiguous words in a particular statute of several dealing with the same general subject, and is not to be resorted to for the purpose of obtaining light upon the question whether it was the legislative intent that the several statutes should together constitute a single plan or scheme for the accomplishment of a particular object. To the contention thus stated we are unable to agree. We can think of no good reason which may stand as in support of it. To the contrary, we accept as expounding the sounder interpretation of the doctrine the following statement thereof in 36 Cyc. p. 1147:

"Statutes in *pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain *the uniform and consistent purpose of the Legislature* (italics ours), or to discover how the policy of the Legislature with reference to the subject-matter has been changed or modified from time to time. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the Legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed."

See, also, *State ex rel. American Piano Co. v. Superior Court*, 105 Wash. 676, 679, 178 P. 827, 828; *Paltro v. Aetna Casualty & Surety Co.*, 119 Wash. 101, 204 P. 1044, 1046; *Ford v. Harbor Commissioners*, 81 Cal. 19, 29, 22 P. 278; *Irelan v. Colgan*, 96 Cal. 413, 414, 415, 31 P. 294; *German Sav. & Loan Society v. Ramish*, 138 Cal. 120, 128, 69 P. 89, 70 P. 1067; 31 Corpus Juris, p. 358, and cases named in the footnotes.

Furthermore, "the rule that statutes in *pari materia* should be construed together applies with peculiar force to statutes passed at the same session of the Legislature; it is to be presumed that such acts are imbued with the same spirit and actuated by the same policy, and they are to be construed together as if parts of the same act. They should be so construed, if possible, as to harmonize, and force and effect should be given to the provisions of each." 36 Cyc. p. 1151.

And particularly in the construction of statutes relating to revenue and taxation is the rule applicable and invariably invoked upon the theory that all such statutes constitute one law. *People v. Cleveland, C., C. & St. L. Ry. Co.*, 306 Ill. 459, 138 N.E. 196; *Commonwealth v. P. Lorillard Co.*, 129 Va. 74, 105 S.E. 683; *State v. Covington*, 35 S.C. 245, 14 S.E. 499. . . .

. . . Where a legislative act contains no uncertain or misleading words, but, taken alone, although the subject-matter thereof be within legislative cognizance, it would, nevertheless, offend certain restrictions or inhibitions of the state or federal Constitution, then, in that case, if there be any other statute or statutes in *pari materia* with such act, the several acts or statutes should be construed together as if they constitute but one law, if in so doing they harmonize in the achievement of the central purpose of their enactment and at the same time remain within the commands or inhibitions of the state and federal Constitutions.

It is perfectly clear, as has been before stated, that the provisions themselves of the act of 1923 imposing a tax of 2 cents on every gallon of fuel gas to be used in gas-propelled motor vehicles, show that the Legislature, *ex industria*, intended that that plan of imposing a privilege tax on those operating or causing to be operated such motor vehicles upon the highways of the state should be in lieu of the registration fee such persons were theretofore required to pay. We therefore hold that the two acts of 1923 under consideration, in so far as they provide, respectively, for a registration fee for electric motor vehicles and the excise or privilege tax on gas for gas-propelled motor vehicles were intended to constitute a single plan or scheme for compelling persons operating, or causing to be operated, motor vehicles upon the public highways of the state to pay a fee or a tax, according to the character of such vehicles as to the method of their propulsion, and that the two acts in that particular are in *pari materia*; that, in effect, they constitute one law. So considering the two acts we can perceive no reason for holding that there is any discrimination in the matter of the privilege fee or tax which the operators of the two classes of motor vehicles are, respectively, required to pay. We cannot so declare from the face of the statutes. It may be that, in particular instances, the amount paid by the operators of gas-propelled motor vehicles used for the transportation of passengers or property in some years is and will be less than the flat fee required to be paid by operators of freight or passenger electric motor vehicles. On the other hand, it may be (and we doubt not that this is true) that in many instances the amount paid as the tax on fuel gas purchased and used by persons operating or causing to be operated gas-propelled passenger or freight motor vehicles is annually far in excess of the sum of \$50 the amount of the registration fee exacted from those operating like electric motor vehicles. The problem is not one of easy solution. It is, however, a problem the solution of which is peculiarly and exclusively one of legislative cognizance, and an approximately fair and equitable adjustment of the whole matter is, perhaps, all that may or should reasonably be expected. The presumption is that the Legislature, in establishing the existing plan, fully investigated the facts upon which it acted in fixing a flat fee in the one case and a fuel gas tax in the other, and in placing the fee for electric motor vehicles used for freight or passenger transportation at \$50, and the statutes themselves constitute a finding that the system established by those acts will bring, and has brought,

about as near an equitable adjustment, as between the operators of the two classes of motor vehicles so used, of the amounts they should respectively pay for the privilege of using the highways as is practicable. Cooley's Const. Limitations, 187; *Stevenson v. Colgan*, 91 Cal. 649, 653, 27 P. 1089, 14 L.R.A. 459, 25 Am.St.Rep. 230. Of course, the courts cannot go behind legislative enactments which, upon their face, are in complete harmony with the Constitution, and, by a resort to evidence, attempt to ascertain whether the Legislature, in passing them, did or did not observe or remain within the restrictions which the Constitution has placed upon its power as a coordinate branch of the government, or has or has not properly performed the duty which is not only enjoined upon it by the Constitution but which its members by their oaths bound themselves properly to perform. *Stevenson v. Colgan*, supra. . . .

For the foregoing reasons, the judgment is affirmed.

NOTES

1. The Supreme Court of the United States has consistently held that when two acts are in *pari materia*, the one passed later may be used as an aid in interpreting the earlier. See *United States v. Freeman*, 3 How. (U.S.) 556, 564 (1845), *Tiger v. Western Investment Co.*, 221 U.S. 286, 309, 31 S.Ct. 578, 55 L.Ed. 738 (1911), *Great Northern Ry. v. United States*, 315 U.S. 262, 276, 62 S.Ct. 529, 86 L.Ed. 836 (1942).

In *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (C.C.A.N.Y. 1945), the court said that "In *United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1940), a later statute in *pari materia* was considered to throw a cross light upon the Anti-trust Acts, illuminating enough even to override an earlier ruling of the court."

2. See *Ex parte Crow Dog*, 109 U.S. 556 (1883) (statutes in *pari materia* may be referred to even though repealed).

3. Does the method of applying the doctrine of in *pari materia* resemble that of developing case law by analogy?

4. Crawford, *The Construction of Statutes*, (1940) at p. 435 states that the resort to statutes in *pari materia* can be justified on the ground that it may be assumed that all statutes which relate to the same subject matter were enacted in accord with the same general legislative policy, and that together they constitute a harmonious or uniform system of law.

KEIFER & KEIFER v. RECONSTRUCTION FINANCE CORPORATION

Supreme Court of the United States, 1939.
306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784.

[The case appears *infra*, p. 1275.]

NOTE

There are numerous cases in which the court has drawn exactly the opposite inference to that which the court drew in the principal case. See *United States v. Dickerson*, *infra*, at p. 1155.

E. The Common Law

Since a statute is a constituent part of the whole body of law of each jurisdiction in which it applies, the common law obviously forms part of its external context. As such the common law, particularly on the same subject, is similarly available with statutes in *pari materia* as an aid to interpretation.

IN RE TYLER'S ESTATE

Supreme Court of Washington, 1926.
140 Wash. 679, 250 P. 456, 51 A.L.R. 1083.

[The case appears *supra*, p. 1018.]

ROBINSON'S CASE

Supreme Judicial Court of Massachusetts, 1881.
131 Mass. 376, 41 Am.Rep. 239.

[The case appears *infra*, p. 1213.]

PERRY v. STRAWBRIDGE

Supreme Court of Missouri, 1908.
209 Mo. 621, 108 S.W. 641, 16 L.R.A.,N.S., 244, 123 Am.St.Rep. 510, 14 Ann.Cas. 92.

[The case appears *supra*, p. 837.]

REEVES & CO. v. RUSSELL

Supreme Court of North Dakota, 1914.
28 N.D. 265, 148 N.W. 654, L.R.A.1915D, 1149.

[The case appears *infra*, p. 1262.]

F. Previous Judicial Interpretation

(i) BY THE SAME COURT

Review here the material in Chapter 1, Section 2(C), which appears *supra*, pp. 41–85.

(ii) OF STATUTES ADOPTED FROM OTHER JURISDICTIONS

CATHCART v. ROBINSON

Supreme Court of the United States, 1831. 5 Pet. 264, 8 L.Ed. 120.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

This is a suit in chancery brought by the appellee in the Court of the United States for the District of Columbia, to enforce the specific performance of a contract entered into between him and James L. Cathcart, one of the appellants, for the sale and purchase of a tract of land, called Howard, lying in the county of Alexandria; and also to subject a claim of the said Cathcart on the United States, under the provisions of the eleventh article of the treaty with Spain, signed at Washington on the 22d of February, 1819, to the payment of the purchase money.

The agreement, which was executed on the 10th of September, 1822, stipulated that Robinson should convey to Cathcart the place called Howard, as soon as a proper deed could be made: that Cathcart should pay therefor the sum of eight thousand dollars by instalments; the first payment of five thousand dollars to be made on the 1st of January, 1825, and the residue in three equal annual payments, to commence from that time. To secure these payments, Cathcart agreed to execute four bonds, bearing interest from the first day of January, 1825; and, as a further security, to execute a deed of trust, with his wife's relinquishment of dower, upon Howard, and likewise on the total amount of his claim on the United States, under the provisions of the eleventh article of the treaty with Spain, signed at Washington on the 22d of February, 1819; and the contract concluded with the following words: "In further confirmation of the said agreement, the parties bind themselves, each to the other, in the penal sum of one thousand dollars."

At the date of this agreement Howard was in possession of a tenant, John T. O. Wilbar, who had a right to hold the premises till the end of the year. Under an arrangement with Cathcart he surrendered possession of the place soon after the purchase was made.

Previous to the contract of the 10th of September, 1822, on the 10th of November, 1818, James L. Cathcart executed a deed conveying to John Woodside, the father of Mrs. Cathcart, for her benefit, all his property, including his claim under the Spanish treaty. This deed conveying wills, is recorded in the proper office for the recording of deeds conveying lands, in the city of Washington.

. . . Mr. Cathcart, in the contract of the 10th of September, 1822, agreed to secure the payment of the purchase money for Howard by the execution of a deed of trust "on the total amount of his claim on the United States, under the provisions of the 11th article of the treaty with Spain." If the penalty be substituted for the purchase money, it should certainly retain the protection of the same security. But the plaintiff in error alleges that he had disabled himself from complying with this part of the contract, by his previous conveyance of this fund to John Woodside in trust for Mrs. Cathcart and her issue.

This being a voluntary conveyance is, at this day, held by the Courts of England to be absolutely void under the statute of 27 Elizabeth, against a subsequent purchaser, even although he purchased with notice, 1 Mad.Ch. 271, 18 Ves. 110. 2 Taunton, 523. Their decisions do not maintain that a transaction, valid at the time, is rendered invalid by the subsequent act of the party. They do not maintain that the character of the transaction is changed, but that testimony afterwards furnished may prove its real character. The subsequent sale of the property is carried back to the deed of settlement, and considered as proving that deed to have been executed with a fraudulent intent to deceive a subsequent purchaser.

The statute of Elizabeth is in force in this district. The rule, which has been uniformly observed by this Court in construing statutes, is to adopt the construction made by the Courts of the country by whose legislature the statute was enacted. This rule may be susceptible of some modification, when applied to British statutes which are adopted in any of these states. By adopting them they become our own as entirely as if they had been enacted by the legislature of the state. The received construction in England at the time they are admitted to operate in this country, indeed to the time of our separation from the British empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But however we may respect subsequent decisions, and certainly they are entitled to great respect, we do not admit their absolute authority. If the English Courts vary their construction of a statute which is common to the two countries, we do not hold ourselves bound to fluctuate with them.

At the commencement of the American revolution, the construction of the statute of 27 Elizabeth seems not to have been settled. The leaning of the Courts towards the opinion that every voluntary settlement would be deemed void, as to a subsequent purchaser, was very strong; and few cases are to be found in which such conveyance has been sustained. But these decisions seem to have been made on the principle that such subsequent sale furnished a strong presumption of a fraudulent intent; which threw on the person claiming under the settlement the burthen of proving it from the settlement itself, or from extrinsic circumstances, to be made in good faith; rather than as furnishing conclusive evidence not to be repelled by any circumstances whatever.

There is some contrariety and some ambiguity in the old cases on the subject: but this Court conceives that the modern decisions establishing the absolute conclusiveness of a subsequent sale to fix fraud on a family settlement, made without valuable consideration, fraud not to be repelled by any circumstances whatever—go beyond the construction which prevailed at the American revolution; and ought not to be followed.

The universally received doctrine of that day unquestionably went as far as this. A subsequent sale, without notice, by a person who had

made a settlement not on valuable consideration, was presumptive evidence of fraud; which threw on those claiming under such settlement the burthen of proving that it was made bona fide. This principle, therefore, according to the uniform course of this Court, must be adopted in construing the statute of 27 Elizabeth as it applies to this case.

The strong presumption of fraud arising from the subsequent conveyance to Mr. Robinson, is not repelled by a single circumstance. On the contrary, all the circumstances which can be collected from the record come in aid of it.

[Specific performance refused. Judgment for plaintiff in penal sum.]

NOTES

1. See *Wilmington Trust Co. v. Mutual Life Ins. Co.*, 68 F.Supp. 83 (D.C.Del. 1946), and Albright, "Forum's Use of the Construction Given a Foreign Statute by a Third State," 13 N.C.L.Rev. 497 (1935). (Cf. *Teders v. Rothermel*, *infra*, p. 1217).

2. See Sioussat, "The Extension of English Statutes to the Plantations", in 1 *Select Essays on Anglo-American Legal History* (1907) 416.

STATE v. CHAPLAIN

Supreme Court of Kansas, 1917. 101 Kan. 413, 166 P. 238.

DAWSON, J. This action was a prosecution for the embezzlement of a piano. The defendant, a piano dealer in Concordia, sold the piano to the prosecuting witness for \$325, taking her promissory note therefor. At the time of the sale the purchaser paid \$50 in cash, which payment was indorsed on the note, and two days later the defendant discounted and sold the note to a stranger. The piano was purchased as a wedding present for the purchaser's daughter, and defendant agreed to keep the piano until after the daughter's marriage and then ship it to the daughter at Iola. Defendant defaulted in both these particulars. The state's evidence tended to prove that defendant employed a drayman to haul the piano to the railway depot and shipped it out of town. Plaintiff's evidence does not clearly show where or to whom the piano was shipped, but did show that it was effectually made away with. Defendant's evidence tended to show that he had formerly sold the piano on installments to one Shinn; that Shinn had defaulted on his payments, and that defendant had taken back the piano, and that he sold it to the prosecuting witness subject to the possibility of Shinn's resumption of payments and the reinstatement of his right to the piano; and it might be equivocally inferred from defendant's evidence that he intended to supply another piano in its stead, but whether to prosecutrix or to Shinn is mere conjecture so far as the record discloses. Other features of defendant's evidence were that the wholesale house in St. Joseph which supplied defendant with pianos sent a man to take charge of defendant's business in Concordia, and that the latter, and not the defendant, had caused the piano to be shipped out of town and disposed of. Much correspondence be-

tween the prosecuting witness and the defendant was introduced, but no purpose would be served by detailing it here. The jury found the defendant guilty as charged. . . .

It is first urged that the motion to quash the information should have been sustained. The information was drawn under section 136 of the Crimes Act, which provides that if any carrier or other bailee shall embezzle or convert to his own use, or make way with or secrete, any goods or property under his care, etc., he shall, upon conviction, be adjudged guilty of larceny, etc. Defendant contends that this statute, being copied from the Missouri Crimes Act (Rev.St.1909, § 4552) should be construed here as there, and that in Missouri the scope of this statute has been restricted by the doctrine of *ejusdem generis* to bailees of the nature and classification of carriers. The doctrine of *ejusdem generis* is all right in a limited way, and the same is true as to the rule that when a statute of another state is adopted the antecedent, authoritative interpretations of that state are likewise adopted; but the latter rule is not an invariable one, nor is it followed where the foreign interpretation is too severe a shock to the intelligence of the courts of the adopting state.

Moreover, when the adopting state has given the statute its own interpretation and applied that interpretation for a long stretch of years without amendment by its own Legislature, the presumption that the foreign interpretation at variance therewith was adopted with the act no longer obtains. In time, when many independent interpretations of the act have been made by the adopting state, it is no longer of any consequence what were the interpretations given to the act before its adoption from the foreign state. This section of the Crimes Act has never been interpreted—or perverted—in Kansas to mean that only a bailee like a carrier, or akin to a carrier, could be prosecuted or punished under its terms. It was held in this state nearly 40 years ago, to apply to a bailee who embezzled a gelding (*State v. Small*, 26 Kan. 209); it has been applied many times to bailees other than carriers and not of the classification of carriers, non *ejusdem generis*, who embezzled public funds (*State v. Spaulding*, 24 Kan. 1); also to embezzlers of private funds (*State v. Combs*, 47 Kan. 136, 27 Pac. 818); and to a warehouseman charged with the embezzlement of a quantity of wheat (*State v. Wales*, 98 Kan. 790, 160 P. 204). A multitude of such cases could be cited from our own reports sustaining prosecutions of embezzling bailees who were not like carriers except in the one respect in which all bailees are alike—persons intrusted with the possession of other people's personal property.

The judgment is affirmed.

NOTE

See review of authorities in comment on *Coyne v. Coyne*, 64 N.Y.S.2d 567 (Sup. 1946), in 31 Minn.L.Rev. 617 (1947).

COLVER v. McINTURFF

Supreme Court of Kansas, 1923. 112 Kan. 604, 212 P. 908.

MASON, J. In a motion for a rehearing the plaintiff, in support of his contention that the interpretation of a Kansas Statute (Gen.Stat. 1915, § 2055) adopted from Missouri in 1855, repealed in 1859, and re-enacted in 1868, is controlled by a Missouri decision rendered in 1857, invokes the rule that—

“A statute literally or substantially re-enacting a prior statute after its words have received a judicial interpretation must be regarded as adopted with knowledge of such construction and with the intention that it should thereafter be interpreted in the same way.” Black’s Law of Judicial Precedents, § 75.

The same principle has been thus expressed:

“It is a settled rule of statutory construction that when a statute or a clause or provision thereof has been construed by the court of last resort of a state, and the same is substantially re-enacted, the Legislature adopts such construction, unless the contrary is clearly shown by the language of the act, or the rules of statutory construction have been changed.” 25 R.C.L. 1075, 1076.

In each case the obvious meaning is that, where a court of last resort interprets a statute of its own state which is afterwards re-enacted, the re-enactment is deemed to adopt the construction as well as the language of the former act. If it has ever been held that the Legislature in re-enacting a statute of its own state is regarded as accepting an interpretation placed upon the same language by the court of the state in which it was first used, in the course of an opinion handed down after it had been copied by the other, such search as we have had opportunity to make has failed to discover it, and the logic of such a decision, if found, would not appeal to us strongly. The texts above quoted appear to recognize the rule we have already applied, that, where the Legislature in framing a law uses the language of an act it had formerly repealed, it is regarded as adopting its own earlier statute rather than as going back to that of another state where the language had been first used. In interpreting a re-enacted territorial statute in accordance with the construction previously given it by the body charged with its administration, the federal Supreme Court has said:

“The presumption that the codifiers of 1901 knew and approved the practice of the board certainly is as strong as the presumption that the original enactors of the statute knew a single decision in another state; and it is more important since it refers to a later time.” *Copper Queen Mining Co. v. Arizona Board*, 206 U.S. 474, 479, 27 Sup.Ct. 695, 696 (51 L.Ed. 1143).

The motion for a rehearing is overruled.

NOTE

Judicial interpretation of statutes made subsequent to their adoption by courts of the state from which they were adopted have been held highly persuasive in the adopting state in *Febock v. Jefferson County*, 219 Wis. 154, 262 N.W. 588 (1935), 101 A.L.R. 95; *Harris v. Diamond Const. Co.*, 184 Va. 711, 36 S.E.2d 573 (1946).

CHRISTGAU v. WOODLAWN CEMETERY ASS'N

Supreme Court of Minnesota, 1940. 208 Minn. 263, 292 N.W. 619.*

PETERSON, JUSTICE. This action is brought under the Minnesota unemployment compensation law, Mason Minn.St.1940 Supp. §§ 4337-21 to 4337-42, to recover unemployment compensation contributions from defendant as an employer of labor. There are 12 causes of action set forth covering the period from January 1, 1936 to September 30, 1939.

Defendant makes two claims of exemption from liability. One is of total exemption upon the ground that it is a corporation organized and operated exclusively for charitable purposes. . . .

Defendant was organized as a public cemetery in 1862 under Rev. Statutes, 1851, c. 37. It is governed now by Mason Minn.St.1927, §§ 7557-7624. The answer alleges that defendant was organized for the sole purpose of operating and maintaining a public cemetery; that it was authorized by law to engage in no other business, except such as is incident thereto; that it has no stock; that its members are the owners of the lots; that its members are not liable to assessment by it; that its trustees serve without compensation; and that no part of its earnings or any profit inure to the benefit of any individual or member.

Defendant has a permanent improvement fund for the perpetual care of burial lots, which was established pursuant to statute. This and the income therefrom it is alleged may not be used for any purpose other than that for which the fund was established. Certain trust funds are held by defendant upon trusts specified by the donors. Defendant has other funds, received and to be used exclusively for upkeep and maintenance of the cemetery.

Plaintiff demurred to the answer. The demurrer was sustained as to those parts in which defendant claimed a partial exemption on the ground of agricultural labor and was overruled as to the defense of exemption upon the ground that defendant was organized and operated exclusively for charitable purposes. . . .

The claim of exemption as a charitable corporation is based on Mason Minn.St.1940 Supp. § 4337-22, subd. H, which so far as here material defines employment as follows:

"(6) The term 'employment' shall not include:

. (a) (b) (c) (d)

* [The court's footnotes are omitted. Ed.]

"(i) Services performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

This provision is exactly the same as the corresponding provision of the federal social security act, 42 U.S.C.A. § 409(b) (8). The argument in support of the claim that defendant is a charitable corporation is that it is operated without profit and financial benefit to any member or individual in discharging the public function of providing burial for the dead. . . .

A corporation which owns and operates a public cemetery without profit is not organized exclusively for charitable purposes, within the meaning of clauses excluding corporations organized and operated exclusively for charitable purposes from state unemployment compensation acts which, like ours, copied the exclusion clause from the federal social security act. *Proprietors of Cemetery of Mount Auburn v. Fuchs*, Mass., 25 N.E.2d 759; *Industrial Commission v. Woodlawn Cemetery Ass'n*, 232 Wis. 527, 287 N.W. 750. There is no authority to the contrary. Defendant is precisely what it purports to be,—a public cemetery and not a public charity. . . .

Extrinsic aids of practically conclusive character in support of our views are found in the history and the purposes of the legislation.

The history of § 4337-22, subd. H, shows that it was copied verbatim from the exclusionary clause of the federal social security act, which in turn was copied from the federal income tax act. The meaning of the words "a corporation . . . organized and operated exclusively for . . . charitable . . . purposes" in the federal acts was that a public cemetery was not a charitable institution the same as if there had been explicit definition to that effect. The state statute adopted the language of the federal act with the same meaning.

The income tax provisions of the federal revenue act of 1918 (40 Stat. 1057) allowed the taxpayer a deduction for gifts or contributions to corporations organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children and animals. Later posts of the American Legion and women's auxiliaries thereof were added. The act at first exempted all those corporations from paying the tax. Public cemeteries were not included, but were subsequently added by a separate section. These sections of the statutes have been re-enacted without change, except for some additions, in 1924, 1926, 1928, 1932, 1934, 1936 and 1938 (26 U.S.C.A.Int.Rev.Acts, p. 1 et seq.).

The federal income tax law received uniform administrative, judicial, and legislative interpretation that a public cemetery is not a charitable corporation. That interpretation was based upon the same reasoning as our decision in the *Bishop Seabury Mission* case, *supra*, that the enumeration of cemeteries, public charities and the other sub-

jects enumerated, restricted the meaning of each so as to exclude the others enumerated, in consequence of which a public cemetery was not a public charity. . . .

There were three re-enactments of income tax provisions containing the language here involved without alteration after construction by the administrative regulation, viz.: in 1928, 1932 and 1934, prior to the enactment of the federal social security act in 1935. 42 U.S.C.A. § 301 et seq. Where a statute has received a known, settled construction we have said that upon re-enactment the legislature must be presumed to have adopted and that the re-enacted statute should receive the prior construction. *Wenger v. Wenger*, 200 Minn. 436, 274 N.W. 517. In *Helvering v. Bliss*, 293 U.S. 144, 55 S.Ct. 17, 79 L.Ed. 246, 95 A.L.R. 207, the sections containing the language involved here were held to have been approved by Congress by repeated re-enactment without change. . . .

Congress exercised its legislative power to manifest its intention by adopting the meaning given to its language by the prior administrative interpretation. Of course its action was prospective in operation. The law making branch declares its own intention "with a plausible aim; for it professes to furnish aid to a correct understanding of its intention, and thus to facilitate the primary judicial inquiry in the exposition of the law." 2 Lewis' Sutherland Statutory Construction (2d) § 358, pp. 683-684. See: 25 R.C.L. p. 1047, § 275.

This clause has been a pattern for similar provisions not only in the social security but in other federal revenue acts such as the estate tax and gift tax acts. The estate tax law was enacted in 1918, section 400 et seq., 40 Stat. 1096. In 1929 the board of tax appeals sustained the construction of the act by the commissioner of internal revenue that the language in question did not comprehend a cemetery of the kind involved here. *Wilber Nat. Bank, etc., v. Com'r of Int. Rev.*, 17 B.T.A. 654. The act has been re-enacted since without change, thereby making such construction part thereof and giving it the force of law.

Congress used the words in the social security act with the same meaning as in the income tax provisions of the various revenue acts. The revenue acts of the United States are in *pari materia*. 25 R.C.L. p. 1068, § 292, note 10, citing many decisions of the Supreme Court of the United States. Not only are statutes presumed to have been passed with deliberation and full knowledge of all existing legislation on the subject, but they are deemed to have been regarded by the law makers as being parts of a connected whole, where they are in *pari materia*, although considered by the legislature at different times and under distinct and varied aspects of the subject. "Such a principle is in harmony with the actual practice of legislative bodies and is essential to give unity to the laws, and connect them in a symmetrical system." 2 Lewis' Sutherland Statutory Construction, 2d Ed., p. 853, § 448. The several provisions are, therefore, to be construed as governed by the same spirit and policy. Where the same language is

used in different sections it will be presumed that it is used with the same meaning until the contrary is shown. While the reasons which have just been stated are in themselves sufficiently persuasive to compel the conclusion that the language has the same meaning in both acts, it affirmatively appears from the deliberations of Congress that such was the intention, thus putting the matter beyond all dispute. When the bill for the social security act was before Congress, the language in question was identical with that of the income tax law. An amendment was proposed to add hospitals to the list of subjects excluded from the act's coverage. The amendment was withdrawn lest it interfere with the long continued construction given the language by the Commissioner of Internal Revenue in interpreting the income tax law. Thus it appears that the Congress not only deliberately used the same language in the social security act as in the income tax law, but that it did so with the intention that the language in the social security act should have the same meaning as in the income tax law. . . .

The State of Minnesota adopted the Minnesota unemployment compensation act on December 24, 1936. The language in question is an exact copy of that in the federal social security act. The federal social security authorities furnished forms of bills to the state authorities, which were adopted with little, if any, change. Minnesota, like Massachusetts, Wisconsin, and other states, adopted the language in question without any change. The state act was adopted with a view to approval by the federal authorities, which has been given, in order to obtain federal contributions of funds and other benefits. Where the state government, acting independently in its own sphere, copies a federal statute, the state act will be construed to have the same meaning as the federal act. *Pittsburgh Plate Glass Co. v. Paine & Nixon Co.*, 182 Minn. 159, 234 N.W. 453. In *Campbell v. Motion Picture Machine Operators' Union, etc.*, 151 Minn. 220, 186 N.W. 781, 27 A.L.R. 631, the question was whether the state anti-trust law should be construed the same as the Sherman federal anti-trust act, 15 U.S.C.A. § 1 et seq., from which it was copied. There were persuasive arguments against the construction of the Sherman act adopted by the federal courts. We held that the state statute was intended to have the same meaning as the federal act and followed the federal rule, pointing out that it would be anomalous to have the state and federal courts applying different rules to the same facts under identical provisions of law and quoted Mr. Justice Mitchell in *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 46 N.W. 342, 346, 9 L.R.A. 263, 20 Am.St.Rep. 566, speaking on a question of commercial law where no statute was involved: "The inconvenience and confusion that would follow from having two conflicting rules on the same question in the same state, one in the federal courts and another in the state courts, is of itself almost a sufficient reason why we should adopt the doctrine of the federal courts on this question."

The statutes involved in the Pittsburgh Glass and the Campbell cases as well as the principles of law involved in the National Bank of Commerce case related to the independent purposes and objects of the

state of the same kind as those of the federal government. The statute involved here is not only the same in kind, but was enacted to accomplish the same purposes and objects as the federal act not through independent action by the state, but in conjunction and cooperation with the federal government. Our statute is in the form suggested by federal agencies and has their approval. That it was intended to have the same meaning is manifest. In speaking of the relation between the federal act and those of some 32 states, including Minnesota (these are referred to in the opinion and marginal note 9), Mr. Justice Cardozo in *Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 891, 81 L.Ed. 1279, 109 A.L.R. 1293, expressed the thought aptly as follows: "The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end." There can be no justification here for not construing our act as having the same meaning as the federal act—that a public cemetery is not a public charity. . . .

Our conclusion is that defendant is not a charitable corporation and is subject to the tax. It was error to hold otherwise.

(iii) OF RE-ENACTED STATUTES

GIROUARD v. UNITED STATES

Supreme Court of the United States, 1946.
328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 422.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In 1943 petitioner, a native of Canada, filed his petition for naturalization in the District Court of Massachusetts. He stated in his application that he understood the principles of the government of the United States, believed in its form of government, and was willing to take the oath of allegiance (54 Stat. 1157, 8 U.S.C. § 735(b), 8 U.S.C.A. § 735(b), which reads as follows:

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God."

To the question in the application "If necessary, are you willing to take up arms in defense of this country?" he replied, "No (Non-combatant) Seventh Day Adventist." He explained that answer before the examiner by saying "it is a purely religious matter with me, I have no political or personal reasons other than that." He did not claim before his Selective Service board exemption from all military service, but only from combatant military duty. At the hearing in the District Court petitioner testified that he was a member of the Seventh Day

Adventist denomination, of whom approximately 10,000 were then serving in the armed forces of the United States as non-combatants, especially in the medical corps; and that he was willing to serve in the army but would not bear arms. The District Court admitted him to citizenship. The Circuit Court of Appeals reversed, one judge dissenting. 1 Cir., 149 F.2d 760. It took that action on the authority of *United States v. Schwimmer*, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889; *United States v. Macintosh*, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302, and *United States v. Bland*, 283 U.S. 636, 51 S.Ct. 569, 75 L.Ed. 1319, saying that the facts of the present case brought it squarely within the principles of those cases. The case is here on a petition for a writ of *certiorari* which we granted so that those authorities might be re-examined.

The *Schwimmer*, *Macintosh* and *Bland* cases involved, as does the present one, a question of statutory construction. At the time of those cases, Congress required an alien, before admission to citizenship, to declare on oath in open court that "he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."¹ It also required the court to be satisfied that the alien had during the five year period immediately preceding the date of his application "behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."² Those provisions were reenacted into the present law in substantially the same form.³

While there are some factual distinctions between this case and the *Schwimmer* and *Macintosh* cases, the *Bland* case on its facts is indistinguishable. But the principle emerging from the three cases obliterates any factual distinction among them. As we recognized in *Re Summers*, 325 U.S. 561, 572, 577, 65 S.Ct. 1307, 1313, 1316, they stand for the same general rule—that an alien who refuses to bear arms will not be admitted to citizenship. As an original proposition, we could not agree with that rule. The fallacies underlying it were, we think demonstrated in the dissents of Mr. Justice Holmes in the *Schwimmer* case and of Mr. Chief Justice Hughes in the *Macintosh* case.

The oath required of aliens does not in terms require that they promise to bear arms. Nor has Congress expressly made any such finding a prerequisite to citizenship. To hold that it is required is to read it into the Act by implication. But we could not assume that Congress in-

¹ Naturalization Act of 1906, § 4, 34 Stat. 596.

² *Id.*

³ We have already set forth in the opinion the present form of the oath which is required. It is to be found in the Nationality Act of 1940, 54 Stat. 1137, 1157, 8 U.S.C. § 735(b), 8 U.S.C.A. § 735(b). Sec. 307(a) of that Act, 8 U.S.C. § 707(a), 8 U.S.C.A. § 707(a), provides that no person shall be naturalized unless he has been for stated periods and still is "a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

tended to make such an abrupt and radical departure from our traditions unless it spoke in unequivocal terms.

The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. Total war in its modern form dramatizes as never before the great cooperative effort necessary for victory. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seaman on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains—these, too, made essential contributions. And many of them made the supreme sacrifice. Mr. Justice Holmes stated in the *Schwimmer* case, 279 U.S. at page 655, 49 S.Ct. at page 451, 73 L.Ed. 889, that “the Quakers have done their share to make the country what it is.” And the annals of the recent war show that many whose religious scruples prevented them from bearing arms, nevertheless were unselfish participants in the war effort. Refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions. One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. Devotion to one's country can be as real and as enduring among non-combatants as among combatants. One may adhere to what he deems to be his obligation to God and yet assume all military risks to secure victory. The effort of war is indivisible; and those whose religious scruples prevent them from killing are no less patriots than those whose special traits or handicaps result in their assignment to duties far behind the fighting front. Each is making the utmost contribution according to his capacity. The fact that his rôle may be limited by religious convictions rather than by physical characteristics has no necessary bearing on his attachment to his country or on his willingness to support and defend it to his utmost.

Petitioner's religious scruples would not disqualify him from becoming a member of Congress or holding other public offices. While Article VI, Clause 3 of the Constitution provides that such officials, both of the United States and the several States, “shall be bound by Oath or Affirmation, to support this Constitution,” it significantly adds that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” The oath required is in no material respect different from that prescribed for aliens under the Naturalization Act. It has long contained the provision “that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion.” R.S. § 1757, 5 U.S.C. § 16, 5 U.S.C.A. § 16. As Mr. Chief Justice Hughes stated in his dissent in the *Macintosh* case, 283 U.S. at page 631, 51 S.Ct. at page 577, 75 L.Ed. 1302, “the history of the struggle for religious liberty, the large number of citizens of our country from the very beginning who have been unwilling to sacrifice their religious convictions, and, in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of

God"—these considerations make it impossible to conclude "that such persons are to be deemed disqualified for public office in this country because of the requirement of the oath which must be taken before they enter upon their duties."

There is not the slightest suggestion that Congress set a stricter standard for aliens seeking admission to citizenship than it did for officials who make and enforce the laws of the nation and administer its affairs. It is hard to believe that one need forsake his religious scruples to become a citizen but not to sit in the high councils of state.

As Mr. Chief Justice Hughes pointed out (*United States v. Macintosh*, supra, 283 U.S. at page 633, 51 S.Ct. at page 578, 75 L.Ed. 1302), religious scruples against bearing arms have been recognized by Congress in the various draft laws. This is true of the Selective Training and Service Act of 1940, 54 Stat. 889, 50 U.S.C.App. § 305(g), 50 U.S.C.A.Appendix, § 305(g),⁴ as it was of earlier acts. He who is inducted into the armed services takes an oath which includes the provision "that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever."⁵ 41 Stat. 809, 10 U.S.C. § 1581, 10 U.S.C.A. § 1581. Congress has thus recognized that one may adequately discharge his obligations as a citizen by rendering non-combatant as well as combatant services. This respect by Congress over the years for the conscience of those having religious scruples against bearing arms is cogent evidence of the meaning of the oath. It is recognition by Congress that even in time of war one may truly support and defend our institutions though he stops short of using weapons of war.

That construction of the naturalization oath received new support in 1942. In the Second War Powers Act, 56 Stat. 176, 182, 8 U.S.C. Supp. IV, § 1001, 8 U.S.C.A. § 1001, Congress relaxed certain of the requirements for aliens who served honorably in the armed forces of the United States during World War II and provided machinery to expedite their naturalization.⁶ Residence requirements were relaxed,

⁴ Sec. 305(g) provides in part:

"Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction."

For earlier Acts see Act of February 24, 1864, 13 Stat. 6, 9; Act of January 21, 1903, 32 Stat. 775; Act of June 3, 1916, 39 Stat. 166, 197, 32 U.S.C.A. § 2; Act of May 18, 1917, 40 Stat. 76, 78, 50 U.S.C.A.Appendix, § 204.

⁵ And see *Billings v. Truesdell*, 321 U.S. 542, 549, 550, 64 S.Ct. 737, 742, 88 L.Ed. 917; Army Regulations No. 615-500, August 10, 1944, Sec. II, 15(f) (2).

⁶ Comparable provision was made in the Act of December 7, 1942, 56 Stat. 1041, 8 U.S.C.Supp. IV, § 723a, 8 U.S.C.A. § 723a, for those who served honorably in World War I, in the Spanish American War, or on the Mexican Border.

educational tests were eliminated, and no fees were required. But no change in the oath was made; nor was any change made in the requirement that the alien be attached to the principles of the Constitution. Yet it is clear that these new provisions cover non-combatants as well as combatants.⁷ If petitioner had served as a non-combatant (as he was willing to do), he could have been admitted to citizenship by taking the identical oath which he is willing to take. Can it be that the oath means one thing to one who has served to the extent permitted by his religious scruples and another thing to one equally willing to serve but who has not had the opportunity? It is not enough to say that petitioner is not entitled to the benefits of the new Act since he did not serve in the armed forces. He is not seeking the benefits of the expedited procedure and the relaxed requirements. The oath which he must take is identical with the oath which both non-combatants and combatants must take. It would, indeed, be a strange construction to say that "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic" demands something more from some than it does from others. That oath can hardly be adequate for one who is unwilling to bear arms because of religious scruples and yet exact from another a promise to bear arms despite religious scruples.

Mr. Justice Holmes stated in the *Schwimmer* case, 279 U.S. at pages 654, 655, 49 S.Ct. at page 451, 73 L.Ed. 889: "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country." The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. As we recently stated in *United States v. Ballard*,

⁷ In *re Kinloch*, D.C., 53 F.Supp. 521, involved naturalization proceedings of aliens, one of whom, like petitioner in the present case, was a Seventh Day Adventist. He had been inducted into the army as a non-combatant. His naturalization was opposed by the Immigration Service on the ground that he could not promise to bear arms. The court overruled the objection, stating, page 523:

"If conscientious objectors, who are aliens, performing military duty, and wearing the uniform, are not granted the privileges of citizenship under this act, then the act would be meaningless. It would be so made if an applicant, being a conscientious objector, who has attained the status of a soldier, performs military duty, and honorably wears the uniform (as is admitted in the instant cases), is denied citizenship. If the oath of allegiance is to be construed as requiring such applicant to agree, without mental reservation, to bear arms, then the result would be a denial of citizenship, even though Congress has conferred such privilege upon him."

And see *In re Sawyer*, D.C., 59 F.Supp. 428.

322 U.S. 78, 86, 64 S.Ct. 882, 886, 88 L.Ed. 1148, "Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674." The test oath is abhorrent to our tradition. Over the years Congress has meticulously respected that tradition and even in time of war has sought to accommodate the military requirements to the religious scruples of the individual. We do not believe that Congress intended to reverse that policy when it came to draft the naturalization oath. Such an abrupt and radical departure from our traditions should not be implied. See *Schneiderman v. United States*, 320 U.S. 118, 132, 63 S.Ct. 1333, 1340, 87 L.Ed. 1796. Cogent evidence would be necessary to convince us that Congress took that course.

We conclude that the *Schwimmer*, *Macintosh* and *Bland* cases do not state the correct rule of law.

We are met, however, with the argument that even though those cases were wrongly decided, Congress has adopted the rule which they announced. The argument runs as follows: Many efforts were made to amend the law so as to change the rule announced by those cases; but in every instance the bill died in committee. Moreover, in 1940 when the New Naturalization Act was passed, Congress reenacted the oath in its pre-existing form, though at the same time it made extensive changes in the requirements and procedure for naturalization. From this it is argued that Congress adopted and reenacted the rule of the *Schwimmer*, *Macintosh*, and *Bland* cases. Cf. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488, 489, 60 S.Ct. 982, 989, 990, 84 L.Ed. 1311, 128 A.L.R. 1044.

We stated in *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604, 125 A.L.R. 1368, that "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines." It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error. The history of the 1940 Act is at most equivocal. It contains no affirmative recognition of the rule of the *Schwimmer*, *Macintosh* and *Bland* cases. The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases. But for us, it is enough to say that since the date of those cases Congress never acted affirmatively on this question but once and that was in 1942. At that time, as we have noted, Congress specifically granted naturalization privileges to non-combatants who like petitioner were prevented from bearing arms by their religious scruples. That was affirmative recognition that one could be attached to the principles of our government and could support and defend it even though his religious convictions prevented him from bearing arms. And, as we have said, we cannot believe that the oath was designed to exact something more from one person than from another. Thus the affirmative

action taken by Congress in 1942 negatives any inference that otherwise might be drawn from its silence when it reenacted the oath in 1940.

Reversed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE STONE dissenting.

I think the judgment should be affirmed, for the reason that the court below, in applying the controlling provisions of the naturalization statutes, correctly applied them as earlier construed by this Court, whose construction Congress has adopted and confirmed.

In three cases decided more than fifteen years ago, this Court denied citizenship to applicants for naturalization who had announced that they proposed to take the prescribed oath of allegiance with the reservation or qualification that they would not, as naturalized citizens, assist in the defense of this country by force of arms or give their moral support to the government in any war which they did not believe to be morally justified or in the best interests of the country. See *United States v. Schwimmer*, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889; *United States v. McIntosh*, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302; *United States v. Bland*, 283 U.S. 636, 51 S.Ct. 569, 75 L.Ed. 1319.

In each of these cases this Court held that the applicant had failed to meet the conditions which Congress had made prerequisite to naturalization by § 4 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596, the provisions of which, here relevant, were enacted in the Nationality Act of October 14, 1940. See c. 876, 54 Stat. 1137, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 176, 182, 183, and by the Act of December 7, 1942, c. 690, 56 Stat. 1041, 8 U.S.C. §§ 707, 723a, 735, 1001 et seq., 8 U.S.C.A. §§ 707, 723a, 735, 1001 et seq., Section 4 of the Naturalization Act of 1906, paragraph "Third", provided that before the admission to citizenship the applicant should declare on oath in open court that "he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." And paragraph "Fourth" required that before admission it be made to appear "to the satisfaction of the court admitting any alien to citizenship" that at least for a period of five years immediately preceding his application the applicant "has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." In applying these provisions in the cases mentioned, this Court held only that an applicant who is unable to take the oath of allegiance without the reservations or qualifications insisted upon by the applicants in those cases manifests his want of attachment to the principles of the Constitution and his unwillingness to meet the requirements of the oath, that he will support and defend the Constitution of the United States and bear true faith and allegiance to the same, and so does not comply

with the statutory conditions of his naturalization. No question of the constitutional power of Congress to withhold citizenship on these grounds was involved. That power was not doubted. See *Selective Draft Law Cases*, (Arver v. United States), 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349, L.R.A.1918C, 361, Ann.Cas.1918B, 856; *Hamilton v. Regents*, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343. The only question was of construction of the statute which Congress at all times has been free to amend if dissatisfied with the construction adopted by the Court.

With three other Justices of the Court I dissented in the *Macintosh* and *Bland* cases, for reasons which the Court now adopts as ground for overruling them.¹ Since this Court in three considered earlier opinions has rejected the construction of the statute for which the dissenting Justices contended, the question, which for me is decisive of the present case, is whether Congress has likewise rejected that construction by its subsequent legislative action, and has adopted and confirmed the Court's earlier construction of the statutes in question. A study of Congressional action taken with respect to proposals for amendment of the naturalization laws since the decision in the *Schwimmer* case, leads me to conclude that Congress has adopted and confirmed this Court's earlier construction of the naturalization laws. For that reason alone I think that the judgment should be affirmed.

The construction of the naturalization statutes, adopted by this Court in the three cases mentioned, immediately became the target of an active, publicized legislative attack in Congress which persisted for a period of eleven years, until the adoption of the Nationality Act in 1940. Two days after the *Schwimmer* case was decided, a bill was introduced in the House, R.R. 3547, 71st Cong., 1st Sess., to give the Naturalization Act a construction contrary to that which had been given to it by this Court and which, if adopted, would have made the applicants rejected by this Court in the *Schwimmer*, *Macintosh* and *Bland* cases eligible for citizenship. This effort to establish by Congressional action that the construction which this Court had placed on the Naturalization Act was not one which Congress had adopted or intended, was renewed without success after the decision in the *Macintosh* and *Bland* cases, and was continued for a period of about ten years.² All of these measures were of substantially the same pattern

¹ In the opinion of the writer there was evidence in *United States v. Schwimmer*, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889, from which the two courts below could and did infer that applicant's behavior evidenced a disposition, present and future, actively to resist all laws of the United States and lawful commands of its officers for the furthering of any military enterprise of the United States, and actively to aid and encourage such resistance in others, and this the two courts below correctly concluded evidenced a want of attachment of the applicant to the principles of the Constitution which the naturalization law requires to be exhibited by the behavior of the applicant, preceding the application for citizenship.

² H.R.3547, 71st Cong., 1st Sess., 71 Cong.Rec. 2184; H.R.297, 72d Cong., 1st Sess., 75 Cong.Rec. 95; H.R.298, 72d Cong., 1st Sess., 75 Cong.Rec. 95; S.3275, 72d Cong., 1st Sess., 75 Cong.Rec. 2600; H.R.1528, 73d Cong., 1st Sess., 77 Cong.Rec. 90; H.R. 5170, 74th Cong., 1st Sess., 79 Cong.Rec. 1356; H.R.8259, 75th Cong., 1st Sess., 81 Cong.Rec. 9193; S.165, 76th Cong., 1st Sess., 84 Cong.Rec. 67.

as H.R. 297, 72d Cong., 1st Sess., introduced December 8, 1931, at the first session of Congress, after the decision in the *Macintosh* case. It provided that no person otherwise qualified "shall be debarred from citizenship by reason of his or her religious views or philosophical opinions with respect to the lawfulness of war as a means of settling international disputes, but every alien admitted to citizenship shall be subject to the same obligation as the native-born citizen." H.R. 3547, 71st Cong., 1st Sess., introduced immediately after the decision in the *Schwimmer* case, had contained a like provision, but with the omission of the last clause beginning "but every alien." Hearings were had before the House Committee on Immigration and Naturalization on both bills at which their proponents had stated clearly their purpose to set aside the interpretation placed on the oath of allegiance by the *Schwimmer* and *Macintosh* cases.³ There was opposition on each occasion.⁴ Bills identical with H.R. 297 were introduced in three later Congresses.⁵ None of these bills were reported out of Committee. The other proposals, all of which failed of passage (see footnote 2, ante), had the same purpose and differed only in phraseology.

Thus, for six successive Congresses, over a period of more than a decade, there were continuously pending before Congress in one form or another proposals to overturn the rulings in the three Supreme Court decisions in question. Congress declined to adopt these proposals after full hearings and after speeches on the floor advocating the change. 72 Cong.Rec. 6966-7; 75th Cong.Rec. 15354-7. In the meantime the decisions of this Court had been followed in *Clarke's Case*, 301 Pa. 321, 152 A. 92; *Beale v. United States*, 8 Cir., 71 F.2d 737; *In re Warkentin*, 7 Cir., 93 F.2d 42. In *Beale v. United States*, supra, [71 F.2d 739] the court pointed out that the proposed amendments affecting the provisions of the statutes relating to admission to citizenship had failed saying: "We must conclude, therefore, that these statutory requirements as construed by the Supreme Court have Congressional sanction and approval."

Any doubts that such were the purpose and will of Congress would seem to have been dissipated by the reenactment by Congress in 1940 of Paragraph "Third" and "Fourth" of § 4 of the Naturalization Act of 1906, and by the incorporation in the Act of 1940 of the very form of oath which had been administratively prescribed for the applicants in the *Schwimmer*, *Macintosh* and *Bland* cases. See Rule 8(c), Naturalization Regulations of July 1, 1929.⁶

³ Hearings on H.R.3547, pp. 12, 22, 29-57, 73-109, 169, 180; Hearings on H.R.297, pp. 4-7, 10, 12, 15-19, 41-48, 53-56, 66-81, 147, 148.

⁴ Hearings on H.R.3547, pp. 57-65, 73, 146-169, 181-212; Hearings on H.R.297, pp. 85-150.

⁵ H.R.1528, 73d Cong., 1st Sess.; H.R.5170, 74th Cong., 1st Sess.; H.R.8259, 75th Cong., 1st Sess.

⁶ Section 307(a) of the Nationality Act, 8 U.S.C. § 707(a), 8 U.S.C.A. § 707(a), provides that no person shall be naturalized unless for a period of five years preceding the filing of his petition for naturalization he "has been and still is a person . . . attached to the principles of the Constitution of the United States, and well

The Nationality Act of 1940 was a comprehensive, slowly matured and carefully considered revision of the naturalization laws. The preparation of this measure was not only delegated to a Congressional Committee, but was considered by a committee of Cabinet members, one of whom was the Attorney General. Both were aware of our decisions in the *Schwimmer* and related cases and that no other question pertinent to the naturalization laws had been as persistently and continuously before Congress in the ten years following the decision in the *Schwimmer* case. The modifications in the provisions of Paragraphs "Third" and "Fourth" of § 4 of the 1906 Act show conclusively the careful attention which was given to them.

In the face of this legislative history the "failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute . . . has brought forth sharply conflicting views both on the Court and in Congress, and where after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488, 489, 60 S.Ct. 982, 989, 84 L.Ed. 1311, 128 A.L.R. 1044. And see to like effect *United States v. Ryan*, 284 U.S. 167-175, 52 S.Ct. 65-68, 76 L.Ed. 224; *United States v. Elgin, J. & E. R. Co.*, 298 U.S. 492, 500, 56 S.Ct. 841, 843, 80 L.Ed. 1300; *State of Missouri v. Ross*, 299 U.S. 72, 75, 57 S.Ct. 60, 62, 81 L.Ed. 46; cf. *Helvering v. Winnill*, 305 U.S. 79, 82, 83, 59 S.Ct. 45, 46, 47, 83 L.Ed. 52. It is the responsibility of Congress, in reenacting a statute, to make known its purpose in a controversial matter of interpretation of its former language, at least when the matter has, for over a decade, been persistently brought to its attention. In the light of this legislative history, it is abundantly clear that Congress has performed that duty. In any case it is not lightly to be implied that Congress has failed to perform it and has delegated to this Court the responsibility of giving new content to language deliberately readopted after this Court has construed it. For us to make such an assumption is to discourage, if not to deny, legislative responsibility. By thus adopting and confirming this Court's construction of what Congress had enacted in the Naturalization Act of 1906 Congress gave that construction the same legal significance as though it had written the very words into the Act of 1940.

The only remaining question is whether Congress repealed this construction by enactment of the 1942 amendments of the Nationality Act. That Act extended special privileges to applicants for naturalization

disposed to the good order and happiness of the United States." Section 335(a) of the Nationality Act, 8 U.S.C. § 735(a), 8 U.S.C.A. § 735(a), provides that before an applicant for naturalization shall be admitted to citizenship, he shall take an oath in open court that inter alia he will "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and . . . bear true faith and allegiance to the same."

who were aliens and who have served in the armed forces of the United States in time of war, by dispensing with or modifying existing requirements, relating to declarations of intention, period of residence, education, and fees. It left unchanged the requirements that the applicant's behavior show his attachment to the principles of the Constitution and that he take the oath of allegiance. In adopting the 1942 amendments Congress did not have before it any question of the oath of allegiance with which it had been concerned when it adopted the 1940 Act. In 1942 it was concerned with the grant of special favors to those seeking naturalization who had worn the uniform and rendered military service in time of war and who could satisfy such naturalization requirements as had not been dispensed with by the amendments. In the case of those entitled to avail themselves of these privileges, Congress left it to the naturalization authorities, as in other cases, to determine whether, by their applications and their conduct in the military service they satisfy the requirements for naturalization which had not been waived.

It is pointed out that one of the 1942 amendments, 8 U.S.C.Supp. IV, § 1004, 8 U.S.C.A. § 1004, provided that the provisions of the amendment should not apply to "any conscientious objector who performed no military duty whatever or refused to wear the uniform." It is said that the implication of this provision is that conscientious objectors who rendered noncombatant service and wore the uniform were, under the 1942 amendments, to be admitted to citizenship. From this it is argued that since the 1942 amendments apply to those who have been in noncombatant, as well as combatant, military service, the amendment must be taken to include some who have rendered noncombatant service who are also conscientious objectors and who would be admitted to citizenship under the 1942 amendments, even though they made the same reservations as to the oath of allegiance as did the applicants in the *Schwimmer*, *Macintosh* and *Bland* cases. And it is said that although the 1942 amendments are not applicable to petitioner, who has not been in military service, the oath cannot mean one thing as to him and another as to those who have been in the noncombatant service.

To these suggestions there are two answers. One is that if the 1942 amendment be construed as including noncombatants who are also conscientious objectors, who are unwilling to take the oath without the reservations made by the applicants in the *Schwimmer*, *Macintosh* and *Bland* cases, the only effect would be to exempt noncombatant conscientious objectors from the requirements of the oath, which had clearly been made applicable to all objectors, including petitioner, by the Nationality Act of 1940, and from which petitioner was not exempted by the 1942 amendments. If such is the construction of the 1942 Act, there is no constitutional or statutory obstacle to Congress' taking such action. Congress if it saw fit could have admitted to citizenship those who had rendered noncombatant service, with a modified oath or without any oath at all. Petitioner has not been so exempted.

Since petitioner was never in the military or naval forces of the United States, we need not decide whether the 1942 amendments authorized any different oath for those who had been in noncombatant service than for others. The amendments have been construed as requiring the same oath, without reservations, from conscientious objectors, as from others. In *re Nielsen*, D.C., 60 F.Supp. 240. Not all of those who rendered noncombatant service were conscientious objectors. Few were. There were others in the noncombatant service who had announced their conscientious objections to combatant service, who may have waived or abandoned their objections. Such was the experience in the First World War. See "Statement Concerning the Treatment of Conscientious Objectors in the Army", prepared and published by direction of the Secretary of War, June 18, 1919. All such could have taken the oath without the reservations made by the applicants in the *Schwimmer*, *Macintosh* and *Bland* cases and would have been entitled to the benefits of the 1942 amendments provided they had performed military duty and had not refused to wear the uniform. The fact that Congress recognized by indirection, in 8 U.S.C. Supp. IV, § 1004, 8 U.S.C.A. § 1004, that those who had appeared in the role of conscientious objectors, might become citizens by taking the oath of allegiance and establishing their attachment to the principles of the Constitution, does not show that Congress dispensed with the requirements of the oath as construed by this Court and plainly confirmed by Congress in the Nationality Act of 1940. There is no necessary inconsistency in this respect between the 1940 Act and the 1942 amendments. Without it repeal by implication is not favored. *United States v. Borden Co.*, 308 U.S. 188, 198, 199, 203-206, 60 S.Ct. 182, 188, 189, 190-192, 84 L.Ed. 181; *State of Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 457, 65 S.Ct. 716, 726; *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 209, 65 S.Ct. 1120, 1128. The amendments and their legislative history give no hint of any purpose of Congress to relax, at least for persons who had rendered no military service, the requirements of the oath of allegiance and proof of attachment to the Constitution as this Court had interpreted them and as the Nationality Act of 1940 plainly required them to be interpreted. It is not the function of this Court to disregard the will of Congress in the exercise of its constitutional power.

MR. JUSTICE REED and MR. JUSTICE FRANKFURTER join in this opinion.

NOTES

1. See commentaries on the principal case in 14 *Geo.Wash.L.Rev.* 641 (1946), 41 *Ill.L.Rev.* 469 (1946), 45 *Mich.L.Rev.* 227 (1946), 21 *N.Y.U.L.Q.Rev.* 445 (1946), 31 *Minn.L.Rev.* 625 (1947).

2. In "American Citizenship: Can Applicants Qualify Their Allegiance?", 33 *A.B.A.J.* 95 (1947), the commentator answers the following question affirmatively: Does the majority decision in the principal case amount to mistaken judicial legislation? Do you agree?

3. See recent state case in accord with the principal case: In *re Elliott's Estate*, 22 *Wash.2d* 334, 156 *P.2d* 427 at 439-440, 157 *A.L.R.* 1335 (1945). See also *Christgau v. Woodlawn Cemetery Ass'n*, *supra*, p. 1084.

4. In *Federal Communications Comm. v. Columbia B. System*, 311 U.S. 132, 61 S.Ct. 152, 85 L.Ed. 87 (1940), where his contextual interpretation agreed with a prior lower court's interpretation of the same provision and the statute had been reenacted by Congress after the latter interpretation, Frankfurter, J., said: "We are not, however, willing to rest decision on any doctrine concerning the implied enactment of a judicial construction upon reenactment of a statute. The persuasion that lies behind that doctrine is merely one factor in the total effort to give fair meaning to language."

5. In "Legislative Adoption of Prior Judicial Construction: The *Girouard Case* and the Reenactment Rule," 59 Harv.L.Rev. 1277 (1946), the author of the Note says (p. 1278): "Analysis of the decisions in which reenactment has been invoked is complicated by the fact that in the vast majority of cases its weight can only be inferred."

"A preliminary outline would recognize three elements: the form of judicial construction, the type of statute construed, and the opportunity for legislative action to alter the construction. The ultimate questions of fact are: (1) What are the chances that the construction reached the attention of the legislature? (2) What are the possibilities that the legislature, if it approved the decision, would have acted as it did? In a few cases these questions may be answered by affirmative evidence that the legislature knew, or that it could not have known, of the construction, and on rare occasions the statute itself will afford internal evidence. In general, however, the problem is one of weighing the inferences from the three variable elements."

After considering in detail the "varying degrees of light and shade" to be derived from State and federal cases as to whether there has been a legislative adoption, he concludes (pp. 1285-1286): "An evaluation of the doctrine of legislative adoption must start from the premise that adoption, once established, should logically be decisive of any statutory construction issue. In the first interpretation of original enactments, the conventional extrinsic aids may be given relative weight, for there is no fixed meaning set before the court. Evidence of legislative adoption, on the contrary, cannot in theory be balanced with other factors. If the legislature has adopted the previous construction, then that construction is the legislative intent, and the court is not free to reconsider. If there has been no adoption, then the court is completely free, subject only to considerations of stare decisis. Use of legislative adoption as an added reason for a decision is both theoretically unsound and subject to practical abuse. Yet this is the status of the doctrine where every reenactment is treated uncritically as creating the presumption of adoption, for the courts are too familiar with its unreality to give it decisive weight in most cases."

"A possible approach might include three elements: (1) a high standard of proof of adoption with the burden on the party urging it; (2) consideration by the court of all relevant factors, with a willingness to give presumptive weight to circumstances suggested as significant in this Note; (3) rigid application of the doctrine as controlling if adoption is found, coupled with its complete rejection if the evidence falls short of the standard. A court will still have to take each case as one of fact, to be decided on circumstantial evidence, but such an approach would at least be explicit, and as realistic as legislative evidence permits."

"Finally, it may be noted that, while the courts can only struggle along with reenactment issues as best they may, it is open to legislatures to limit them, insofar as they arise from affirmative action, by avoiding superfluous reenactment, and by the careful drafting of revisions and reenactments."

[The footnotes are omitted. Ed.]

6. See Horack, "Congressional Silence: A Tool of Judicial Supremacy", 25 Texas L.Rev. 247 (1947).

W. H. D. WINDER, THE INTERPRETATION OF STATUTES SUBJECT TO CASE LAW

58 Jurid.Rev. 93 (1946).

The words of James, L.J., in *Ex p. Campbell, In re Cathcart* are often quoted: "Where once certain words in an Act of Parliament have received a judicial construction in one of the superior courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them." Lord Macmillan expounded the rule put forward by James, L.J., in this way: "The principle of the rule is that where the language of a statute has received judicial interpretation, and Parliament again employs the same language in a subsequent statute dealing with the same subject-matter, there is a presumption that Parliament intended that the language so used by it in the subsequent statute should be given the meaning which meantime has been judicially attributed to it. Parliament, in short, is to be presumed to have given statutory effect to the judicial interpretation so as to render it as binding on the Courts as if it had been expressly enacted in an interpretation section."

If a judicial interpretation of a statute has been well settled for a considerable time even an appellate court will probably follow it, and the argument for following it will be greater if the terms of the statute have been repeated in a later Act. This results from the accepted principles of case law. For example, in *Foskett v. Kaufman* (1885) 16 Q.B. 279, 292, 293, C.A., Cotton, L.J., referring to a decision "given by a Court consisting of judges of great eminence," said: "In my opinion it would be wrong of us, although that was not a decision of a Court of Appeal, to interfere with and set it aside, even if we thought it wrong, after the length of time that has elapsed without its having been ever questioned or reversed, and after Parliament with a knowledge of that decision has passed subsequent Acts which have made no change in what was so decided. In my opinion we ought to follow that case." The courts always treat a decision of long standing with careful consideration even though it is not strictly binding. The ordinary rules of judicial precedent have in practice the same effect as has the relaxed form of the rule of statutory construction which Lord Macmillan supports.

It is submitted, however, that when a statute uses a word in its legal meaning Parliament normally can be presumed to intend that this meaning which it has adopted should continue to be expounded by the courts in the same manner as is the law in general. This view seems to be sound in principle and is supported by authorities, positive and negative, already quoted. All words of art are subject to development and interpretation. When the Legislature takes over a legal term it takes over something which has a developing meaning. Why must we presume that its development is intended to be stifled when

the Legislature lays its hands on it? It seems more logical to say that Parliament wishes to approve its legal meaning both actual and potential. A strict reading of the rule of construction would lead to the conclusion that Parliament intends to give permanent sanction to the opinion of, perhaps, one judge of first instance. Yet legislators are not habitually so deferential to judge-made law as this, nor are courts of appeal. In the name of legislative intent, judicial precedents would come to have more binding authority than has ever been claimed for them at common law. It is submitted that the true principle is that judicial decisions on words which are incorporated in a later enactment have no more than the accustomed binding authority of decided cases.

CLEVELAND v. UNITED STATES

Supreme Court of the United States, 1946.
329 U.S. 14, 67 S.Ct. 13, 91 L.Ed. —.*

[The majority and dissenting opinions in this case appear *supra*, p. 823.]

MR. JUSTICE RUTLEDGE, concurring.

I concur in the result. . . .

There are vast differences between legislating by doing nothing and legislating by positive enactment, both in the processes by which the will of Congress is derived and stated¹ and in the clarity and certainty of the expression of its will. And there are many reasons, other than to indicate approval of what the courts have done, why Congress may fail to take affirmative action to repudiate their misconstruction of its duly adopted laws. Among them may be the sheer pressure of other and more important business. See *Moore v. Cleveland R. Co.*, 6 Cir., 108 F.2d 656, 660. . . . In short, although recognizing that by silence Congress at times may be taken to acquiesce and thus approve, we should be very sure that, under all the circumstances of a given situation, it has done so before we so rule and thus at once relieve ourselves from and shift to it the burden of correcting what we have done wrongly. The matter is particular, not general, notwithstanding earlier exceptional treatment and more recent tendency. Just as dubious legislative history is at times much overridden, so also is silence or inaction often mistaken for legislation.

I doubt very much that the silence of Congress in respect to these cases, notwithstanding their multiplication and the length of time during which the silence has endured, can be taken to be the equivalent of

* [The court's footnotes reprinted are renumbered. Ed.]

¹ Legislative intent derived from nonaction or "silence" lacks all the supporting evidences of legislation enacted pursuant to prescribed procedures, including reduction of bills to writing, committee reports, debates, and reduction to final written form, as well as voting records and executive approval. Necessarily also the intent must be derived by a form of negative inference, a process lending itself to much guess-work.

bills approving them introduced in both houses, referred to and considered by committees, discussed in debates, enacted by majorities in both places, and approved by the executive. I doubt, in other words, that, in view of all the relevant circumstances including the unanticipated consequences of the legislation, such majorities could have been mustered in approval of the Caminetti decision at any time since it was rendered. Nor is the contrary conclusion demonstrated by Congress' refusal to take corrective action.²

The Caminetti case, however has not been overruled and has the force of law until a majority of this Court may concur in the view that this should be done and take action to that effect. This not having been done, I acquiesce in the Court's decision.

NOTES.

1. Cf. *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422, 67 S.Ct. 815, at 818-819, 91 L.Ed. — (1947).

2. See application of *Girouard v. United States* and concurring opinion of Rutledge J. *supra*, in *Zazove v. United States*, 162 F.2d 443 (C.C.A.7, 1947).

G. Previous Administrative Interpretation

HENNEPIN COUNTY v. RYBERG

Supreme Court of Minnesota, 1926. 168 Minn. 385, 210 N.W. 105.

STONE, J. Action for an accounting, the purpose being to recover from the clerk of court of Hennepin county fees which he has received in naturalization proceedings over a long period of years. The plaintiff contends that such fees are required by law to be paid into the county treasury. Defendant clerk of court and the surety on his official bond, the Hartford Accident & Indemnity Company, claim on the other hand that the fees belong to the clerk personally. Judgment went for defendants on the pleadings, and plaintiff appeals.

The fees have been paid and received under the Act of Congress of June 29, 1906, entitled, "An act to provide for a uniform rule for the naturalization of aliens throughout the United States." 34 Statutes at Large, 596. After prescribing the fees in naturalization proceedings, the act, in the fourth paragraph of section 13 (U.S.Comp. St. § 4372) provides that the clerk collecting such fees "is hereby authorized to retain one-half . . . ; the remaining one-half . . . shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of [Immigration and] Naturalization." On the point here involved, that law did not receive construction at the hands of the Supreme Court of the United States until 1913,

² Since the Caminetti decision two bills have been introduced to limit the effect of that case. S.2438, 73d Cong., 2d Sess.; S.101, 75th Cong., 1st Sess. Neither was reported out of committee. In such circumstances the failure of Congress to amend the Act raises no presumption as to its intent. *Order of Railway Conductors of America v. Swan*, 7 Cir., 152 F.2d 325, 329.

when it was dealt with in *Mulcrevy v. City and County of San Francisco*, 231 U.S. 669, 34 S.Ct. 260, 58 L.Ed. 425. It was there held that the act did not touch "the relations of a state officer with the state." The court said:

"The act is entirely satisfied without putting the officers of a state in antagonism to the laws of the state—the laws which give them their official status. It is easily construed and its purpose entirely accomplished by requiring an accounting of one half of the fees to the United States, leaving the other half to whatever disposition may be provided by the state law."

In the meantime the question of the title to the fees retained by the clerk, with the express authority of the Naturalization Law, had given to a marked contrariety of judicial opinion. On the one hand, it was held that, inasmuch as in naturalization proceedings the clerks of state courts functioned as agencies of the federal government, the state laws dealing with their fees and referring to compensation for official services rendered the state and its citizens had nothing to say to the subject, and that the clerks properly retained as their own the half of the fees which the federal law said they might retain. *State ex rel. v. Quill*, 53 Ind.App. 495, 102 N.E. 106; *Hampden County v. Morris*, 207 Mass. 167, 93 N.E. 579, Ann.Cas.1912A, 815; *Fields v. Multnomah County*, 64 Or. 117, 128 P. 1045, 44 L.R.A.(N.S.) 322; *Eldredge v. Salt Lake*, 37 Utah, 188, 106 P. 939.

Other courts held that the clerks were still state officers and their courts state courts; that the state laws regulated all their functions and required them to accept their salaries as compensation for all services of whatsoever character and to account and pay over to the state their fees in naturalization proceedings. *San Francisco v. Mulcrevy*, 15 Cal.App. 11, 113 P. 339; *Franklin County v. Barnes*, 68 Wash. 488, 123 P. 779; *Barron County v. Beckwith*, 142 Wis. 159, 124 N.W. 1030, 30 L.R.A.(N.S.) 810, 135 Am.St.Rep. 1079. Considering the decision of the Supreme Court decisive of the whole question, the Supreme Judicial Court of Massachusetts reversed *County of Hampden v. Morris*, supra, in *County of Berkshire v. Cande*, 222 Mass. 87, 109 N.E. 838. We are not required here to review these cases and choose between their opposed principles of decision, for there is another which must control this case.

The Naturalization Law had not been long in force when, on December 3, 1906, Hon. Edward T. Young, then Attorney General of Minnesota, was called upon for an opinion on the subject. It was addressed to Hon. P. M. Kerst, then public examiner. Section 2721, R.L. 1905 (section 7018, G.S. 1923), was in effect, and provided that every officer of the state receiving a fixed salary should be entitled to no other compensation. Mr. Young's opinion was in part as follows:

"I beg to advise you that, in my opinion, section 2721 of the Revised Laws was intended to apply only to duties performed under state laws. The duties in relation to naturalization are imposed by federal law, and any compensation derived therefrom is received under a federal law and is not, in my opinion, in any manner affected by any law

of this state. It follows that such fees may be received and retained by the clerk of the district court in Hennepin county without violating any law of this state."

Succeeding Attorneys General have never departed from that view. Aside from the instant case, not more than one other county attorney, so far as we have been advised, has ever taken issue with it. There is no evidence that the executive department, from the Governor to county commissioners, has ever disagreed. Mr. Kerst, public examiner in 1906, and all of his successors in office, have governed themselves accordingly.

The question has been presented to the district court but once and never before to this court. Prior to 1912, in a mandamus proceeding, the right of the clerk of court of Otter Tail county to retain naturalization fees was challenged. The issue was decided for the clerk by Judge Taylor, then one of the judges of the Seventh judicial district. One of the grounds of his decision was stated thus:

"The services in question were not performed for the state of Minnesota nor pursuant to the laws of the state of Minnesota, but for the United States and under and pursuant to the laws of the United States. They were wholly outside the duties imposed upon the clerk by the state laws, and, in my opinion, the fees allowed for such services are not within the purview of the state laws above cited and the clerk is entitled to retain them."

The construction put upon the act of Congress by the Mulcrevy Case is of course binding upon us. But in the construction of our own statutes it helps only to the extent of saying that those statutes can do as they please with the half of naturalization fees not paid over by the clerk to federal authority. The question remains, what do our laws say on the subject? The county attorney claims the benefit of the general statutes, and cites chapter 373, G.L. 1891; chapter 365, G.L. 1903; chapter 372, G.L. 1907; chapter 440, G.L. 1913; chapter 18, G.L. 1919, and, finally chapter 133, G.L. 1921. He takes position finally on section 7018, G.S. 1923, which reads:

"Unless otherwise provided by law, every county official in the state of Minnesota receiving a stated salary shall receive the same in full compensation for all services and expenses whatsoever, and shall, on the first Monday of each month, file with the county auditor a correct statement of all fees received by him, and turn the same into the county treasury."

Defendant insists that the general laws have no application to the clerk of court of Hennepin county, and, referring to much special legislation and its history, proceeds with an argument, not necessary to be followed here, to the effect that there is no statute requiring the clerk of court of Hennepin county to account for naturalization fees.

The foregoing shows that to start with and at least until the decision of the Mulcrevy Case in 1913, there existed much uncertainty as to the proper solution of the question now before us. Clearly, in

naturalization proceedings, the clerk of a state court functions as an agency of the federal government and the federal law says he may retain half of the fees. The services compensated by those fees are not rendered for the state, and there is ground for holding, as has frequently been held, that statutes such as section 7018, G.S. 1923, providing that official salaries shall be in "full compensation for all services and expenses whatsoever," refer only to services rendered and expenses incurred by the officer in his capacity as a state and county officer, and in the performance of his duties to the state or county, and not for services rendered under federal law. The existence originally of ambiguity and difficulty cannot be denied. Solution of the problem was helped by the decision in the Mulcrevy Case only to the extent of its declaration that state law may control the disposition of the fees retained by the clerk. That declaration does not go very far, however, in aiding the determination whether a given state law appropriates such fees for the state or leaves them to the clerk. That question remains notwithstanding the Mulcrevy decision, and that is the one now before us.

It would be difficult for fancy to state a more appropriate case for the application of the rule of practical construction. The practical interpretation of our state law was first formulated by Attorney General Young in 1906, immediately after the enactment of the Uniform Naturalization Law. The extent to which it has been acquiesced in by the executive department of state and county government has been stated. It remains to show that the acquiescence of the Legislature, during the period of 20 years which has lapsed, is just as marked. It may well be doubted whether one legislature has any power to place upon the acts of its predecessor a construction which will be binding. But the understanding of old laws by the lawmakers and their acquiescence in a given status assumed to have been created thereby is not only frequently for judicial consideration but also and occasionally of great if not controlling importance. It would have been easy for the Legislature at any time, since it was apparent in 1906 that the executive department was not disposed to question the retention of naturalization fees by clerks of court, to have made a very definite law on the subject, putting at rest the right of the counties to those fees. Not only has no such act been passed, but we find two statutes, since enacted, which indicate affirmatively, not only the acquiescence of the Legislature in the retention of the fees, but also an expression of legislative will that the practice should continue.

One of those laws is chapter 97, G.L. 1911, which provided for the return to clerks of court by county treasurers of naturalization fees paid into the county treasury "by mistake" between November 13, 1906, and March 22, 1909. Another such law is chapter 355, G.L. 1921. It has to do with the compensation of clerks of court in counties having more than sixty and less than eighty townships, there being also a restriction as to population. The act provides that the compensation of the clerks "shall remain as now fixed by law, except that no fees from any source except those received for naturalization papers and

work on the board of audit shall be retained by such clerk as a part of his compensation, but all other fees collected by him shall be paid into the county treasury." These laws are not only a legislative declaration of what the law should be, but also an expression of legislative opinion as to what it was and had been with respect to the title of clerks of court of this state to fees collected in naturalization proceedings.

So if we were now to adopt the view that the law is, and, since 1906 has been, that the fees in question belong not to the clerks but to the counties, we would be overturning a settled conviction as to what the law is which has prevailed throughout the executive and legislative departments of the state government for twenty years and has been once concurred in by the judicial department. There was clear ambiguity to start with, a patent uncertainty under state law of the effect of the declaration by Congress that the clerks of state courts might retain the fees, which has been subjected to the practical construction and settled opinion just referred to. It would be utterly presumptuous for the courts at this day, even though they might have reached the contrary opinion to start with, to disagree with that conviction, settled and effective for twenty years. Such a judicial reversal of settled executive opinion and policy would be particularly objectionable in view of their clear approval by the legislative department, expressed not only by acquiescence but also by explicit recognition and confirmation. For judges to reverse or nullify such a clear executive and legislative decision of such long standing would be to destroy confidence not only in the certainty of law but in official action thereunder. That is one of the disastrous results frequently prevented by the doctrine of practical construction. It is a rule of such clear sanity and practical wisdom that it may control the construction of constitutions as well as statutes. *City of Faribault v. Misener*, 20 Minn. 396 (Gil. 347).

For subjecting this case to decision by the rule of practical construction we have exact precedent in *United States v. Hill*, 120 U.S. 169, 7 S.Ct. 510, 30 L.Ed. 627. It was a suit to recover of the clerk of the United States District Court for the District of Massachusetts a large sum in naturalization fees which he had collected but which he had not included in his returns of "fees and emoluments" to the government. Judgment in the circuit court went for defendant. 25 F. 375. It was affirmed by the Supreme Court.

The practice involved, of the retention of naturalization fees by clerks of the United States District Courts, had continued for more than 40 years. The Supreme Court, after referring to that circumstance, said, its language almost equally applicable to the instant case:

"A court seeking to administer justice would long hesitate before permitting the United States to go back, and not only as against the clerk, but as against the surety on his bond, reopen what had been settled with such abundant and formal sanction. This principle has been applied, as a wholesome one, for the establishment and enforce-

ment of justice, in many cases in this court, not only between man and man, but between the government and those who deal with it, and put faith in the action of its constituted authorities, judicial, executive, and administrative."

The judgment appealed from is right and must be affirmed.

So ordered.

WILSON, C. J. I dissent because:

(1) Of *Commissioners of Hennepin County v. Dickey*, 86 Minn. 331, 90 N.W. 775. If there was a silent, unconscious acquiescence no one was misled. It was not like a case where property rights or titles are affected and practical construction is invoked to protect innocent acts. Here the official is merely keeping money not his.

(2) In my opinion the acts of the public officials from the passage of the act of Congress in 1906 to the decision in the *Mulcrevy Case* in 1913 are insufficient to invoke or support the application of the doctrine of practical construction. That decision eliminated the ambiguity in the congressional act which must always exist as a basis for the application of this doctrine. Ambiguity in our statute never existed. The decision in the *Mulcrevy Case* was controlling, and all of the official acts referred to in the opinion which occurred after that decision are inconsequential. Practical construction precedes but does not follow judicial interpretation.

NOTES

1. How far does the effect given by the Courts to administrative interpretation permit the exercise of legislative, if not judicial, power in the executive department of government?

2. "Long continued practice and the approval of administrative authority may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter the provisions that are clear and explicit when related to the facts disclosed. A failure to enforce the law does not change it." Hughes, C. J., in *Louisville & Nashville Railroad Company v. U. S.*, 282 U.S. 740, 741, 759, 51 S.Ct. 297, 75 L.Ed. 672 (1930).

3. See the following notes: "The Supreme Court on Administrative Construction as a Guide in the Interpretation of Statutes", 40 Harv.L.Rev. 469 (1927), "Reliance Upon Construction by Administrative Officers", 9 Wash.L.Rev. 167 (1934), "Effect Given to Practical Construction of Statutes", 20 Minn.L.Rev. 56 (1935).

4. In *Walker v. United States*, 83 F.2d 103 (C.C.A.Minn.1936), Stone, J., said:

The weight or force which the courts will in their construction of an act, give to . . . executive or legislative constructions, has been variously phrased by the Supreme Court. Similarly, there is a variety of expression as to such weight and force where the court conceives the executive construction to be also approved by Congress. In such latter situation, it has been said that the executive construction has the "force of law" (*Hartley v. Commissioner*, 295 U.S. 216, 220, 55 S.Ct. 756, 758, 79 L.Ed. 1399; *Old Mission Portland Cement Co. v. Helvering*, 293 U.S. 289, 294, 55 S.Ct. 158, 79 L.Ed. 367); that it "must be accepted" (*Alaska Steamship Co. v. United States*, 290 U.S. 256, 262, 54 S.Ct. 159, 161, 78 L.Ed. 302); that it "will not be overturned except for very cogent reasons" (*Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 358, 77 L.Ed. 796);

that it would be given "great weight, even if we doubted the correctness of the ruling" (*Costanzo v. Tillinghast*, 287 U.S. 341, 345, 53 S.Ct. 152, 154, 77 L.Ed. 350); that it will not be "disturbed except for reasons of weight" (*McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 492, 51 S.Ct. 510, 512, 75 L.Ed. 1183); that "were the matter less clear" the court "should be constrained" to follow it (*Poe v. Seaborn*, 282 U.S. 101, 116, 51 S.Ct. 58, 61, 75 L.Ed. 239); that it will be followed "when not plainly erroneous" (*New York, New Haven & H. R. Co. v. Interstate Commerce Commission*, 200 U.S. 361, 402, 26 S.Ct. 272, 281, 50 L.Ed. 515). When the quotations in the above sentence are considered in connection with the issues and situations in which they were severally used, it would seem that a safe statement of this rule of construction is that, where a statutory provision is ambiguous, and the executive department which must apply and enforce it declares a construction (not in itself ambiguous, *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16, 20, 52 S.Ct. 275, 76 L.Ed. 587) for administrative purposes, and thereafter Congress re-enacts the provision without substantial change, the courts will accept that construction unless it be "plainly erroneous."

UNITED STATES v. AMERICAN TRUCKING ASS'NS

Supreme Court of the United States, 1940.
310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345.

[The case appears *supra*, p. 1051.]

FISHGOLD v. SULLIVAN DRYDOCK & REPAIR CORPORATION

Circuit Court of Appeals of the United States, Second Circuit, 1946.
154 F.2d 785.

L. HAND, CIRCUIT JUDGE. Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America appeals from a judgment awarding damages to the plaintiff for his loss of wages because of two lay-offs by his employer, the Sullivan Drydock and Repair Corporation, against which alone the action was brought. The union intervened, and charged itself with the defence; the United States, the Railway Labor Executives Association and the Congress of Industrial Organizations have filed briefs, as amici. The appeal raises only the proper interpretation of subdivision (b) and (c) of § 8 of the Selective Training and Service Act of 1940, as amended in 1944 (§ 308(b) and § 308(c), 50 U.S.C.A. Appendix, which we quote in the margin).¹

¹ "8(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

"(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and

The facts as found by the judge were as follows.

The plaintiff entered the employ of the Sullivan Drydock and Repair Corporation as a welder, on December 21, 1942, and was steadily employed as such until May 22, 1943, when he was inducted into the Army. He served until July 12, 1944, and was then honorably discharged, and received a certificate of the kind described in § 8(a), 50 U.S.C.A. Appendix § 308(a). At that time he concededly was, and he has since been, qualified as a first-class welder; and the company restored him to this former position on August 21, 1944, and has never dismissed him. The controversy here at bar arises because on three occasions: Viz., on April 9, April 11, and from May 17 to May 24, inclusive, it refused to give him any work, because there was not enough on those days to occupy all hands. In so refusing it preferred other welders, not veterans, who had a higher shop seniority than the plaintiff: this in accordance with the agreement between the company and the union. The plaintiff's position is that, as a veteran, § 8(b) and (c) gave him priority over all his fellows except other veterans; the union's position is that those sections merely restored him to the same place in the shop hierarchy which he would have had, if he had been on leave of absence during the period of his service. The judge held with the plaintiff and the union appealed.

Subsection B of § 8(b) is the operative source of the privilege on which the plaintiff relies; it reads as follows: "Such employer shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." "Such position" is nowhere defined except as "a position other than a temporary position, in the employ of any employer." Taking this clause by itself, it seems to us beyond debate that it was not intended that the veteran should gain in seniority. It will be observed that the grant is in the alternative: he is to be "restored" to his original position, or to one of "like seniority, status and pay," whenever possible. The phrase, "like seniority" means the "same seniority" as before; and it necessarily precludes any gain in seniority. It follows that, if the original position is no longer open, the substitute shall be a position of no greater, though no less, seniority than the lost position. But if that be true, there can be no implication that, if the original position be not lost, but be still available, the veteran shall be restored to it with a gain in priority; for that would pre-suppose that Congress did not

pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so."

"8(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

intend the substitute to be as nearly a complete substitute for the lost original as it was possible to make it, a hypothesis absurd on its face. Hence we must start with the proposition that subsection B of § 8(b) not only did not grant any step up in seniority, but positively denied any.

Subdivision (c) confirms the intention so disclosed. As subsection B reads, it would probably be understood to restore the veteran only to that same position which he held when he was inducted. That was, however, thought to be unfair; for while he was in the service, there were likely to be such changes in the personnel that when he came back, he might find himself junior to those over whom he had had priority when he left. To remedy this, by an amendment made while the bill was in Congress, he was given the same status that he would have had, if he had been "on furlough or leave of absence" while he was in the service. How that differed from his position, had he remained actively at work, does not appear; but clearly the amendment presupposed that a difference there might be. Having in this way declared how the veteran's interim position "shall be considered," Congress added that he should be "restored without loss of seniority." Had the purpose been, not only to insure the veteran that he should not lose any more steps upon the ladder than if he had been on leave, but also that he should go to the top, we cannot conceive that Congress would have expressed itself in the words, "without loss of seniority." They have no such express meaning, and their implications are directly the opposite; for they disclose a concern against his possible demotion inconsistent with any implied belief in his promotion. For these reasons we are satisfied that, except for the concluding phrase of subdivision (c) there can be no doubt that textually the union's construction is the right one. It remains to consider that phrase which, as we understand it, is the chief reliance of those who take the opposite view.

It declares that the veteran "shall not be discharged from such position within one year after such restoration"; and we should, so far as possible, interpret it so as not to conflict with the rest of the section; in particular, so as to leave untouched the privilege of seniority, as it is earlier defined. There is no difficulty in doing so, if "discharge" means a permanent end to the relation of employment, a separation, as dismissal; and that is indeed its ordinary meaning. For example, the Oxford Dictionary (Vol. II, p. 412, subtitle "Discharge" I, 3), reads: "To relieve of a charge or office; (more usually) to dismiss from office, service or employment; to cashier": this in distinction with "Lay-off," (Supplement, p. 8): "A period during which a workman is temporarily dismissed or allowed to leave his work; that part or season of the year during which activity in a particular business or game is partly or completely suspended; an off-season." It seems to us that Congress used "discharge" in this sense: i.e., that the veteran was to be assured of his job for the same period—a year—for which he was to be drafted; but that the job to which he was "restored"—as that very word implies—was to be subject to the same

conditions to which the old job had been subject, with only the exception that it should be better in so far as a leave of absence for the year might improve it. The value of that assurance would indeed vary. In a closed shop it would presumably add little, for the union would not allow a member to be discharged without cause anyway. In an open shop the same would be true, if it were partly unionized, and the veteran were in the union; but, whenever for any reason he had not that protection it prevented his being turned out, so long as he behaved himself, and that was an advantage of no mean importance. We do not know what proportion of those in industry are not in unions; but their number is certainly very large, and, even though the clause was of value only to them, they are numerous enough to give it a purpose; to say nothing of the possibility that statutory protection may be an important supplement to union protection.

When we consider the situation at the time that the Act was passed—September, 1940—it is extremely improbable that Congress should have meant to grant any broader privilege than as we are measuring it. It is true that the nation had become deeply disturbed at its defenseless position, and had begun to make ready; but it was not at war, and the issue still hung in the balance whether it ever would be at war. If we carry ourselves back to that summer and autumn, we shall recall that the presidential campaigns of both parties avoided commitment upon that question, and that each candidate particularly insisted that no troops should be sent overseas. The original act limited service to one year, and it was most improbable that within that time we should be called upon to fight upon our own soil; as indeed the event proved, for we were still at peace in September, 1941. Congress was calling young men to the colors to give them an adequate preparation for our defence, but with no forecast of the appalling experiences which they were later to undergo. Against that background it is not likely that a proposal would then have been accepted which gave industrial priority, regardless of their length of employment, to unmarried men—for the most part under thirty—over men in the thirties, forties or fifties, who had wives and children dependent upon them. Today, in the light of what has happened, the privilege then granted may appear an altogether inadequate equivalent for their services; but we have not to decide what is now proper; we are to reconstruct, as best we may, what was the purpose of Congress when it used the words in which § 8(b) and § 8(c) were cast.

The plaintiff argues, however, that, regardless of their original scope, these sections have in any event by administrative interpretation and by later legislation, taken on the meaning which he claims. We shall consider first the administrative interpretations. Section 8(g) directs the Director of Selective Service to establish a "Personnel Division" which shall "render aid in the replacement in their former positions of, or in securing positions for . . . persons who have satisfactorily completed any period of their training and service under this Act," and on March 5, 1944, the Director issued a memorandum (No. 190-A, Part IV, § 4(b)), which read: "A veteran who has

been reinstated to his former position cannot be displaced by another on the ground that the latter has greater seniority rights." Section 8(e) directs the proper district attorney, "if reasonably satisfied" that a veteran "is entitled" to the benefits of the Act, to "appear and act as attorney" for him to enforce his rights; and the Attorney General, as appears from his intervention as amicus in this action, has read the law like the Director of Selective Service. On the other hand, the National War Labor Board adopted the opposite view in *In Re Scovill Manufacturing Co.*, 21 W.L.R. 200; as have several of its arbitrators; and the Solicitor of the Department of Labor did the same in an instruction for the guidance of federal conciliators in dealing with war veterans (16 L.R.R. 481).

So far as we can find, these are the only interpretative rulings that have as yet appeared by officials who can be said to have been charged with any duty in administering the Act; and it can hardly be said that they have had that consistency to which we should yield our judgment. We do not forget that the canon which the plaintiff invokes is not confined to decisions *inter partes*, like those of the Federal Trade Commission, the Interstate Commerce Commission, the Labor Board, or the Tax Court; it extends also to the interpretations of officials, charged with the duty of enforcing statutes. *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161; *Great Northern R. Co. v. United States*, 315 U.S. 262, 62 S.Ct. 529, 86 L.Ed. 836. Whether the weight to be given to such rulings is less than to regulations for the conduct of, or decisions in, contested cases, has never been expressly decided, though was intimated in *Skidmore v. Swift*, *supra*, 323 U.S. at page 139, 65 S.Ct. at page 164; and see Judge Frank's dissent in *Duquesne Warehouse v. Railroad Retirement Board*, 2 Cir., 148 F.2d 473, 485-487. There is indeed a basis for making such a distinction because the position of a public officer, charged with the enforcement of a law, is different from one who must decide a dispute. If there is a fair doubt, his duty is to present the case for the side which he represents, and leave decision to the court, or the administrative tribunal, upon which lies the responsibility of decision. If he surrenders a plausible construction, it will, at least it may, be surrendered forever; and yet it may be right. Since such rulings need not have the detachment of a judicial, or semi-judicial decision, and may properly carry a bias, it would seem that they should not be as authoritative; and of this sort were the rulings of the Director and the Attorney General in the case at bar, unlike the decisions of the War Labor Board and the direction of the Solicitor of the Labor Department. Be that as it may, concededly all such considerations are only cautionary, and not authoritative; for in the end, after whatever reserve, upon the courts rests the ultimate responsibility of declaring what a statute means: as the Supreme Court recognized in its last word upon the subject. *Jewell Ridge Coal Corp. v. Local*, 325 U.S. 161, 65 S.Ct. 1063. We should have to be in much greater doubt than we are, if we were to yield, even to a more uniform administrative interpretation than exists here.

There remains the question whether the amendment of § 8 in December, 1944, 50 U.S.C.A. Appendix, § 308, and the extension of the whole act until May 15, 1946, is to be taken as embodying the Director's position. The amendment, taken alone, only extended the time within which a veteran might apply for reinstatement from forty days to ninety days, and made that period begin from the termination of "hospitalization continuing after discharge for a period of not more than one year," if he was in a hospital. Of itself this indicated no other change in intent; but the Director's ruling had been made for over six months in December, 1944. Moreover, Colonel Keesling, of the Director's office, in one part of his testimony before the subcommittee of the Committee on Military Affairs, stated the Director's position. His later remarks were, perhaps, somewhat ambiguous, and we are left in doubt as to the final impression which his testimony as a whole may have left on the subcommittee. After he had first mentioned the subject, the presiding chairman, Mr. Costello, wished to revert to it, and the Colonel thereupon read the Act as it stood, and a colloquy ensued which we quote in the margin.² He was then speaking of the fact that the veteran's absence from the shop should be counted as though he were on leave, or on furlough; and whether his hearers assumed that this was consistent with what he had said before, or supplanted it, is not entirely certain.

However, we cannot in any event assimilate the situation to that to which courts so frequently resort in aid of the interpretation of ambiguous language; i.e., reenactment without change after administrative interpretation. *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 492, 51 S.Ct. 510, 75 L.Ed. 1183; *National Lead Co. v. United States*, 252 U.S. 140, 146, 40 S.Ct. 237, 64 L.Ed. 496; *Massachusetts Mutual Life Insurance Co. v. United States*, 288 U.S. 269, 273, 53 S.Ct. 337, 77 L.Ed. 739. The rationale of that canon must be, either that those in charge of the amendment are familiar with existing rulings, or that they mean to incorporate them, whatever they may be. The second would hardly be tenable; we should hesitate to say that Congress might enact as law regulatory provisions with which it con-

² "Mr. Johnson: And the time he serves in the armed forces does not affect his seniority?"

"Colonel Keesling: That is right. He shall be restored without loss of seniority.

"Mr. Harness: Does that mean he does not lose any of the seniority he has acquired up to the time of his induction, or that he gets that seniority that has accrued to him while he was working, plus the time he served in the Army?"

"Colonel Keesling: The latter is right.

"Mr. Harness: Whose construction is that?"

"Colonel Keesling: Ours. The language is clear. It says that a person so restored shall be restored without loss of seniority.

"Mr. Johnson: It is not clear that that means his former seniority.

"Colonel Keesling: Would it not be loss of seniority if a nonveteran increased his seniority by 2 years without crediting an employee with 2 years' seniority for the 2 years he spent in the armed forces?"

"Mr. Johnson: It might mean without loss of what he had before.

"Colonel Keesling: That is not the way we have construed it.

"There has not been any difference of opinion on that as far as the labor groups are concerned. The act says any person who is restored shall be restored without loss of seniority."

cededly had no acquaintance. On the other hand, if we are to suppose, in the absence of evidence to the contrary, that Congress is familiar with all existing administrative interpretations, and is content to accept them when it makes no change, it would seem that the force of that assumption should vary with the circumstances. For example, successive recensions of the Internal Revenue Act are the result of detailed conferences between the Treasury and the committees of Congress; and there is good reason to assume that, in so far as the statute is not changed, existing regulations and even less formal interpretations are expressly affirmed. That may well be a proper inference in the case of all general recensions, accompanied as these ordinarily are by continuous and intimate consultation with administrative officers. But it would seem hazardous to carry such a conclusion to the situation here at bar. So far as concerns any actual information conveyed to Congress, it was at most confined to the occasion which we have discussed for it would be gratuitous to suppose that the same information ever reached the Senate Committee of Military Affairs. That aside, the same ambiguity arises here, if we were to impute to Congress a knowledge of all administrative rulings, as arises from the rulings themselves, for the decisions of the National Labor Relations Board and of the Solicitor of the Labor Department both preceded the amendment of § 8 (c). To suppose that Congress was familiar with one set of rulings and not with the other would be baseless in fact, and involve the canon in greater uncertainty than already attaches to its use, which—be it said with all deference—is by no means negligible. We should be clutching at straws and relying on phantoms, if we were to suppose that the re-enactment of this section with its very specific amendment was intended to effect so vital a change in industrial relations. Certainly we should be unwarranted in believing that Congress would have made so far reaching a change without notice to those who had an interest equal with the veterans themselves—the unions. Finally, as in the case of the effect of such rulings unaccompanied by any amendment of the statute, when all is said, the canon is only a help when the intent is otherwise in doubt; and, after every allowance for the differences which have actually arisen, we cannot bring ourselves to abandon the construction we have adopted. As for judicial interpretation, this is the first appeal; and the only decisions in the district courts are apparently equally divided. *Whirls v. The Trailmobile Co.*, D.C.S.D.Ohio, 64 F.Supp. 713, is against the view we take; *Olin Industries Inc. v. Barnett*, D.C.S.D.Ill., 64 F.Supp. 722 is in accord. The fact that we are ourselves not agreed cautions us that we should not be too sure of our conclusion; and obviously the really important matter is that the question should reach the Supreme Court as soon as possible.

We cannot conclude without expressing the hope, though it may not be realized, that our decision may not be taken as indicating any indifference to the claims of those who stood by the nation in the hour of its need at the hazard, and so often with the loss, of all that life holds dear.

Judgment reversed; complaint dismissed.

NOTE

The distinction drawn by Judge Hand in the principal case, between interpretations made by administrative officials charged with the duty of enforcing statutes and those made in adversary administrative proceedings, was applied in *Suwannee Fruit & Steamship Co. v. Fleming*, 160 F.2d 897 (Em.App.1947). (This case appears *supra*, p. 808.)

FISHGOLD v. SULLIVAN DRYDOCK & REPAIR CORP.

Supreme Court of the United States, 1946.

328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230, 167 A.L.R. 110.

MR. JUSTICE DOUGLAS delivering the opinion of the Court concluded:

. . . .
It is said . . . that when Congress amended Sec. 8 of the Act in 1944, 58 Stat. 798, and extended the Act in 1945 without any change in Sec. 8 (Pub.L. 54, 79th Cong., 1st Sess., 50 U.S.C.A.Appendix, Sec. 316 (b)), it was apprised of an administrative interpretation of Sec. 8(c) that a veteran was entitled to his former job regardless of seniority; and that therefore Congressional approval of or acquiescence in the administrative construction would be inferred. See *Massachusetts Mutual Life Ins. Co. v. United States*, 288 U.S. 269, 273, 53 S.Ct. 337, 339, 77 L.Ed. 739, and cases cited. An administrative interpretation was rendered by the Director of Selective Service who was authorized to administer the Act. He had ruled that the Act required reinstatement of a veteran to "his former position or one of like seniority, status, and pay even though such reinstatement necessitates the discharge of a non-veteran with a greater seniority." But a different construction was given to Sec. 8(c) by the National War Labor Board in its handling of disputes arising out of the negotiation of collective bargaining agreements. The Board read the Act as we read it. The ruling of the Director may be resorted to for guidance. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124; *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607. But his rulings are not made in adversary proceedings and are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making inter partes decisions. *Skidmore v. Swift & Co.*, *supra*, 323 U.S. page 139, 65 S.Ct. page 164, 89 L.Ed. 124. The history and language of the Act would be far less clear for us to give his rulings persuasive weight. Moreover, as the Circuit Court of Appeals pointed out, the contrariety of administrative rulings lends less credence to the contention that Congress by the amendment in 1944 and the extension in 1945 showed a preference for one over the other. In view of the language of the Act and the nature of the administrative findings we would want explicit indication by Congress that it chose the Director's interpretation before we concluded that Congress had adopted it.

Affirmed.

[MR. JUSTICE BLACK dissented on the ground that the Union was not a proper party to appeal. Ed.]

NOTES

1. See comment in 24 Minn.L.Rev. 129 (1939). Cf. *United States v. Wyoming*, 331 U.S. 440, 67 S.Ct. 1319 at page 1327, 91 L.Ed. — (1947).

2. For discussion of the effect of the principal case on "Superseniority" for Returning Veterans, see note in 35 Geo.L.J. 250 (1947).

3. In *Conn v. United States*, 68 F.Supp. 966 (Ct.Cl.1946) it was held that Congress would be assumed to have been aware of contemporaneous administrative interpretations of a prior act when Congress enacted a subsequent act on the same subject. Do you think the assumption well founded?

Administrative interpretations that are meant to be guides for the public are published in the Federal Register. In his dissenting opinion in *Federal Crop. Ins. Corporation v. Merrill*, — U.S. —, 68 S.Ct. 1, 5 (1947), Jackson J. remarked: ". . . To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops. Nor am I convinced that a reading of technically-worded regulations would enlighten him much in any event."

See also *Smith v. Bryan*, 100 Va. 190, 40 S.E. 652 (1902).

4. In *Zazove v. United States*, 156 F.2d 24, 26 (C.C.A.7, 1946), Minton, J., said: "Where there is a clear-cut construction by a District Court unappealed from, standing alone as judicial authority, and a departmental construction covering relatively the same period, which is in conflict with the judicial construction, and Congress thereafter enacts legislation incorporating substantially the same language contained in a former act which has received the aforesaid conflicting construction by the courts and the department, we cannot say that Congress can be presumed to have adopted either construction."

SOCIAL SECURITY BOARD v. NIEROTKO

Supreme Court of the United States, 1946.

327 U.S. 358, 66 S.Ct. 637, 90 L.Ed. 718, 162 A.L.R. 1445.

MR. JUSTICE REED delivered the opinion of the Court.

A problem as to whether "back pay," which is granted to an employee under the National Labor Relations Act, shall be treated as "wages" under the Social Security Act comes before us on this record. . . .

The respondent, Joseph Nierotko, was found by the National Labor Relations Board to have been wrongfully discharged for union activity by his employer, the Ford Motor Company, and was reinstated by that Board in his employment with directions for "back pay" for the period February 2, 1937, to September 25, 1939.¹ The "back pay" was paid by the employer on July 18, 1941. Thereafter Nierotko requested the

¹ National Labor Relations Act, Sec. 10(c), 49 Stat. 454, 29 U.S.C.A. § 160(c).

Social Security Board to credit him in the sum of the "back pay" on his Old Age and Survivor's Insurance account with the Board.² In conformity with its minute of formal general action of March 27, 1942, the Board refused to credit Nierotko's "back pay" as wages. On review of the Board's decision,³ the District Court upheld the Board. The Circuit Court of Appeals reversed. 149 F.2d 273. On account of the importance of the issues in the administration of the Social Security Act, we granted certiorari.⁴ 66 S.Ct. 55; Judicial Code § 240, 28 U.S.C.A. § 347.

During the period for which "back pay" was awarded respondent the Federal Old Age benefits were governed by Title II of the Social Security Act of 1935. 49 Stat. 622. As Title II of the Social Security Act Amendments of 1939 became effective January 1, 1940 (53 Stat. 1362, 42 U.S.C.A. § 401 et seq.), the actual payment of the "back wages" occurred thereafter. In our view the governing provisions which determine whether this "back pay" is wages are those of the earlier enactment.⁵

Wages are the basis for the administration of Federal Old Age Benefits. 49 Stat. 622. Only those who earn wages are eligible for benefits. The periods of time during which wages were earned are important and may be crucial on eligibility under either the original act or the Amendments of 1939. See sec. 210(c) and compare sec. 209(g), 53 Stat. 1376, 42 U.S.C.A. § 409(g).⁷ The benefits are financed by payments from employees and employers which are calculated on wages. The Act defines "wages" for Old Age benefits as follows:

² Social Security Act, Sec. 205(c) (3), 53 Stat. 1369, 42 U.S.C.A. § 405(c) (3).

³ Sec. 205(g).

⁴ The briefs of the Government advise us that more than thirty thousand individual employees were allowed "back pay" in "closed" cases by the National Labor Relations Board under Sec. 10(c), 49 Stat. 454, in the period 1939-1945. See *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 187, 61 S.Ct. 845, 849, 85 L.Ed. 1271, 133 A.L.R. 1217. *Second*. The aggregate in money exceeded \$7,700,000 in the fiscal years 1939 to 1944 as shown by the reports of the N. L. R. B. for those years.

⁵ By the foregoing statement it is not intended to imply that the variations in the definitions of wages between the two enactments are significant on the issues herein considered. Sec. 209(b) of the Amendment, 42 U.S.C.A. § 409(b), recognizes possible differences in the meaning of employment: "(b) The term 'employment' means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210(b) of the Social Security Act prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him. . . ."

[Footnote 6 is omitted. Ed.]

⁷ Sec. 209. "(g) The term 'fully insured individual' means any individual with respect to whom it appears to the satisfaction of the Board that—

"(1) He had not less than one quarter of coverage for each two of the quarters elapsing after 1936, or after the quarter in which he attained the age of twenty-one, whichever quarter is later, and up to but excluding the quarter in which he attained the age of sixty-five, or died, whichever first occurred, and in no case less than six quarters of coverage; or

"(2) He had at least forty quarters of coverage."

[Footnote 8 is omitted. Ed.]

"Sec. 210. When used in this title—

"(a) The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash,"

Employment is defined thus : "(b) The term 'employment' means by service, of whatever nature, performed within the United States by an employee for his employer, except—."

Since Nierotko remained an employee under the definition of the Labor Act, although his employer had attempted to terminate the relationship, he had "employment" under that Act and we need further only consider whether under the Social Security Act its definition of employment, as "any service performed by an employee for his employer," covers what Nierotko did for the Ford Motor Company. The petitioner urges that Nierotko did not perform any service. It points out that Congress in considering the Social Security Act thought of benefits as related to "wages earned" for "work done."¹⁶ We are unable, however, to follow the Social Security Board in such a limited circumscription of the word "service." The very words "any service performed for his employer," with the purpose of the Social Security Act in mind import breadth of coverage. They admonish us against holding that "service" can be only productive activity. We think that "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.¹⁷

¹⁶ H.Rep.No.615, 74th Cong., 1st Sess., pp. 6, 21, 32, and S.Rep.No.628, 74th Cong., 1st Sess., p. 7, 32.

¹⁷ For example the Social Security Board's Regulations No. 3 in considering "wages" treats vacation allowances as wages. 26 CFR, 1940 Supp., 402 227(b).

Compare *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S.Ct. 165, 168.

Treasury Department Regulations No. 91 relating to the Employees' Tax and the Employer's Tax under Title VIII of the Social Security Act, 1936, Art. 16, classifies dismissal pay, vacation allowances or sick pay, as wages. Regulations 106 under the Federal Insurance Contributions Act, 1940, pp. 48, 51, continues to consider vacation allowances as wages. It differentiates voluntary dismissal pay.

I. R. B., 1940, 1-22-10271, S.S.T. 389, an Office Decision, holds that amounts paid employees during absence on jury service to make their pay equivalent to regular salary are wages.

Though formal action was taken by the Social Security Board on March 27, 1942, our attention has not been called to any regulation of any governmental agency excluding "back pay" from wages. The Treasury Department has authority to issue regulations for Social Security taxes. Secs. 808 and 908, 49 Stat. 633, et seq., 42 U.S.C.A. §§ 1008, 1108; Internal Revenue Code, Sec. 1429, 53 Stat. 178, 26 U.S.C.A. Int.Rev.Code § 1426. So has the Social Security Board, sec. 1102, 49 Stat. 647, 42 U.S.C.A. § 1302, and sec. 205(a), 53 Stat. 1368, 42 U.S.C.A. § 405(a). All authority for the promulgation of regulations limits the action to rules and regulations not inconsistent with the provisions of the various sections.

In regulations governing the collection of income taxes at source on or after January 1, 1945, 58 Stat. 247, the Bureau of Internal Revenue classified vacation allowances and dismissal pay as wages under the following statutory definition of wages:

"Sec. 1621. Definitions. As used in this subchapter—

"(a) Wages. The term 'wages' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including

An argument against the interpretation which we give to "service performed" is the contrary ruling of the governmental agencies which are charged with the administration of the Social Security Act. . . .

. . . Their competence and experience in this field command us to reflect before we decide contrary to their conclusion. The first administrative determination was apparently made in 1939 by an Office Decision of the Bureau of Internal Revenue on the problem of whether "back pay" under a Labor Board order was wages subject to tax under Titles VIII and IX of the Social Security Act which the Bureau collects.¹⁸ The back pay was held not to be subject as wages to the tax because no service was performed, the employer had tried to terminate the employment relationship and the allowance of back pay was discretionary with the Labor Board. Reliance for the conclusions was placed upon *Agwilines, Inc. v. National Labor Relations Board*, 5 Cir., 87 F.2d 146, which had held "back pay" a public reparation order and therefore not triable by jury as a private right for wages would have been. This position is maintained by the Social Security Board by minute of March 27, 1942. It is followed by the National Labor Relations Board which at one time approved the retention by the employer of the tax on the employees' back pay for transmission to the Treasury Department as a tax on wages and later reversed its position on the authority of the Office Decision to which reference has just been made. *Re Pennsylvania Furnace and Iron Co.*, 13 N.L.R.B. 49, 53(5), 54, 58.¹⁹

The Office Decision seems to us unsound. The portion of the *Agwilines* decision, which the Office Decision relied upon, was directed at the constitutional claim to a right of trial by jury. It stated that "back pay" was not a penalty or damages which a private individual might claim. But there is nothing in the opinion which supports the idea that the "back pay" award differs from other pay. Indeed the opinion said that "Congress has the right to eradicate them [unfair practices] from the beginning." 87 F.2d loc. cit. 151. . . .

But it is urged by petitioner that the administrative construction on the question of whether "back pay" is to be treated as wages should lead us to follow the agencies' determination. There is a suggestion that the administrative decision should be treated as conclusive, and reliance for that argument is placed upon *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, 130, 64 S.Ct. 851, 860, 88 L.Ed. 1170, and *Gray v. Powell*, 314 U.S. 402, 411, 62 S.Ct. 326, 332,

the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—". See 26 CFR, 1944 Supp., 405-101(d) and (e).

¹⁸ I.R.B., 1939, 14-9776, S.S.T. 359. No regulations covering "back pay" under the Social Security Act have been found. They are authorized by §§ 808 and 908, 49 Stat. 638, 643.

¹⁹ The states have largely followed the Bureau of Internal Revenue in their classification of "back pay." Some have disagreed. Unemployment Insurance Service, *All State Treatise*, C.C.H., Paragraph 1201. See *In re Tonra*, 258 App.Div. 835, 15 N.Y.S.2d 755; *Id.*, 283 N.Y. 676, 28 N.E.2d 402.

86 L.Ed. 301. In the acts which were construed in the cases just cited, as in the Social Security Act, the administrators of those acts were given power to reach preliminary conclusions as to coverage in the application of the respective acts. Each act contains a standardized phrase that Board findings supported by substantial evidence shall be conclusive.²¹ The validity of regulations is specifically reserved for judicial determination by the Social Security Act Amendments of 1939, sec. 205(g).

The Social Security Board and the Treasury were compelled to decide, administratively, whether or not to treat "back pay" as wages and their expert judgment is entitled, as we have said, to great weight.²² The very fact that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to properly supported findings of fact. Both *N.L.R.B. v. Hearst Publications*, page 131, of 322 U.S., page 860 of 64 S.Ct., 88 L.Ed. 1170, and *Gray v. Powell*, page 411 of 314 U.S., page 332 of 62 S.Ct., 86 L.Ed. 301, advert to the limitations of administrative interpretations. Administrative determinations must have a basis in law and must be within the granted authority. Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. Congress might have declared that "back pay" awards under the Labor Act should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretive power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function.²³ Congress used a well-understood word—"wages"—to indicate the receipts which were to govern taxes and benefits under the Social Security Act. There may be borderline payments to employees on which courts would follow administrative determination as to whether such payments were or were not wages under the act. . . .

Affirmed.

[The concurring opinion of Mr. JUSTICE FRANKFURTER is omitted.]

²¹ National Labor Relations Act, 49 Stat. 454, see 10(e), 29 U.S.C.A. § 160(e); Bituminous Coal Act of 1937, 50 Stat. 72, 85, sec. 4-A, 15 U.S.C.A. § 834; Social Security Act Amendments of 1939, secs. 205(c) (3) and (g).

²² See *Sanford Estate v. Com'r*, 308 U.S. 39, 52, 60 S.Ct. 51, 59, 84 L.Ed. 20; *Skidmore v. Swift & Co.*, 323 U.S. 134, 139, 140, 65 S.Ct. 161, 164.

²³ *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110, 23 S.Ct. 33, 39, 47 L.Ed. 90; *International Ry. Co. v. Davidson*, 257 U.S. 506, 514, 42 S.Ct. 179, 182, 66 L.Ed. 341; *Iselin v. United States*, 270 U.S. 245, 46 S.Ct. 248, 70 L.Ed. 566; *Koshland v. Helvering*, 298 U.S. 441, 56 S.Ct. 767, 80 L.Ed. 1268, 105 A.L.R. 756; *Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 144, 60 S.Ct. 437, 442, 84 L.Ed. 656; *United States v. Carolina Carriers Corp.*, 315 U.S. 475, 489, 62 S.Ct. 722, 729, 86 L.Ed. 971; *Helvering v. Credit Alliance Co.*, 316 U.S. 107, 113, 62 S.Ct. 989, 992, 86 L.Ed. 1307; *Helvering v. Sabine Trans. Co.*, 318 U.S. 306, 311, 312, 63 S.Ct. 569, 572, 87 L.Ed. 773; *Addison v. Holly Hill Products*, 322 U.S. 607, 611, et seq., 64 S.Ct. 1215, 1218, 88 L.Ed. 1488, 153 A.L.R. 1007; cf. *Steuart & Bro. v. Bowles*, 322 U.S. 398, 403, 61 S.Ct. 1097, 1099, 88 L.Ed. 1350.

NOTES

1. Cf. *Morganthau, Implied Limitations on Regulatory Powers in Administrative Law*, 11 Univ. of Chicago L.Rev. 91 (1914).

2. In *Interstate Commerce Commission v. U. S. ex rel. Humboldt Steamship Company*, 224 U.S. 474, 32 S.Ct. 556, 56 L.Ed. 849, the Commissioners refused to require certain Alaskan shippers to file rate schedules because, under their interpretation of the act, Alaskan commerce was not within their jurisdiction. They based this conclusion upon construction of the word "territory" in the Interstate Commerce Act (49 U.S.C.A. § 1 et seq.). The party aggrieved sought a writ of mandamus to compel the Commission to act. The Commission pleaded that, since it was the body principally charged with the enforcement of the Act, the preliminary question of its jurisdiction thereunder was as much within the scope of its authority as any other question of interpretation which would arise, and that its decision thereon was binding upon the courts. The Supreme Court of the United States holding that the Commission's interpretation of "territory" was erroneous and that mandamus was a proper remedy, said at p. 484, "The Interstate Commerce Commission is purely an administrative body . . . it may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refused to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise jurisdiction. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its non-action be reviewed?"

3. See *Wiel, "Administrative Finality"*, 38 Harv.L.Rev. 447 (1925).

4. In *United States v. Ruzika*, 329 U.S. 287, 67 S.Ct. 207, 211, 91 L.Ed. 229 (1947), *Frankfurter, J.*, commented, "Those who are entitled to speak tell us that the development of the natural sciences has often suffered from premature generalization. Certainly the recent growth of administrative law counsels against generalizations regarding what is compendiously called judicial review of administrative action".

H. History of Legislation on the Subject Matter and Conditions at the Time of Enactment

STATE v. KELLY

Supreme Court of Kansas, 1905.
71 Kan. 811, 81 P. 450, 70 L.R.A. 450.

Mandamus by the state, on the relation of C. C. Coleman, Attorney General, against T. T. Kelly, State Treasurer, and E. B. Jewett, warden of the State Penitentiary. Writ denied.

This proceeding was instituted in this court by the state, on the relation of the Attorney General, for a peremptory writ of mandamus to compel Thomas T. Kelly, as State Treasurer, and E. B. Jewett, as warden of the State Penitentiary, to execute, negotiate, and sell certain bonds on behalf of the state of Kansas, and apply the proceeds as directed by Senate Bill No. 30 (Laws 1905, p. 783, c. 478). An alternative writ was allowed, to which the defendants separately answered that the state was proceeding under an act authorizing them, in their official capacities, to issue and sell the bonds in question, and apply the proceeds thereof to the construction, maintenance, and operation

READ & MACDONALD U.C.B.L.E.G.

of a state oil refinery at Peru, all of which would be one of those "works of internal improvement" to the carrying on of which the state may never be a party without violating the provisions of section 8 of article 11 of the Constitution. In reply to the claim of defendants the state contends that the intention of the Legislature was to build a branch penitentiary in that part of the state where oil is found in large quantities, and, incidental thereto, and as a part of the branch penitentiary, for the purpose of furnishing proper employment for the inmates of the State Penitentiary, to build and operate an oil refinery. . . .

GREENE, J. (after stating the facts). The sole question in this proceeding is the constitutionality of the act of 1905 called the "Oil Refinery Bill." In its consideration the object of the statute—that is, the good which the Legislature intended to accomplish, or the evil which it intended to prevent or correct—must be determined. Whether this law is simply a provision for securing larger and better facilities for the maintenance, employment, and care of the inmates of the penitentiary, thus accomplishing a good work, or a provision for constructing, operating, and maintaining an oil refinery, thus attempting to correct a great evil, is of supreme importance. In construing a statute, resort should first be had to the language of its provisions. If it be found that a clear and definite meaning may be ascertained by giving the words their common signification, the court has no choice or discretion to exercise. Its only duty is to declare the result of its investigation. An observation of this rule requires the court to consider every part of the act, and, if possible, to discover from the whole the legislative intent. Another requisite rule of construction is that where it is doubtful which of two objects the Legislature had in view, one being within its authority, and the other not, the language must be given a broad and liberal interpretation, and an endeavor made to apply the act to the object within the legislative authority. All presumptions are resolved in favor of the constitutionality of a statute, and when doubt is entertained its language should be given that construction which will sustain it. *People ex rel. Sinkler v. Terry*, 108 N.Y. 1, 14 N.E. 815; *Miller v. Dunn*, 72 Cal. 462, 14 P. 27, 1 Am.St.Rep. 67; *City of San Diego v. Granniss*, 77 Cal. 511, 19 P. 875; *Mauldin v. City Council*, 42 S.C. 293, 20 S.E. 842, 27 L.R.A. 284, 46 Am.St.Rep. 723; *Wenger v. Taylor*, 39 Kan. 754, 18 P. 911.

We confess to great difficulty in determining the object of the act under consideration. The title expresses it in this way: "An act to provide for branch penitentiary and oil refinery in connection therewith, the issuance of bonds for said purpose, and making an appropriation therefor, and for the payment of principal and interest on said bonds." The title indicates that it was the intention to build and maintain a branch penitentiary, and also to build an oil refinery. Section 1 provides: "For the purpose of providing proper employment for convicts confined in the State Penitentiary, the warden of the Kansas State Penitentiary is hereby empowered, by and with the advice of the board of directors of said penitentiary, to secure, without expense

to the state, a suitable site for the erection of a branch of the State Penitentiary and oil refinery at Peru." Here again appears the double purpose—a branch of the State Penitentiary and an oil refinery. The subsequent provisions of the section do not indicate an intention to build a branch of the State Penitentiary, but go into great detail for the construction, maintenance, and operation of an oil refinery for the manufacture of crude and refined oil and its by-products; and the warden of the State Penitentiary is required to keep such refinery in repair, and furnish the requisite machinery, equipments, and instrumentalities for receiving, manufacturing, and storing crude and refined oil, and marketing the same. No reference is made to the construction or maintenance of a branch of the State Penitentiary, its dimensions, the number of rooms, the material of which it shall be constructed, or that any shall be constructed. Section 2, however, makes some reference to a branch penitentiary, but closely connects it with the oil refinery. It provides that in "constructing, maintaining and operating such branch penitentiary and oil refinery, said warden and board of directors are hereby authorized to employ convicts in the State Penitentiary." The latter part of this section makes a specific provision with reference to a so-called branch of the State Penitentiary, authorizing the officials to provide "suitable and humane facilities for the housing, feeding, guarding and overseeing of said convicts and the work to be performed by them." The only other reference in the act to the construction of a branch penitentiary is in section 3, where an appropriation of \$10,000 is made for the construction of suitable quarters and facilities for housing, feeding, guarding, and overseeing the convicts at the branch penitentiary. It also makes an appropriation of \$200,000 for the construction of an oil refinery plant, and \$200,000 more for operating and keeping the same in repair, the purchase of crude oil, and the expense of receiving, refining, storing, handling, and marketing its products.

From these provisions alone it is doubtful whether the primary object of the bill was to build a branch penitentiary at Peru, where oil is produced in great quantities, and incidentally thereto, and for the purpose of furnishing employment to the convicts confined therein, to build and operate an oil refinery, or whether it was to construct and operate an oil refinery plant in this oil field, and operate it, so far as possible, by convicts in the State Penitentiary, with such provisions, and only such, for the housing, guarding, and feeding such convicts, as would be necessary for their care while employed in the refinery. But for the rule previously stated—that all presumptions are in favor of the constitutionality of a statute, and that all doubts should be resolved in support of it—and but for other means of information than the language of the act, we would be strongly inclined to hold that the Legislature regarded the building and operating of the oil refinery as of paramount importance. Where, however, an act is so ambiguous, indefinite, and uncertain that it is doubtful which of two objects the Legislature had in mind, the court, for the purpose of determining the legislative intent, may resort to other means of interpretation than

the language. The history and conditions of the people within the jurisdiction of a court at the time of the passage of an act which it is called upon to construe for the purpose of determining its validity are familiar to a court, and its knowledge of the same should aid it in assuming the proper viewpoint from which to discover the object of the law—particularly a law of the nature of the one under consideration. The history of a state, which should include the facts surrounding the enactments of its Legislature, and the questions therein raised upon the passage of every law of an economic nature, as well as the doings of its people and the public questions which have agitated their minds, is known by a court. If the act under consideration be one passed immediately before a court is called upon to construe it, it is as familiar with the conditions of the people as any well-informed citizen of the state. It knows that in certain portions of the state large areas are devoted to the growing of wheat, while in other portions the farming of that cereal is not practicable. It knows that the same is true of corn and other crops. It knows that certain parts of the state require irrigation to make farming profitable, while in other parts the precipitation is generally sufficient. It knows that in certain counties large deposits of coal are found, and in others large fields of oil and gas have been discovered. It knows the enterprises of the people of the state in a business way quite as well as it understands the agricultural conditions. It also knows those general facts concerning the public aims and interests of the state in social and economic ways which all well-informed people know, including the questions that agitated the public mind at the time this certain law was enacted, and knows the history of the Constitution, and the reason for the adoption of certain provisions and the rejection of others. A court cannot divest itself of the knowledge of all these things in construing a statute or constitutional provision, even if it were disposed so to do. The consideration of this knowledge, without proof of the facts, is generally termed "judicial notice," and, for the want of a better expression, it will suffice; but the term means no more than that courts, in construing the law, will bring to their aid all those facts which are known by all well-informed persons because they are matters of public concern.

Authority for taking into consideration the history of an enactment and the conditions of the people of the state at that particular time is abundant. . . .

"That the persons whose duty it may be to inspect the act with a view to the determination of that question are not required to divest themselves of all knowledge save that to be gleaned from the act alone. For, were it possible for them to divest themselves, the act would be unintelligible—a jumble of words without meaning. So, when we say that the question is to be determined by an inspection of the act itself, we imply that those under whose inspection it is brought will scan it in the light of that knowledge which they possess in common with other men. There is no presumption that courts are ignorant of all matters that transpire outside the courtroom. On the contrary, there are many matters outside the science of law of which they are re-

quired to take judicial notice." *Redell v. Moores*, 63 Neb. 219, 226, 88 N.W. 243, 245, 55 L.R.A. 740, 93 Am.St.Rep. 431.

The principle is stated thus in *Bishop on Statutory Crimes* (3d Ed.) § 77: "They [courts] do not close their eyes to what they know of the history of the country and of the law, of the condition of the law at the particular time, of the public necessities felt, and other like things."

"Courts are authorized to collect the intention of the Legislature from the occasion and necessity of the law—from the mischief felt, and the objects and remedy in view." *Sibley v. Smith et al.*, 2 Mich. 486, 487.

"But courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it." *United States v. Union Pacific R. Co.*, 91 U.S. 72, 79, 23 L.Ed. 224.

"Courts will take judicial notice, without proof, of all judicial events which are generally known within the limits of their jurisdiction." *State v. Boyd*, 34 Neb. 435, 51 N.W. 964.

"In construing a constitution or law, the history of its passage through the convention or Legislature is often of great assistance." *Minnesota & Pacific Railroad Company v. H. H. Sibley*, 2 Minn. 13, 19 (Gil. 1).

Statutes are but public sentiments enacted into laws, and frequently the policy of such legislation is the subject of much public discussion both before and at the time of its enactment. In construing it, courts may not shut their eyes to these public discussions. They are proper matters of consideration in determining the legislative intent, and should be considered for that purpose in the construction of an act growing out of such discussion.

In common with all other well-informed persons, this court knows of the great quantities of crude oil that were discovered in a part of the state; the rapid development of this field of industry; the general public complaint that a particular corporation was unjustly manipulating the market of this product so that the producer was being deprived of what rightfully belonged to him; that a public demand was made upon the Legislature of 1905 to enact some law which would protect the producer from the further encroachments of this corporation upon his rights. The Senate journal of that Legislature shows that on January 12, 1905, Senate Bill No. 30 was introduced by Senator Porter, with the following title: "An act to provide for the construction, maintenance and operation of a state oil refinery, and to provide the necessary funds for such construction, maintenance, operation and management, and to place the operation and management thereof under state control." January 16th Senate Bill No. 30 was read a second time, and referred to the committee on oil and gas. February 3, 1905, under the head of "Reports of Standing Committees," the committee on oil and gas made the following report: "Mr. President: Your committee on oil and gas to whom was referred substitute for Senate Bill No. 30, 'An act in relation to the employment

of convicts in the State Penitentiary and in relation to the construction and operation of a state oil refinery in connection therewith,' have had the same under consideration and instruct me to report the bill back to the Senate with the recommendation that it be passed. S. S. Benedict, Chairman." This report refers to substitute for Senate Bill No. 30, but the journal does not show that a substitute was introduced in the Senate. On February 7th the committee of the whole made the following report: "Mr. President: The committee of the whole Senate have had under consideration bills on the calendar under the head of 'Special Orders,' and I am directed to report as follows: Recommend that substitute for Senate Bill No. 30, 'An act to provide for the construction, maintenance and operation of a state oil refinery, and to provide the necessary funds for such construction, maintenance, operation, and management, and to place the operation and management thereof under state control,' be passed as amended."

The Senate journal of February 8th, under the head of "Presentation of Petitions," contains the following petition offered by Senator Porter of Crawford:

"To The Honorable, the Senate and House of Representatives of the State of Kansas, in Legislature Assembled: The undersigned petitioners, citizens of Cherokee, Kansas, and vicinity, respectfully call your attention to the fact that Kansas petroleum, one of the most staple articles that constitute the natural wealth of the state, is rapidly falling into the hands of the most arrogant and despotic trust in the world, which, by the ownership and monopoly of such product is not only stifling industry in this state but extorting millions of dollars every year from the people of Kansas by setting its own price on our state products. Therefore, your petitioners respectfully ask that some legislative enactment be granted by which the state may own and operate a number of plants throughout the oil fields for the refining, distribution and sale of oil. Your petitioners fully believe that such action on your part would not only be for the best interest of the state, but it would be in accord with the will of a large majority of the citizens."

On February 8th, under the head of "Third Reading of Bills," the journal shows that Senate Bill No. 30 passed under the following title: "An act to provide for the construction, maintenance and operation of a state oil refinery, and to provide the necessary funds for such construction, maintenance, operation and management, and to place the operation and management thereof under state control." On the motion of Senator Smith, of Edwards, the title was amended, and the present title substituted for the original one, which reads: "An act to provide for a branch penitentiary and oil refinery in connection therewith, the issuance of bonds for said purpose, and making an appropriation therefor and for the payment of interest on said bonds."

Senate journal of February 16th shows that the Governor transmitted to the Legislature his special message, approving Senate Bill No. 30, . . .

The executive sustains a more direct and intimate relation to the people than any other official. He knows and understands the conditions, desires, aspirations, and aims of each community. The bill in question having originated, as expressed in the message, in a popular demand for relief against a "powerful commercial combatant," against which the individual was unable to cope, it met the hearty and enthusiastic approval of the Governor, not as an appropriation to build a branch of the State Penitentiary, but as an appropriation for the construction and operation of an oil refinery; and, inasmuch as no reference is made to the branch penitentiary, it may be said that the Governor did not understand that there were any provisions in the bill which seriously contemplated the building of a branch of the State Penitentiary. The Governor discloses his apprehension of the constitutionality of this bill in his comparison of the feasibility of the many plans which had been suggested for the repression of the greed of this "rapacious corporation" with his own, which was to appropriate \$50,000 for an experimental refinery at Lansing. He said: "I believe the expenditure of that sum for the establishment of an experimental refinery at Lansing would have eliminated the constitutional question, and subserved all the possible purposes to be subserved by the larger appropriations." This constitutional provision is a limitation placed by the people in their paramount law upon the power of the Legislature, preventing it from diverting the energies of the state from public and governmental functions into private and business enterprises. No circumstances can arise which will justify its violation by any governmental department. It is a protection against a particular class of ill-advised or rash legislation, resulting from a distempered public sentiment, which requires only cooling time for its proper adjustment.

If, as contended by the state, the object of the bill is to construct a branch penitentiary, it seems strange that the Governor, in approving it, should feel called upon to say that it "is such a radical departure from governmental precedent that it seems wise to put upon the records a clear statement of the provocation and purpose of this undertaking, . . . that our action be clearly defined and thoroughly understood at home and abroad." The construction of penal institutions is not a "radical departure from governmental precedent." The "provocation" for maintaining such institutions is known to all persons. Besides, what interest have the people abroad in the subject of our penal institutions, that for their benefit "our action be clearly defined." The indictment of the Standard Oil Company in the message is, no doubt, true, and the provocation was very great, but—

"We must not make a scarecrow of the law,
Setting it up to fear the birds of prey."

The consideration of the bill in the light of the public conditions under which it was conceived, the title under which it was introduced in the Senate, the bill itself, and its reference by the Senate to its committee on oil and gas, instead of to its committee on penal institutions, the passage of the bill by the Senate under its original title, the pur-

pose of the bill, and the reasons for its passage as expressed by the Governor in his special message of approval, leave no doubt in our minds that the object of the bill is to secure a site whereon the state should construct, operate, and maintain an oil refinery, and that, in so far as the warden and board of directors of the State Penitentiary might think advisable, they could employ in the construction of the building and maintaining and operating the refinery inmates of the State Penitentiary, and for this reason provisions were made for housing, feeding, guarding, and overseeing such convicts, and the work to be performed by them while thus engaged.

The bill, being an appropriation for the construction, operation, and maintenance of an oil refinery, which is a work of internal improvement, within the provisions of section 8, art. 11, of the state Constitution, which provides that "the state shall never be a party in carrying on any works of internal improvement," is void. . . .

The peremptory writ is denied. All the Justices concurring.

CHATWIN v. UNITED STATES

Supreme Court of the United States, 1945.
326 U.S. 455, 66 S.Ct. 233, 90 L.Ed. 198.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The Federal Kidnapping Act¹ punishes any one who knowingly transports or aids in transporting in interstate or foreign commerce "any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof." The sole issue confronting us in these cases is whether the stipulated facts support the convictions of the three petitioners under this Act, the indictment having charged that they unlawfully inveigled, decoyed and carried away a minor child of the age of 15, held her for a stated period, and transported her from Utah to Arizona with knowledge that she had been so inveigled and held. We are not called upon to determine or characterize the morality of their actions. Nor are we concerned here with their liability under any other statute, federal or state.

Petitioners are members of the Fundamentalist cult of the Mormon faith, a cult that sanctions plural or "celestial" marriages. In August, 1940, petitioner Chatwin, who was then a 68-year old widower, employed one Dorothy Wyler as a house keeper in his home in Santaquin, Utah. This girl was nearly 15 years old at this time although the stipulation indicates that she had only a mental age of 7.² Her employ-

¹ 47 Stat. 326; 48 Stat. 781, 18 U.S.C. § 408a, 18 U.S.C.A. § 408a.

² At the time of her employment by Chatwin, the girl's physical age was 14 years and 8 months; her mental age was 7 years and 2 months; her intelligence quotient was 67. At the time of the stipulation in March, 1944, she was a "high grade moron" with a mental age of 9 years and 8 months and an intelligence quotient of 64.

ment by Chatwin was approved by her parents. While residing at Chatwin's home, the girl was continually taught by Chatwin and one Lulu Cook, who also resided there, that plural marriage was essential to her salvation. Chatwin also told her that it was her grandmother's desire that he should take her in celestial marriage and that such a marriage was in conformity with the true principles of the original Mormon Church. As a result of these teachings, the girl was converted to the principle of celestial marriage and entered into a cult marriage with Chatwin December 19, 1940. Thereafter she became pregnant, which fact was discovered by her parents on July 24, 1941. The parents then informed the juvenile authorities of the State of Utah of the situation and they took the girl into custody as a delinquent on August 4, 1941, making her a ward of the juvenile court.

On August 10, 1941, the girl accompanied a juvenile probation officer to a motion picture show at Provo, Utah. The officer left the girl at the show and returned later to call for her. The girl asked to be allowed to stay on for a short time and the officer consented. Thereafter, and prior to the second return of the officer, the girl "left the picture show and went out onto the street in Provo." There she met two married daughters of Chatwin who gave her sufficient money to go from Provo to Salt Lake City. Shortly after arriving there she was taken to the home of petitioners Zitting and Christensen. They together with Chatwin, convinced her that she should abide, as they put it, "by the law of God rather than the law of man" and that she was perfectly justified in running away from the juvenile court in order to live with Chatwin. They further convinced her that she should go with them to Mexico to be married legally to Chatwin and then remain in hiding until she had reached her majority under Utah law. Thereafter, on October 6, 1941, the three petitioners transported the girl in Zitting's automobile from Salt Lake City to Juarez, Mexico, where she went through a civil marriage ceremony with Chatwin on October 14. She was then brought back to Utah and thence to Short Creek, Arizona. There she lived in hiding with Chatwin under assumed names until discovered by federal authorities over two years later, December 9, 1943. While in Short Creek she gave birth to two children by Chatwin. The transportation of the girl from Provo to Salt Lake City, thence to Juarez, Mexico, and finally to Short Creek was without the consent and against the wishes of her parents and without authority from the juvenile court officials.

Having waived jury trials, the three petitioners were found guilty as charged and were given jail sentences. *United States v. Cleveland*, D.C., 56 F.Supp. 890. The court below affirmed the convictions. 10 Cir., 146 F.2d 730. We granted certiorari, 324 U.S. 835, 65 S.Ct. 858, 859, 860, because of our doubts as to the correctness of the judgment that the petitioners were guilty under the Federal Kidnapping Act on the basis of the foregoing facts.

The Act by its own terms contemplates that the kidnapped victim shall have been (1) "unlawfully seized, confined, inveigled, decoyed,

kidnapped, abducted, or carried away by any means whatsoever" and (2) "held for ransom or reward or otherwise." The Government contends that both elements appear from the stipulated facts in this case. . . .

The stipulated facts of this case reveal a situation quite different from the general problem to which the framers of the Federal Kidnapping Act addressed themselves. This statute was drawn in 1932 against a background of organized violence. 75 Cong. Rec. 13282-13304. Kidnaping by that time had become an epidemic in the United States. Ruthless criminal bands utilized every known legal and scientific means to achieve their aims and to protect themselves. Victims were selected from among the wealthy with great care and study. Details of the seizures and detentions were fully and meticulously worked out in advance. Ransom was the usual motive. "Law enforcement authorities, lacking coordination, with no uniform system of intercommunication and restricted in authority to activities in their own jurisdiction, found themselves laughed at by criminals bound by no such inhibitions or restrictions The procedure was simple—a man would be kidnapped in one State and whisked into another, and still another, his captors knowing full well that the police in the jurisdiction where the crime was committed had no authority as far as the State of confinement and concealment was concerned." Fisher and McGurie, "Kidnapping and the So-called Lindbergh Law," 12 New York U.L.Q.Rev. 646, 653. See also Hearing before the House Committee on the Judiciary (72d Cong., 1st Sess.) on H. R. 5657, Serial 4; Finley, "The Lindbergh Law," 28 Georgetown L. J. 908.

It was to assist the states in stamping out this growing and sinister menace of kidnaping that the Federal Kidnapping Act was designed. Its proponents recognized that where victims were transported across state lines only the federal government had the power to disregard such barriers in pursuing the captors. H. Rep. No. 1493 (72d Cong., 1st Sess.); S. Rep. No. 765 (72d Cong., 1st Sess.) Given added impetus by the emotion which gripped the nation due to the famous Lindbergh kidnaping case, the federal statute was speedily adopted. See 75 Cong. Rec. 5075-5076, 13282-13304. Comprehensive language was used to cover every possible variety of kidnaping followed by interstate transportation. Armed with this legislative mandate, federal officials have achieved a high and effective control of this type of crime.

But the broadness of the statutory language does not permit us to tear the words out of their context, using the magic of lexicography to apply them to unattractive or immoral situations lacking the involuntariness of seizure and detention which is the very essence of the crime of kidnaping. Thus, if this essential element is missing, the act of participating in illicit relations or contributing to the delinquency of a minor or entering into a celestial marriage, followed by interstate transportation, does not constitute a crime under the Federal Kidnapping Act. No unusual or notorious situation relating to the inability of state authorities to capture and punish participants in such activities evidenced itself at the time this Act was created; no authoritative

spokesman indicated that the Act was to be used to assist the states in these matters, however unlawful and obnoxious the character of these activities might otherwise be. Nor is there any indication that Congress desired or contemplated that the punishment of death or long imprisonment, as authorized by the Act, might be applied to those guilty of immoralities lacking the characteristics of true kidnappings. In short, the purpose of the Act was to outlaw interstate kidnappings rather than general transgressions of morality involving the crossing of state lines. And the broad language of the statute must be interpreted and applied with that plain fact in mind. . . .

Were we to sanction a careless concept of the crime of kidnaping or were we to disregard the background and setting of the Act the boundaries of potential liability would be lost in infinity. A loose construction of the statutory language conceivably could lead to the punishment of any one who induced another to leave his surroundings and do some innocent or illegal act of benefit to the former, state lines subsequently being traversed. The absurdity of such a result, with its attendant likelihood of unfair punishment and blackmail, is sufficient by itself to foreclose that construction

The judgment of the court below affirming the convictions of the petitioners must therefore be reversed.

Reversed.

NOTES

1. Cf. With the principal case: *Caminetti v. United States*, supra, p. 691, and *Cleveland v. United States*, supra, pp. 823, 1102.

2. In *State v. City of St. Paul*, 81 Minn. 391, 394, 84 N.W. 127 (1900), Lewis, J., said:

"It is not uncommon for judges to assume knowledge of extrinsic facts when interpreting statutes of peculiar public importance. To a certain extent such practice is warranted when it is necessary to consider the history of, and the circumstances connected with, the birth of a statute, in order to discover the intent with which it was adopted. But the courts should resort to such method of interpretation only when the enactment is so ambiguous that the intent of its makers must be sought beyond its own limits."

KELLY v. DEWEY

Supreme Court of Errors of Connecticut, 1930. 111 Conn. 280, 149 A. 840.

HAINES, J. The facts of this proceeding are not in dispute. The plaintiff was convicted on June 18, 1928, by the city police court of Hartford, of operating a motor vehicle while under the influence of liquor. He was again convicted in the same court on October 12, 1929, of a second offense, and sentenced and committed to the Hartford county jail for a period of six months. On December 31, 1929, a judge of that court issued an order purporting to suspend the jail sentence so imposed, and issued an order purporting to place the plaintiff in the custody of the probation officer of that court for one year, and caused the facts to be made a part of the record in the case. The order was directed to the sheriff of Hartford county, who refused to recognize it. The plaintiff thereupon prayed out a writ of habeas corpus which was

issued by the superior court for Hartford county. The return made by the defendant in obedience to this writ, set up the provisions of chapter 285 of the Public Acts of 1929, and alleged that the plaintiff was held by the respondent under a mittimus which directed the plaintiff's confinement for six months from and after October 12, 1929, following a conviction of the plaintiff for operating a motor vehicle while under the influence of liquor, second offense, and averring that the judge of the city police court of Hartford was without authority or jurisdiction to suspend the execution of that sentence and order the plaintiff to be placed upon probation for one year in the custody of a probation officer. To this return the plaintiff demurred on the ground that the provisions of the statute referred to, and especially section 2 thereof, showed that the judge did have power to suspend the execution of the sentence and make the order for probation, and that the return was therefore insufficient. The statute in question, chapter 285 of the Public Acts of 1929, appears in the footnote.¹

The plaintiff rests his claim that the action of the judge of the city police court of Hartford was legally authorized upon the second section of chapter 285, Pub. Acts of 1929, saying that sections 1 and 2 of the act "are entirely separate and distinct and have nothing whatsoever to do with each other. . . . It was not the intention to limit the power of the court in section two, to the extent that the court could not suspend the execution of the sentence and place on probation in a case similar to the present one."

Let us examine the position the plaintiff thus takes. Under section 1, literally construed, it is quite apparent that the sentence of this plaintiff could not be suspended; it is specifically forbidden. ". . . The court shall, in no case, suspend the execution of the sentence of an

¹ An act amending an act concerning the suspension of execution of sentence.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Chapter 62 of the public acts of 1923 is amended to read as follows: Any criminal court in any case within its jurisdiction, except in cases of commitment to the State Prison, may impose sentence and suspend the execution thereof indefinitely, when the mitigating circumstances clearly justify such action, and, upon such suspension, the court shall forthwith cause to be spread upon its records the reasons upon which such action is based, provided the court shall, in no case, suspend the execution of the sentence of an accused convicted of operating a motor vehicle while under the influence of intoxicating liquor if such offense shall have been committed within a period of six years immediately following such final conviction of a like offense by a court of this state, or by a person convicted of a felony if it shall appear that he has twice been previously convicted of a felony.

Sec. 2. Chapter 71 of the public acts of 1919 as amended by chapter 175 of the public acts of 1921 is amended to read as follows: In cases within its jurisdiction, except in cases after commitment to the State Prison or to the Connecticut Reformatory, any criminal court or the judge holding such court may, during or after the adjournment of the session at which such commitment was issued, after hearing, continue the case or suspend the execution of the sentence and commit the accused to the custody of a probation officer or to the custody of a probation officer pro tempore, to be appointed by such judge, for such time not exceeding one year as the court may fix, and thereupon the court or judge shall cause the facts upon which such action is based to be made a part of the record of such case. Approved June 6, 1929.

accused convicted of operating a motor vehicle while under the influence of intoxicating liquor if such offense shall have been committed within a period of six years. . . ."

Under section 2, also literally construed, and if standing alone and independent of any other legislation on the same subject, the court was permitted, except in state prison and reformatory cases, "during or after the adjournment of the session at which such commitment was issued, after hearing, [to] continue the case or suspend the execution of the sentence and commit the accused to the custody of a probation officer."

The logic of the plaintiff's position then is this: That the two sections of this act should be read and construed literally, and that they stand separate and distinct from each other, but of equal legislative effect; that the Legislature intended by the first section to forbid the release of drunken drivers guilty of second offense; that it intended by the second section to permit the release of such drivers; that the second section leaves the law on this particular subject where it stood before; that, though the obvious intent shown in the first section was to adopt the change recommended by the judicial council, it was also the intent to defeat that result by the provisions of the second section of the same act.

The claim that the two sections of chapter 285 should be read and construed as separate and distinct cannot be sustained by any sound rule of statutory construction. The act is a substitute for, and a repeal of all prior legislation to which it specifically refers. We must look upon it as a single piece of new legislation enacted as a substitute for the prior provisions.

This conclusion results from another well-known rule of construction which is that all parts of an act are to be construed together, and it is not permissible to rest the construction upon any one part alone. The general intention is the key to the whole act, and the intention of the whole controls the interpretation of all its parts.

A legitimate and often helpful means of determining the legislative intent is to examine the history and derivation of the act, and consider the circumstances and conditions known to the Legislature at the time of its enactment. *Mattoon's Appeal*, 79 Conn. 86, 87, 63 A. 784; *Quinebaug Bank v. Tarbox*, 20 Conn. 518.

The first legislation in this state on the subject of suspended sentences and probation was chapter 126, Pub. Acts of 1903, which provided for the appointment of probation officers, and gave power to "any court" to pronounce sentence and suspend execution and commit the accused to the Probation Officer for not more than one year. An exception was made of state prison crimes. This was amended by chapter 142, Pub. Acts of 1905, leaving out the provision as to state prison crimes, and these provisions remained until 1907, when a judge was given the authority after the term of court had closed. This was again amended by chapter 106, Pub. Acts of 1911, but with no change pertinent to the present question. It was again amended by chapter

56, Pub. Acts of 1915, and the exception of state prison and reformatory cases was again made, the Act then taking substantially the same form in which it appears in section 6671, Rev.1918. This was again amended by chapter 71, Pub. Acts of 1919, making verbal changes regarding state prison and reformatory prisoners. Another amendment was made by chapter 175, Pub. Acts of 1921, without any change affecting this inquiry, and this was followed by the present section 2 of chapter 285, Pub. Acts of 1929 which we are considering.

In chapter 62, Pub. Acts of 1923, power was given to any criminal court to "impose sentence and suspend the execution thereof indefinitely, in any case within its jurisdiction." This was amended in 1929, and became section 1 of chapter 285, Pub. Acts of 1929.

The chronology of these sections shows that, at the time chapter 285, was enacted, there were two existing statutes which provided as follows:

"In cases within its jurisdiction, except in cases after commitment to the state prison, or state reformatory, any criminal court or the judge holding such court may, during or after the adjournment of the term, after hearing, continue the case or suspend the execution of the sentence and commit the accused to the custody of a probation officer or to the custody of a probation officer pro tempore, to be appointed by such judge, for such time not exceeding one year as the court may fix. . . ." Pub. Acts 1921, c. 175.

"Any criminal court may impose sentence and suspend the execution thereof indefinitely in any case within its jurisdiction. Such court may order brought before it any person upon whom such sentence has been imposed who shall be convicted, within one year from the date thereof, of any crime, and may revoke such suspension, whereupon such sentence shall be in force." Pub. Acts 1923, c. 62.

By chapter 190, Pub. Acts 1927, a "Judicial Council" was created by the Legislature "for the continuous study of the organization rules and methods of procedure and practice of the judicial system of the state, the work accomplished and the results produced by that system and its various parts." Section 1. In its first report to the Governor of this state, after discussing the selection of jurors and the appointment of the judges of the city, town, and borough courts, extended consideration is given to what is termed "the abuse of the suspension of sentence."

In opening that discussion, the report first makes specific reference to the two statutory provisions which we have quoted. Characterizing these as broad powers, and pointing out the serious consequences of their abuse, the report continues: "It is however, a matter of common knowledge that some city, town and borough courts are imposing fines, or fines with a suspended jail sentence, in many cases involving second, third and fourth offenses, rather than a jail sentence with a possibility of an appeal and loss of fine to city or town. We have particularly in mind the driving of an automobile under the influence of intoxicating liquor, transportation of liquor in violation of law, and the reckless

accused convicted of operating a motor vehicle while under the influence of intoxicating liquor if such offense shall have been committed within a period of six years. . . ."

Under section 2, also literally construed, and if standing alone and independent of any other legislation on the same subject, the court was permitted, except in state prison and reformatory cases, "during or after the adjournment of the session at which such commitment was issued, after hearing, [to] continue the case or suspend the execution of the sentence and commit the accused to the custody of a probation officer."

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driving of motor vehicles. The second and third violation of these crimes ought not to be treated as lightly as our city, town and borough courts frequently treat them, penalizing the violation by a fine, or a fine with a suspended jail sentence. The driver of a motor vehicle who is under the influence of intoxicating liquor is a menace to every vehicle he may meet on the road. In every such case, unless the mitigating circumstances are very exceptional, such a driver when convicted of this offense, should be committed to jail and his license revoked, and the license not renewed until the commissioner of motor vehicles is fully satisfied that the driver is in no likelihood of again becoming under the influence of intoxicating liquor."

After the discussion of some other features of the situation, the following recommendation was made: "That said public acts of 1921 and 1923 be amended by providing that the provisions of said acts shall not permit the suspension of the execution of the sentence of a person convicted of operating a motor vehicle under the influence of intoxicating liquor if such offense was committed within a period of six years immediately following final conviction of a like offense by a court of this state, or by a person convicted of a felony if it shall appear that he has been previously convicted two times of any felony. These provisions, if enacted into law, will tend to stop, in large part, the abuse of the suspended sentence as now practiced, and tend to rid our highways of many drivers of motor vehicles who continually imperil all other users of the highway. The safety of society and the safety of the traveling public upon our highways, will be promoted by the passage of the proposed acts."

The Legislature thus had before it in the session of 1929 the law as it then existed, the serious public evil which was permitted by that law, and recommendation by an official body created by the Legislature itself, looking toward a remedy. A comparative reading of chapter 285 which the Legislature thereupon passed, particularly section 1, and the recommendation of the judicial council, makes it too clear for argument that the Legislature intended to adopt that recommendation. The general effect of the provisions of section 1, which follow the language of the recommendation almost verbatim, was to prevent the release of a driver twice convicted of driving under the influence of liquor. It thus aimed to, and did, accomplish the remedy suggested. Can it be thought that, in adding section 2, the Legislature intended to render the provisions of section 1 ineffective? The reasonable, and we think the only, explanation of the seemingly conflicting language of the two sections is that, in the endeavor to preserve the general authority of the courts to suspend sentences and give probation, the effect of the exception which had just been made was not sufficiently considered.

We are satisfied, therefore, from the history of this legislation to which we have called attention, that it was clearly intended by the Legislature to remedy the evil to which its attention had been called. "When changes have been introduced by amendment, it is not to be assumed that they are without design." *Stamford v. Stamford*, 107

Conn. 596, 606, 141 A. 891, 895. The literal reading of section 2 makes the clear intent of section 1 ineffective. How, then, are we to construe chapter 285 as a whole? "The literal construction has in general but a *prima facie* preference. To arrive at the real meaning, it is always necessary to take a broad general view of the Act so as to get an exact conception of its aim, scope and object. It is necessary, according to Lord Coke, to consider, (1) what was the law before the Act was passed, (2) what was the mischief or defect for which the law had not provided, (3) what remedy the legislature had appointed, and, (4) the reason for the remedy. . . . The true meaning of any passage is to be found not merely in the words of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing from those circumstances which the legislature had in view, and what were the causes and occasion for the passage of the Act and the purpose intended to be accomplished by it in the light of the circumstances at the time and the necessity for its enactment. . . . If possible, a statute must be so construed as to make it effect the purposes for which it was intended." Endlich, pp. 35-37; *Stapleberg v. Stapleberg*, 77 Conn. 31, 35, 58 A. 233; *Mulcahy v. Mulcahy*, 84 Conn. 659, 662, 81 A. 242; *Wooley v. Williams*, 105 Conn. 671, 673, 136 A. 583. Satisfied, therefore, that the legislative intent in enacting chapter 285 was to except cases like the present from the operation of the suspended sentence and the probation law, how are we to construe section 2 of this act?

This section is the final word of the Legislature which conferred upon our criminal courts the right of suspending sentence and giving probation. We have traced its progress from 1903 to the present time. It is a broad general grant of power. Throughout its history, the only restrictions aimed at are state prison and reformatory sentences. Coming to the session of 1929, it is apparent to us that the Legislature clearly sought to impose other restrictions in response to a suggestion and to curb an existing evil of magnitude. That was done by a specific and express provision which is section 1 of this act. The net result was a chapter containing both a restatement of the general powers and the restrictions aimed at by a specific exception. We have to deal, therefore, with one section which is general and at the same time one that is specific; the latter covering a matter which is within the general powers. The rule of statutory construction under such circumstances is well established.

"Where there are two provisions in a statute, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one case or subject within the scope of a general provision, then the particular provision must prevail; and if both cannot apply, the particular provision will be treated as an exception to the general provision."

The application of this rule in the construction of the act before us furnishes the solution of our problem, and we accordingly hold that the second section is a grant of general powers and covers all cases within

its terms, save and except such as are specially excepted by the specific provisions of section 1. It follows that it was error to sustain the order of the judge of the city court of Hartford.

There is error, and the case is remanded to the superior court, with direction to enter judgment for the defendant.

HINMAN, J. (dissenting). My inability to concur in the majority opinion, of course, is not due to disagreement with the desirability of the result attained by the construction which it accords to section 2 of chapter 285 of the Public Acts of 1929, but it springs from a conviction that such a construction is precluded by fundamental and controlling rules of law which should not be sacrificed or transgressed in order to effect a result deemed desirable in an individual case. In the construction of statutes, the intent is to be sought, first of all, in the words and language employed, and, if the words are free from ambiguity and doubt, there is no occasion to resort to other means of interpretation. . . . The provisions of the act under consideration are not ambiguous; the language of each section is so clear as to leave no room for question as to the meaning expressed thereby. Hence the above rules are applicable and controlling, and those by which resort may be had to inferences and extraneous aids where the intention is not clearly expressed by the language used are not available.

There is a further reason why the present case does not afford appropriate occasion for application of the rule, invoked and principally relied upon by the majority opinion, by which, in construing an act covering, in a single enactment, an entire subject, all its component parts are to be considered together "upon the assumption that the law was intended to be read as a whole with each provision in harmony with every other." *New Haven Orphan Asylum v. Haggerty Co.*, 108 Conn. 232, 239, 142 A. 847, 849. Enactments to which this rule applies are illustrated by the Mechanics' Lien Law, involved in the case just cited and in *Hartford Builders' Finish Co. v. Anderson*, 99 Conn. 343, 122 A. 76, and the act of 1919 (Pub. Acts 1919, c. 336), providing for payment to discharged soldiers, sailors, and marines, involved in *Bissell v. Butterworth*, 97 Conn. 605, 118 A. 50—the Connecticut cases upon which the majority rely on this point. The act now under consideration (chapter 285 of the Public Acts of 1929) amended, by separate sections, statutes which are not only physically separate but are distinct in reason and purpose. Chapter 175 of the Public Acts of 1921, which was amended by section 2 of the 1929 act, originated as one section of the General Probation Act of 1903, and was so retained in the Revision of 1918. The act of 1923 (chapter 62), amended by section 1 of the 1929 act, obviously was passed to meet a different situation and serve a distinct purpose—to permit courts to suspend execution of sentence, without commitment to a probation officer (which was mandatory when sentence was suspended under the Probation Act) substituting for probation the revocation of the suspension upon another conviction within the year. Otherwise there would have been no occasion for passing the 1923 act.

The fact that the 1929 amendments of these two separate statutes were effected by including them in one chapter is without apparent significance other than convenience, and that they pertained to related subjects. Each of these sections is complete in itself, and, so far as appears, covers the entire subject-matter intended; each should be construed independently so far as concerns reading, by implication, provisions of one into the other. Plainly, the intent expressed in the amendment of the 1923 act was both to except the specified cases from those in which sentence could be suspended without probation under the act of 1923 and to require that in other cases suspension be justified by circumstances, made a matter of record. It is equally clear that the only addition to the Probation Act which section 2 manifests an intent to make is to require the facts upon which the continuance or suspension is based to be made a matter of record. A belief, on our part, that the same exceptions should have been embodied in the latter statute as in the former, or even an assumption that the General Assembly so desired and intended, does not enable us to insert it by implication. To do so transgresses the limits of a proper exercise of judicial powers, and constitutes an invasion of functions which are distinctively legislative.

IN RE HALL

Supreme Court of Errors of Connecticut, 1882.
50 Conn. 131, 47 Am.Rep. 625.

[The case appears *supra*, p. 402.]

H. C. GUTTERIDGE, A COMPARATIVE VIEW OF THE INTERPRETATION OF STATUTE LAW

8 Tulane L.Rev. 1, 11-13 (1933).

. . . it may be of interest to refer to a question which has formed the subject matter of much controversy in continental legal circles. It has been argued that when reference is made to the intention of the legislator the word "intention" is itself capable of ambiguity. To put it quite shortly, are we to assume that the legislator has in view only the circumstances as they exist when the statute is put into force, or is he to be deemed to intend to lay down a rule for the future which is to be plastic and may thus vary from time to time in accordance with changed circumstances? An example of the difficulty which may arise in this way is furnished by a Scottish case, *Marquis of Linlithgow v. North British Railway*,¹ which turned on a dispute as to the meaning of the word "minerals" in an Act of Parliament. The Act in question, which was passed in 1817, authorized the construction of a

¹ See the discussion of this case in "Law and Language" an address delivered by Lord MacMillan to the Holdsworth Club of Birmingham University on May 15, 1931, and published by the Holdsworth Club (Birmingham, 1931).

canal across land belonging to the vendors, the predecessors in title of the Marquis, and reserved the "minerals" underlying the surface to the vendors of the land. Below the surface was a valuable deposit of oil shale, which the Marquis desired to exploit, but he was met by a claim on the part of the railway company, who were the owners of the canal, that the shale underneath the canal belonged to them because in 1817, when the Act in question was passed, the process of extracting oil from shale was unknown, and consequently shale could not be a mineral within the meaning of the Act. It was contended on behalf of the Marquis that the term "minerals" must not be regarded as having a meaning fixed once for all in 1817, but as including anything which from time to time would come to be generally regarded as a mineral substance. This argument failed to convince the House of Lords and the Marquis lost his case.

A continental jurist would describe the dispute which arose in this case as a clash between the subjective and objective theories of interpretation. According to the subjective theory it is the duty of the judge to discover the intentions of the lawgiver at the time when the statutory rule of law to be interpreted was first enacted, that is to say, regard must be had solely to the circumstances as they were when the statute was brought into being. The advocates of the objective theory contend, on the other hand, that the rule must be interpreted in accordance with the circumstances as they exist at the time when interpretation takes place. It will be observed that this objective theory involves a progressive or teleological system of interpretation which may give a different aspect to a rule at different epochs, although the text of the law will remain the same. . . .

I. Contemporary Opinion

STATE v. PARTLOW

Supreme Court of North Carolina, 1884. 91 N.C. 550, 49 Am.Rep. 652.

[The case appears *supra*, p. 840.]

J. Legislative History: Herein of Journals, Committee Reports and Debates

GOSSELIN v. THE KING

Supreme Court of Canada, 1903. 33 Can.S.C. 255.

THE CHIEF JUSTICE, (Sir E. Taschereau) . . . I deem it expedient to say a few words upon the question raised during the argument of the reference by counsel to the debates in Parliament for the purpose of construing any statute. Such a reference has always been refused by my predecessors in this court and, when counsel in this case began to read from the Canadian Hansard the remarks made in Parliament when the Canada Evidence Act in question was under discus-

sion, I did not feel justified in departing from the rule so laid down, though, personally, I would not be unwilling, in cases of ambiguity in statutes, to concede that such a reference might sometimes be useful. The same rule is observed in England. Alderson B. says, *In re Gorman*, 5 Ex. 667:

"We do not construe Acts of Parliament by reference to history." And, in *Barbat v. Allen*, 7 Ex. 616, Pollock C. B. says:

"I must at the same time state that the history of a clause in a statute is certainly no ground for its interpretation in a court of law and I would guard myself against being considered as resorting to any such means."

In the case of *The Queen v. The Bishop of Oxford*, 4 Q.B.D. 525, it is true, a reference to a speech of the Lord Chancellor in the House of Lords, relating to a certain statute, was allowed by the Court of Appeal, but the remarks of the learned judges upon that point, if I read them correctly, are far from justifying the contention raised in some quarters that they intended to alter the general rule on that point.

Thesiger L.J. said:

"I would only say that, among the authorities upon which I rely I do not count the speech of the Lord Chancellor in the House of Lords. I was a party to the decision under which it was allowed to be quoted to us, and the ground upon which I thought it admissible was that it had, in the occasion upon which it was spoken and the position of the speaker, at least as great a sanction as the text-books of living judges which have upon many occasions been admitted as authorities.

"But, upon further consideration of the matter, I have been led to doubt very much whether the principle upon which such text-books have been treated as authorities is a sound one; and, even if it were a sound one, I cannot but think the extension of it to speeches in a House of Parliament, sitting in its legislative capacity, however eminent may be the speakers, however solemn the occasion on which they speak, inexpedient in a very high degree. It is true that in many instances, and perhaps this particular one is a conspicuous example, the speech, looking to the circumstances under which it was made, the previous consideration which the speaker has given to the subject, and the character in which he speaks, may be entitled to far more weight than the hasty utterances of a judge at *nisi prius* or even the *obiter dicta* of a judge *in banco*; but the judge, in the latter cases, has the safeguard of a judicial proceeding cast around him; his mind is not likely to be influenced by any considerations beyond those which the law enforces upon him; while, when the scene is removed to the area of Parliament, political considerations may enter, as they have before now entered, into the opinions of lawyers upon legal subjects, and may insensibly affect the judgments of even the greatest and wisest of our judges. The sanction and safeguard of judicial procedure are removed, and even the conditions which give the text-book its weight, the exclusive devotion to the legal subject of which it treats, and the calmness with which it is necessarily prepared may, in many instances, not exist."

That case is, however, no authority upon the question, for when in the House of Lords, sub nomine, *Julius v. Oxford*, 49 L.J.Q.B. 578,

"In the course of the arguments strong disapprobation was expressed by the Lord Chancellor, (Earl Cairns) and Lord Selborne of the course taken by the Court of Appeal in allowing to be cited a speech made by the Lord Chancellor in the House of Lords." . . .

In the United States the rule seems to be the same.

"But in truth, little reliance can or ought to be placed upon such sources of interpretation of a statute," says Story J. in 2 Story's Reports, 654.

Peckham J., in the United States Supreme Court, said:

"There is a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. The reason is that it is impossible to determine with certainty what construction was put upon an Act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other; the result being that the only proper way to construe a legislative Act is from the language used in the Act and, upon occasion, by a resort to the history of the times when it was passed. *United States v. Freight Association*, 166 U.S.R. at pages 290 to 318 [1896]."

NOTES

1. Concerning deficiencies in the technique of the English courts for statutory interpretation see Lee "A Plea for Historical Interpretation of Statute Law", 1935 J.Pub.Tof L. 1; Davies, "Interpretation of States in the Light of their Policy", 35 Colum.L.Rev. 519 (1935); Jennings, "Judicial Process at Its Worst", 1 Mod.L.Rev. 111 (1937); Mann, "Interpretation of Uniform Statutes", 62 Law Q.Rev. 278 (1946), (with special reference to unsuitability in interpreting "international" legislation, owing to refusal to admit travaux préparatoires.)

2. Cf. with reference to use of extrinsic aids when the constitutionality of Canadian statutes is in issue, Vincent O. MacDonald, "Constitutional Interpretation and Extrinsic Evidence", 17 Can.B.Rev. 77 (1930).

3. In an Australian case, *South Australia v. Commonwealth* (1942) 65 C.L.R. 373, the states tendered in evidence the report of a committee on Uniformity of Taxation, and speeches made by the Australian Treasurer in Parliament. Court rejected them.

4. Lord MacMillan in "Law and Language" in "Law and Other Things," (1931), says at p. 164: ". . . and in construing an Act of Parliament, the legislators who passed it cannot be asked to state on oath what they meant by particular words in it—for which they must often be devoutly thankful. Even the debates, which have preceded the enactments of a statute must not be looked at, however surreptitiously. At least they must not be referred to in court".

PELLETT v. INDUSTRIAL COMMISSION OF WISCONSIN

Supreme Court of Wisconsin, 1916.

162 Wis. 596, 156 N.W. 956, Ann.Cas.1917D, 881.

Action by Walter E. Pellett and others against the Industrial Commission of Wisconsin and James Suffern. Judgment for defendants, and plaintiffs appeal.

VINJE, J. . . . Plaintiffs . . . seek to set aside the award because it was procured by fraud. The allegations as to fraud on claimant's part are substantially these: (a) That Suffern testified before the commission that he was totally disabled for 6 months, when in fact, he was not, and that he settled with a casualty company in which he was insured for only one month of total disability; (b) that he concealed from the commission that he was subsequently, and within 6 months of his injury, injured while in the employ of one Kennedy resulting in total disability for 10 days and partial disability for one week more. Plaintiffs also allege they first learned of Suffern's representations to the casualty company January 11, 1915, and that the commission refused to set aside the award because more than 10 days had elapsed since it was made. Section 2394—17, Stats. 1915.

It will be seen the fraud complained of consisted of false testimony on the part of the claimant, and of concealment by him of facts material to the issue before the commission. Section 2394—19, Stats. 1915, provides that an award may be set aside on the following grounds:

"(1) That the commission acted without or in excess of its powers. (2) That the order or award was procured by fraud. (3) That the findings of fact by the commission do not support the order or award."

The question therefore presented is whether the fraud alleged, assuming it to be sustained by proof, constitutes a ground for setting aside the award. It may be conceded that the language of the statute upon an original construction, regardless of principles guiding equity in granting relief from judgments obtained by fraud as announced in *Boring v. Ott*, 138 Wis. 260, 119 N.W. 865, 19 L.R.A.(N.S.) 1080, *Uecker v. Thiedt*, 137 Wis. 634, 119 N.W. 878, and *Laun v. Kipp*, 155 Wis. 347, 145 N.W. 183, and regardless of the intent of the Legislature as expressed in the report of and discussions before the committee that drafted the Workmen's Compensation Act, is susceptible of the construction that the fraud meant by the act includes perjury or the concealment of material facts upon the hearing. It is also susceptible of the construction that it includes neither, and that it was not contemplated that trial after trial should be had upon the question of whether a witness testified falsely, for, if one award could be set aside upon that ground, a subsequent one could also, and so on indefinitely. Happily there is as to this statute no doubt upon the subject. The report of the committee referred to and the discussions had before it conclusively show that it was the legislative intent that perjured testimony or concealment of material facts were not such fraud as the statute contemplates. In their report the committee said:

"The fraud alluded to in the second ground will be only such as was perpetrated in securing the award, and will not include false testimony of any party, because such questions all will be decided by the board [commission]."

This view is reinforced by the discussions before the committee, too lengthy to be here inserted. Such being the express legislative construction given the language used, and such construction being repugnant neither to the language used nor to judicial principles, must control.

That reference may be had to the report for the purpose of ascertaining the correct construction of the language used was held in *Minneapolis, St. P. & S. S. M. R. Co. v. Industrial Comm.*, 153 Wis. 552, 558, 141 N.W. 1119, Ann.Cas.1914D, 655; *Hoenig v. Industrial Comm.*, 159 Wis. 646, 648, 150 N.W. 996. The court therefore properly refused to receive evidence of the fraud alleged, since, if established, it could not affect the validity of the award.

Judgment affirmed.

NOTE

In *United States v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 247 U.S. 310, 38 S.Ct. 525, 62 L.Ed. 1130 (1917), in confirmation of its strict literal interpretation the court resorted to the legislative history of the act including an extract from the Congressional Record reporting the remarks of Representative Lacey, chairman of the House committee in charge of the bill for the act. Pitney J. said: "It is not our purpose to relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment. . . . But the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications. [Citing cases.] The remarks of Mr. Lacey, and the amendment offered by him, in response to an objection urged by another member during the debate, were in the nature of a supplementary report of the committee; and as they related to matters of common knowledge they may very properly be taken into consideration as throwing light upon the meaning of the proviso; not for the purpose of construing it contrary to its plain terms, but in order to remove any ambiguity by pointing out the subject matter of the amendment. This is but an application of the doctrine of the old law, the mischief, and the remedy."

Expressing the same distinction between committee reports and debates, see *Imhoff-Berg Silk Co. v. United States*, 43 F.2d 836 (D.C.N.J.1930).

COMMONWEALTH v. WEST PHILADELPHIA FIDELIO MANNERCHOR

Superior Court of Pennsylvania, 1934. 115 Pa.Super. 241, 175 A. 434.

PARKER, JUDGE. This is an appeal by the West Philadelphia Fidelio Mannerchor, an incorporated club, from an order of the court of common pleas revoking a liquor license under section 410 of the Pennsylvania Liquor Control Act of November 29, 1933, P.L. Special Session,

p. 15 (47 PS § 744—410). That section provides that, on petition of the Attorney General, the district attorney, or fifteen or more taxpayers, residents of the municipality where the hotel, restaurant, or club is located, the court of common pleas may, after hearing, suspend or revoke the license where it shall appear to the court that the licensee has violated any law of this commonwealth, and that "the action of the court in suspending or revoking a license shall be final."

The last clause does not affect our right to issue a writ of certiorari in order to determine, from an inspection of the record, whether or not the court below exceeded its jurisdiction and for the purpose of correcting errors apparent on the face of the record, and with this object in view it is proper to examine the opinion of the court in order to discover the reasons for its action. [Citing cases.]

An inspection of the record discloses the facts that the appellant had received a license under the Liquor Control Act, that it had made sales of liquor on Sunday, and that the lower court revoked the license for the sole reason that such sales so made on Sunday were a violation of section 411 of that act (47 PS § 744—411). It is conceded by both appellant and appellee that the only question for our determination is whether the section in question prohibits the sale of liquor by a club on Sunday. The portion of the section with which we are concerned is as follows: "Liquor may be sold by licensees, other than clubs, only after seven o'clock ante meridian of any week day and until two ante meridian of the following week day, and shall not be sold on Sunday or on any day on which a general, municipal, special or primary election is being held."

The contentions of the appellant are that the paragraph in question is ambiguous and capable of two meanings; that the clause is not so clear in its meaning that it would support an order which imposes a penalty on the respondent; that in aid of determining the meaning of the clause it is proper to have recourse to the debates among members of the Legislature at the time of the passing of the statute; and that such debates indicate an intention upon the part of the Legislature to exclude clubs from the provision prohibiting a sale upon Sunday.

• • •

Taking the plain words of the clause we have for consideration, we do not find the meaning ambiguous. Two subjects are dealt with, sales between 2 a.m. and 7 a.m. and sales on Sunday and election days. Liquor may be sold by licensees *other than clubs* only after 7 a.m. and before 2 a.m. of the following week day, and shall not be sold on Sunday or election days. There is not any exception contained in the provision proscribing sales on Sunday and election days. By a strict grammatical construction, the subject of the predicate in the last portion of the paragraph is the word "liquor." The appellant asks us to supply an exception which would change the plain meaning of the act; in other words, the ambiguity is not in the act, but only arises by reason of the suggestion that a clause be supplied.

We have so far considered only a literal interpretation of the paragraph. The literal construction has a *prima facie* preference. "To arrive at the real meaning, it is always necessary to take a broad general view of the Act, so as to get an exact conception of its aim, scope and object." Endlich on Interpretation of Statutes, p. 35. According to Lord Coke, it is necessary to consider the old law, the mischief and remedy. *County of Cumberland v. Boyd*, 113 Pa. 52, 4 A. 346. The Liquor Control Act, just as the Brooks Law, Act May 13, 1887, P.L. 108 (*Raudenbusch's Petition*, 120 Pa. 328, 340, 341, 14 A. 148), was enacted for the purpose of regulating and restraining the sale of liquor and not for the purpose of promoting it. Such is the expressed purpose as contained in the title and in section 3 dealing with the interpretation of the act (47 PS § 744—3). It is significant that in fixing the license fees to be paid by clubs it is provided that, where clubs "cater to groups of non-members, either privately or for functions" (section 407 [47 PS § 744—407]), they shall be required to pay the same license fee as is paid by hotels and restaurants situated in the same municipality. Not only clubs which cater to other than members, but even those which sell to their members, are made subject to the provision of the statute. In construing the law prohibiting sales on Sunday and on election days, we are asked to supply an exception which would remove clubs from the prohibition. These words are not in the clause, and we are not justified in reading them in, in the absence of any reason for so doing. The construction urged by the appellant would affect not only sales upon Sunday but those upon election days, and all the evils resulting from the free distribution of liquor upon election days would be promoted and not regulated if we adopted the contention of the appellant.

The argument which is urged most seriously by the appellant is based upon certain remarks made by members of the House when the act was being debated during its consideration. While we are of the opinion that the only safe guide in the instant case is the plain meaning of the act as expressed in the statute considered in the light to which we have heretofore referred, nevertheless those debates do not furnish a basis for a different construction even though we consider them.

"In giving construction to a statute we cannot be controlled by the views expressed by a few members of the legislature who expressed verbal opinions on its passage. Those opinions may or may not have been entertained by the more than 100 members who gave no such expression. The declarations of some, and the assumed acquiescence of others therein, cannot be adopted as a true interpretation of the statute." *County of Cumberland v. Boyd*, *supra*, page 57 of 113 Pa., 4 A. 346, 347. There is, however, authority for the consideration of reports of committees having a bill in charge or of a commission appointed to codify the law upon a given subject. In the late case of *Tarlo's Estate*, 315 Pa. 321, 324, 325, 172 A. 139, 140, the modern view is thus expressed: "While it is true that the views expressed by those who draft or enact laws are not a safe guide when the courts are called up-

on to determine the meaning of the words employed therein [Citing cases], yet, in order to get at the old law, the mischief and the remedy, and properly to understand and construe a statute embodying the latter, the history of the enactment in question may always be considered. [Citing cases.] In *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S.Ct. 172, 179, 65 L.Ed. 349, 16 A.L.R. 196, . . . the Supreme Court said (page 474 of 254 U.S., 41 S.Ct. 172, 179): 'By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. . . . But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure.' . . . The report of a commission appointed to codify the law upon a given subject is entitled to even greater weight than the report of a committee; especially is this so where the Legislature enacts the exact language of the commission's draft."

When the bill was presented to the House, the paragraph in question did not contain the phrase "other than clubs," but was passed on third reading with that phrase included (L.J. p. 195) and was presented to the Senate for concurrence. The Senate struck out the phrase and returned it to the House. On its return, Representative Sowers moved to amend the bill by reinstating the phrase. On debate a member of the House interrogated Mr. Sowers, who had offered the amendment, as to its effect, and Mr. Sowers replied as follows: "Mr. Speaker, as a lawyer I answer that clubs will not be permitted to sell liquor on Sunday. They will be permitted to distribute liquor among their members. Clubs never sold under the laws of Pennsylvania. When a club has liquor in its treasury, or in its possession, all of that liquor belongs to the entire membership, and a man cannot buy that of which he is a part owner, and there is a Supreme Court case to that effect." Mr. Wilson again interrogated Mr. Sowers, asking him for a more definite answer, and his final answer was that, if the amendment prevailed, the same condition would be restored as existed under the Brooks High License Law. Mr. Wilson then interrogated Mr. McClure, who presented the original bill to the House, as to the meaning of the clause as follows:

"Mr. Wilson: If this amendment of Mr. Sowers prevails, would clubs then be able to dispense liquor on Sunday.

"Mr. McClure: In my judgment they would be."

The Constitution vests the legislative power of the commonwealth in both the Senate and the House of Representatives, and gives to the Governor the power of veto. When the Governor approved the bill, he said: "Fortunately, efforts in the House to permit sales in clubs on Sunday did not succeed." This presents a situation which demonstrates not only the wisdom of the rule that individual opinions of members are not of assistance in interpreting a statute, but demonstrates an absence of any such positive indication of the intention of

the Legislature as would justify us in departing from the interpretation which we have given the paragraph.

Prior to the adoption of the Eighteenth Amendment to the Federal Constitution, a club "organized and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary, or other purposes, to which the furnishing of liquors to its members would be merely incidental, in the same way, to the same extent, that the supplying of dinners or daily papers might be, then it cannot be considered as within either the purpose or letter of the law [Brooks Law]." *Klein v. Livingston Club*, 177 Pa. 224, 232, 35 A. 606, 608, 34 L.R.A. 94, 55 Am.St.Rep. 717. By the Liquor Control Act of 1933, the Legislature provided for the licensing of all clubs and, as we have heretofore pointed out, provided one license fee where the sales are only to members and another and larger license fee, the same as that for hotels and restaurants, where the clubs cater to groups of nonmembers. In section 3 of the act (47 PS § 744—3), dealing with its interpretation, the Legislature said: "Except as otherwise expressly provided, the purpose of this act is to prohibit *transactions* in liquor which take place wholly within the Commonwealth, except by and under the control of the board." (Italics supplied.) The word "transactions" is much broader than "sale and importation." It is impossible, after a consideration of the reasons given by the Supreme Court in the *Livingston Case* for concluding that a dispensing of liquor for a price to members of a club of the kind indicated was not a sale, to come to any other conclusion than that the effect of the *Livingston Case* has been nullified by the Legislature, and that a dispensing of liquor by a club for a price to its members is now to be regarded as a sale and subject to the regulations of the Liquor Control Act. In that case the Supreme Court commented upon the fact that the Legislature had not indicated an intention to class such dispensing of liquors as a sale, and that this was a matter within the control of the Legislature. The lawmaking department of the commonwealth has now spoken upon the subject, and it is definitely settled that a club must take out a license before engaging in the sale of intoxicating liquor, even to its members.

It follows that such conclusions as were stated by the members of the Legislature were based on an incorrect interpretation of the law. In addition, it is of importance to note that the author of the amendment distinctly said that in his opinion a *sale* could not be made on Sunday, while the author of the bill only went so far as to say that liquor might be *dispensed* to members. It is most apparent that these opinions of members of the House furnish no basis for a different conclusion than that at which we have arrived. We are all of the opinion that the order should be affirmed.

The order of the court below is affirmed.

NOTES

1. Concerning the problem of using extrinsic aids in the interpretation of state-statutes, see "Statutory Construction—Use of Extrinsic Aids in Wisconsin" (1940),

Wis.L.Rev. 453. See generally "Legislative Materials to Aid Statutory Interpretation", 50 Harv.L.Rev. 822 (1937).

2. Cf. with the principal case on use of debates of state legislature, *Houghton Mifflin v. Continental Bank*, 293 Ill.App. 423, 12 N.E.2d 714 (1938).

3. See use made of recommendation of the New York Law Revision Commission that resulted in the act which was being interpreted, in *Fonthelm v. Third Ave. Ry. Co.*, 257 App.Div. 147, 12 N.Y.S.2d 90 (1939).

4. See *International Brotherhood v. Wisconsin Employ. R. Bd.*, 249 Wis. 362, 24 N.W.2d 672 (1946) (state court using report of Congressional committee in interpreting federal act).

AH KOW v. NUNAN

Circuit Court of the United States, 1879. 5 Sawy. 552.

By the court, MR. JUSTICE FIELD. The plaintiff is a subject of the Emperor of China, and the present action is brought to recover damages for his alleged maltreatment by the defendant, a citizen of the state of California and the sheriff of the city and county of San Francisco. The maltreatment consisted in having wantonly and maliciously cut off the queue of the plaintiff, a queue being worn by all Chinamen, and its deprivation being regarded by them as degrading and as entailing future suffering.

* It appears that in April, 1876, the legislature of California passed an act "concerning lodging-houses and sleeping apartments within the limits of incorporated cities," declaring, among other things, that any person found sleeping or lodging in a room or an apartment containing less than five hundred cubic feet of space in the clear for each person occupying it, should be deemed guilty of a misdemeanor, and on conviction thereof be punished by a fine of not less than ten or more than fifty dollars, or imprisonment, in the county jail, or by both such fine and imprisonment, Session Laws of 1875-6, p. 759. Under this act the plaintiff, in April, 1878, was convicted and sentenced to pay a fine of ten dollars, or in default of such payment to be imprisoned five days in the county jail. Failing to pay the fine, he was imprisoned. The defendant, as sheriff of the city and county, had charge of the jail, and during the imprisonment of the plaintiff cut off his queue, as alleged. The complaint avers that it is the custom of Chinamen to shave the hair from the front of the head and to wear the remainder of it braided into a queue; that the deprivation of the queue is regarded by them as a mark of disgrace, and is attended, according to their religious faith, with misfortune and suffering after death; that the defendant knew of this custom and religious faith of the Chinese, and knew also that the plaintiff venerated the custom and held the faith; yet, in disregard of his rights, inflicted the injury complained of; and that the plaintiff has, in consequence of it, suffered great mental anguish, been disgraced in the eyes of his friends and relatives, and ostracised from association with his countrymen; and that hence he has been damaged to the amount of ten thousand dollars.

Two defenses to the action are set up by the defendant; the second one being a justification of his conduct under an ordinance of the city and county of San Francisco. It is upon the sufficiency of the latter defense that the case is before us. The ordinance referred to was passed on the fourteenth of June, 1876, and it declares that every male person imprisoned in the county jail, under the judgment of any court having jurisdiction in criminal cases in the city and county, shall immediately upon his arrival at the jail have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof," and it is made the duty of the sheriff to have this provision enforced. Under this ordinance the defendant cut off the queue of the plaintiff.

The validity of this ordinance is denied by the plaintiff on two grounds: 1. That it exceeds the authority of the board of supervisors, the body in which the legislative power of the city and county is vested; and, 2. That it is special legislation imposing a degrading and cruel punishment upon a class of persons who are entitled, alike with all other person within the jurisdiction of the United States, to the equal protection of the laws. We are of opinion that both these positions are well taken. . . .

The second objection to the ordinance in question is equally conclusive. It is special legislation on the part of the supervisors against a class of persons who, under the constitution and laws of the United States, are entitled to the equal protection of the laws. The ordinance was intended only for the Chinese in San Francisco. This was avowed by the supervisors on its passage, and was so understood by every one. The ordinance is known in the community as the "queue ordinance," being so designated from its purpose to reach the queues of the Chinese, and it is not enforced against any other persons. The reason advanced for its adoption, and now urged for its continuance, is, that only the dread of the loss of his queue will induce a Chinaman to pay his fine. That is to say, in order to enforce the payment of a fine imposed upon him, it is necessary that torture should be superadded to imprisonment. Then, it is said, the Chinaman will not accept the alternative, which the law allows, of working out his fine by his imprisonment, and the state or county will be saved the expense of keeping him during the imprisonment. Probably the bastinado, or the knout, or the thumbscrew, or the rack, would accomplish the same end; and no doubt the Chinaman would prefer either of these modes of torture to that which entails upon him disgrace among his countrymen and carries with it the constant dread of misfortune and suffering after death. It is not creditable to the humanity and civilization of our people, much less to their Christianity, that an ordinance of this character was possible.

The class character of this legislation is none the less manifest because of the general terms in which it is expressed. The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to

remedied. Besides, we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly. We may take notice of the limitation given to the general terms of an ordinance by its practical construction as a fact in its history, as we do in some cases that a law has practically become obsolete. If this were not so, the most important provisions of the constitution, intended for the security of personal rights, would, by the general terms of an enactment, often be evaded and practically annulled. *Brown v. Piper*, 1 Otto. 42; *Ohio Life Ins. and Trust Co. v. Debolt*, 16 How. 435; *Scott v. Sandford*, 19 Id. 407. The complaint in this case shows that the ordinance acts with special severity upon Chinese prisoners, inflicting upon them suffering altogether disproportionate to what would be endured by other prisoners if enforced against them. Upon the Chinese prisoners its enforcement operates as a "cruel and unusual punishment." . . .

The plaintiff must have judgment on the demurrer to the defendant's plea of justification; and it is so ordered.

NOTE

In *Federal Trade Comm. v. Baladarn Co.*, 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191 (1931), the principal case was relied upon as authority for using Congressional debates as evidence of legislative purpose.

HARRY WILLMER JONES, THE PLAIN MEANING RULE AND EXTRINSIC AIDS IN THE INTERPRETATION OF STATUTES

25 Wash.U.L.Q. 2, 10-11 (1939).

. . . The Supreme Court has frequently quoted from the opinion of Mr. Justice Brown in *Hamilton v. Rathbone*,¹ to the effect that "the province of construction lies wholly within the domain of ambiguity," and that extrinsic aids may be "resorted to to *solve* but not to create an ambiguity." Not even committee reports, generally regarded as the most reliable of the extrinsic aids, are admissible as evidence that the decision directed by the supposed "plain meaning" of the text of a statute is not the result which the members of the legislature actually intended.

Theoretically, the plain meaning rule raises a preliminary issue of admissibility in every case, and the acceptance or rejection of offered extrinsic aids should depend upon the disposition which the court makes of that preliminary issue. The evidence afforded by extrinsic

¹ (1899) 175 U.S. 414, 421, 20 S.Ct. 155, 44 L.Ed. 219 (Italics are those of *Brown*. *Id.*)

aids, logically speaking, should be irrelevant unless the interpreting court has *first* come to the conclusion either that the statute is "ambiguous" with respect to the fact situation of the particular controversy, or that the application of the statute, according to its literal meaning, would lead to "absurd or wholly impracticable consequences." The frequently quoted formula that extrinsic aids may be resorted to "to solve but not to create an ambiguity" can only mean that the evidence provided by such aids should be considered solely for the light which it throws upon the proper resolution of a doubt or "ambiguity" apparent to the courts *before* it examines the extrinsic sources. In other words, the theory of the plain meaning doctrine is that the "ambiguity" or "absurdity" which will take a case outside the scope of its application must be discoverable upon a bare or literal reading of the text, wholly apart from the background or context which the committee reports and other extrinsic sources provide. . . .

BOSTON SAND & GRAVEL CO. v. UNITED STATES

Supreme Court of the United States, 1928.
278 U.S. 41, 49 S.Ct. 52, 73 L.Ed. 170.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a libel in admiralty brought by the petitioner to recover for damages done to its steam lighter *Cornelia* by a collision with the United States destroyer *Bell*. It is brought against the United States by authority of a special Act of May 15, 1922, c. 192, 42 Stat., Part 2, 1590. There has been a trial in which both vessels ultimately were found to have been in fault and it was ordered that the damages should be divided. (C.C.A.) 7 F.2d 278. Thereafter the damages were ascertained (D.C.) 16 F.2d 643 and the petitioner sought to be allowed interest upon its share. (There was no cross-libel.) The Circuit Court of Appeals, going on to the words of the statute, parallel legislation, and the general understanding with regard to the United States, held that no interest could be allowed. 19 F.2d 744. As there was a conflict of opinion with the Second Circuit dealing with similar language in a special act, *New York & Cuba Mail S. S. Co. v. United States* (C.C.A.) 16 F.2d 945, a writ of certiorari was allowed by this Court, 275 U.S. 519, 48 S.Ct. 121, 72 L.Ed. 403.

The material words of the Act are that the District Court "shall have jurisdiction to hear and determine the whole controversy and to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision, if any shall be found to be due either for or against the United States, upon the same principle and measure of liability with costs as in like cases in admiralty between private parties with the same rights of appeal." On a hasty reading one might be led to believe that Congress had put the United States on the footing of a private person in all respects. But we are of opinion that a scrutiny leads to a different result. It is at least possible that the words fixing the extent of the government's liability were carefully chosen, and we

are of opinion that they were. We start with the rule that the United States is not liable to interest except where it assumes the liability by contract or by the express words of a statute, or must pay it as part of the just compensation required by the Constitution. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304, 306, 43 S.Ct. 354 (67 L.Ed. 664). Next we notice that when this special act was passed there was a recent general statute on the books, the Act of March 9, 1920, c. 95, § 3, 41 Stat. 525, 526 [46 USCA § 743], allowing suits in admiralty to be brought in personam against the United States, in which it was set forth specifically that interest was to be allowed upon money judgments and the rate was four per centum not the six per centum that the petitioner expects to get. The later general statute passed as a substitute for special bills like the one before us, allows suits in admiralty for damages done by public vessels but excludes interest in terms. Act of March 3, 1925, c. 428, § 2, 43 Stat. 1112 (46 USCA § 782).

We are satisfied by the argument for the Government that the policy thus expressed in the Act of 1925 had been the policy of the United States for years before 1922 and that the many private acts like the present generally have been understood, before and since the act now in question not to carry interest by the often repeated words now before us. This was stated by the Attorney General in a letter to the Chairman of the Senate Committee on Claims when the Act of 1925 was under consideration (Sen. Report 941, p. 12, 68th Cong., 2d Sess.) and the bill was amended so as to remove all doubt. The Act of March 2, 1901, c. 824, 31 Stat. 1789, believed to be the first of the private acts in the present form, was passed after an amendment striking out an allowance of interest, thus showing that the words now relied upon then were understood not to allow it. The same thing has happened repeatedly with later acts, and when by exception interest has been allowed it has been allowed by express words. Before 1901, since 1871, such cases had been referred to the Court of Claims which was forbidden by statute to allow interest. Rev.Sts. § 1091; Code, title 28, § 284, (28 USCA § 284). It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice it would be arbitrary to refuse to consider that fact when we come to interpret a statute. But as we have said the usage of Congress simply shows that it has spoken with careful precision, that its words mark the exact spot at which it stops, and that it distinguishes between the damages caused by the collision and the later loss caused by delay in paying for the first—between damages and “the allowance of interest on damages” as it is put by Mr. Justice Bradley in *The Scotland*, 118 U.S. 507, 6 S. Ct. 1174, 30 L.Ed. 153.

What the Act authorizes the Court to ascertain and allow is the “amount of the legal damages sustained by reason of said collision.”

Of these interest is no part. It might be in case of the detention of money. But this is not a claim for the detention of money, nor can any money be said to have been detained. When a jury finds a man guilty of a tort or a crime it may determine not only the facts but also a standard of conduct that he is presumed to have known and was bound at his peril to follow. *Nash v. United States*, 229 U.S. 373, 377, 33 S.Ct. 780, 57 L.Ed. 1232. But legal fiction never reached the height of holding a defendant bound to know the estimate that a jury would put upon the damage that he had caused. As the cause of action is the damage not the detention of the money to be paid for it, it could be argued in a respectable Court, as late as 1886, that at common law, even as a matter of discretion, interest could not be allowed. *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126, 4 N.E. 620. And although it commonly is allowed in admiralty still the element of discretion is not wholly absent there. As stated by Mr. Justice Bradley in *The Scotland*, 118 U.S. 507, 6 S.Ct. 1174, 30 L.Ed. 153, "the allowance of interest on damages is not an absolute right." When the Government is concerned there is no obligation until the statute is passed and the foregoing considerations gain new force.

It has been urged that the United States would claim interest and that as the statute speaks of "damages . . . due either for or against the United States" the claims on the two sides stand alike. But that is not true. The United States did not need the statute, and it has been held that, even in the adjustment of mutual claims between an individual and the Government, while the latter is entitled to interest on its credits it is not liable for interest on the charges against it. *United States v. Verdier*, 164 U.S. 213, 218, 219, 17 S.Ct. 42, 41 L. Ed. 407; *United States v. North American Transportation & Trading Co.*, 253 U.S. 330, 336, 40 S.Ct. 518, 64 L.Ed. 935.

The mention of costs and the omission of interest again helps the conclusion to which we come. Compare Judicial Code, § 152, and the same, § 177; U.S.Code, title 28, §§ 258, 284 (28 USCA §§ 258, 284).

Decree affirmed.

MR. JUSTICE SUTHERLAND (dissenting). . . . The rule was tersely stated in *United States v. Hartwell*, 6 Wall. 385, 396 (18 L.Ed. 830):

"If the language be clear it is conclusive. There can be no construction where there is nothing to construe."

This is also the recognized rule of the English courts. In one of the English decisions Lord Denman said the court was bound to look to the language employed and construe it in its natural and obvious sense, even though that was to give the words of the act an effect probably never contemplated by those who obtained the act and very probably not intended by the Legislature which enacted it. *The King v. The Commissioners*, 5 A. & E. 804, 816. See, also, *United States v. Lexington Mill Co.*, 232 U.S. 399, 34 S.Ct. 337, 58 L.Ed. 658, L.R.A. 1915B, 774; *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442, L.R.A.1917F, 502, Ann.Cas.1917B, 1168; *Russell Co. v. United States*, 261 U.S. 514, 519, 43 S.Ct. 428, 67 L.Ed. 778.

The enforcement of the statute according to its plain terms results in no absurdity or injustice, for, as this court recently said, in holding the United States liable for damages including interest in a collision case where the government had come into court to assert a claim on its own behalf:

"The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it." *United States v. The Thekla*, 266 U.S. 328, 340, 45 S.Ct. 112, 113 (69 L.Ed. 313).

To refuse interest in this case, in my opinion, is completely to change the clear meaning of the words employed by Congress by invoking the aid of extrinsic circumstances to import into the statute an ambiguity which otherwise does not exist and thereby to set at naught the prior decisions of this court and long-established canons of statutory construction.

MR. JUSTICE BUTLER, MR. JUSTICE SANFORD, and MR. JUSTICE STONE concur in this opinion.

NOTE

See commentary on the principal case in 27 Mich.L.Rev. 815 (1929).

UNITED STATES v. AMERICAN TRUCKING ASS'NS

Supreme Court of the United States, 1940.
310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345.

[The case appears *supra*, p. 1051.]

UNITED STATES v. DICKERSON

Supreme Court of the United States, 1940.
310 U.S. 554, 60 S.Ct. 1034, 84 L.Ed. 1356.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The question is whether respondent, Dickerson, may recover a judgment against the United States upon a cause of action founded upon Section 9 of the Act of June 10, 1922, c. 212, 42 Stat. 625, 629, 630, 10 U.S.C.A. § 633.

Section 9 provides that after the 1st of July, 1922, an enlistment allowance shall be paid "to every honorably discharged enlisted man . . . who reenlists within a period of three months from the date of his discharge". Respondent, who was honorably discharged upon the termination of an enlisted period ending on the 21st of July, 1938, reenlisted on the following day, the 22nd, for a period of three years, but was not paid an enlistment allowance. He thereupon brought this action in the Court of Claims. It is conceded that Section 9, if not repealed or suspended at the date of his reenlistment, would entitle him to the sum of seventy-five dollars.

The Government opposed the action before the Court of Claims on the ground that Section 402 of Public Resolution No. 122, June 21, 1938, c. 554, 52 Stat. 809, 818, 819, suspended the allowance for reenlistment during the fiscal year ending June 30, 1939. Section 402 contains a proviso, appended to an appropriation for the Rural Electrification Administration, that "no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1939, shall be available for the payment" of any enlistment allowance for "reenlistments made during the fiscal year ending June 30, 1939, notwithstanding the applicable portions of sections 9 and 10" of the Act of June 10, 1922.

The Court of Claims entered judgment for respondent on the ground that Section 402, while it restricted the funds available for payment of the allowance, did not suspend or repeal Section 9. Because of the importance of the issue in the administration of the revenues, we granted certiorari. March 25, 1940, 309 U.S. 647, 60 S.Ct. 713, 84 L. Ed. 999.

There can be no doubt that Congress could suspend or repeal the authorization contained in Section 9; and it could accomplish its purpose by an amendment to an appropriation bill, or otherwise. *United States v. Mitchell*, 109 U.S. 146, 150, 3 S.Ct. 151, 153, 27 L.Ed. 887; *Mathews v. United States*, 123 U.S. 182, 8 S.Ct. 80, 31 L.Ed. 127; *Dunwoody v. United States*, 143 U.S. 578, 12 S.Ct. 465, 36 L.Ed. 269; *Belknap v. United States*, 150 U.S. 588, 593, 14 S.Ct. 183, 185, 37 L.Ed. 1191; *United States v. Vulte*, 233 U.S. 509, 515, 34 S.Ct. 664, 666, 58 L.Ed. 1071. See *United States v. Langston*, 118 U.S. 389, 6 S.Ct. 1185, 30 L.Ed. 164. The question remains whether it did so during the fiscal year ending on the 30th of June, 1939.

Section 9 remained in full force and effect during the eleven fiscal years ending on the 30th of June, 1923 to 1933, after which date it was suspended during the ensuing four fiscal years by a provision inserted in various appropriation acts. Section 18 of the Economy Act of March 3, 1933, c. 212, 47 Stat. 1489, 1519, 37 U.S.C.A. § 13 note, provided that: "So much of sections 9 and 10 of the Act . . . approved June 10, 1922 . . . as provides for the payment of enlistment allowance to enlisted men for reenlistment within a period of three months from date of discharge is hereby suspended as to reenlistments made during the fiscal year ending June 30, 1934." This provision, which concededly suspended the authorization for the enlistment allowance, was continued in full force and effect for the fiscal years ending on the 30th of June, 1935, 1936 and 1937, by its insertion in the Economy Provisions of the Independent Office Appropriation Act for the fiscal year 1935 and in the Treasury-Post Office Appropriation Acts for the fiscal years 1936 and 1937.¹

The Second Deficiency Appropriation Bill of May 28, 1937, c. 277, 50 Stat. 213, 232, also contained a provision affecting the enlistment

¹ Act March 28, 1934, c. 102, 48 Stat. 509, 523; Act May 14, 1935, c. 110, 49 Stat. 218, 236, 227; Act June 23, 1936, c. 725, 49 Stat. 1827, 1837.

allowance but the form of words used was changed. That Act as passed by Congress provided that "no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1938, shall be available for the payment of enlistment allowance to enlisted men for reenlistment within a period of three months from date of discharge as to reenlistments made during the fiscal year ending June 30, 1938, notwithstanding the applicable provisions of sections 9 and 10 of the Act" approved June 10, 1922. The identical provision, with the exception of the dates, was appended as a proviso to Section 402 of Public Resolution 122, copied above, and was made applicable during the fiscal year ending on the 30th of June, 1939.

The provision inserted in the Second Deficiency Appropriation Bill for 1937 was introduced on the floor of the Senate as an amendment by Senator Byrnes. In response to questions concerning the amendment, the Senator stated (81 Cong.Rec. 4426): ". . . the language of the amendment has been carried ordinarily in the Treasury and Post Office Appropriation Bill, but was not carried in that appropriation bill this year, and is therefore proposed to be included in the bill now before us. . . . The effect of it is simply to carry the same limitation that has been carried for years in the appropriation bills. . . . Its purpose is to continue the appropriation situation that has existed for years, so that no bounty shall be paid for reenlistment in the military and other uniformed services." The amendment was thereupon adopted in the Senate without recorded opposition, and was sent to conference. The House managers, in reporting the amendment to the House, described it as "Continuing during the fiscal year 1938 the suspension of the reenlistment gratuity for enlisted personnel of the Army, Navy, Marine Corps, and Coast Guard." 81 Cong.Rec. 5084. The course of the debate amply discloses that the House regarded the amendment as continuing during the fiscal year 1938 the same restriction on the enlistment allowance as the provision inserted in earlier appropriation bills.² It was then adopted by the House. 81 Cong.Rec. 5091.

² Mr. Scott, one of the chief speakers against the amendment, stated (81 Cong. Rec. 5089):

"In 1933 an amendment went into the Treasury-Post Office appropriation bill taking away or suspending this reenlistment bonus. . . . The provision was continued by inserting it in the Treasury-Post Office appropriation bill each year from 1933 until this year. It was in the Treasury-Post Office appropriation bill that was brought into the House for consideration this year. I raised a point of order against the provision on the ground it was legislation on an appropriation bill, and that it did not come under the Holman rule. The Chairman of the Committee sustained the point of order.

"The bill went to the Senate and the suspension was not placed in the bill. The second deficiency appropriation bill passed the House and went over to the Senate. This amendment was placed in there. It was clearly subject to a point of order in the Senate, but the point was not made against it.

"It now comes back to the House for a separate vote as an amendment. If we vote for this amendment it means the further suspension of the reenlistment bonus to the enlisted personnel of the Army, Navy, Marine Corps, Coast and Geodetic Survey, and Coast Guard."

Mr. Woodrum, who took charge of explaining the Conference Report to the House, stated (81 Cong.Rec. 5090):

The identical provision (except as to the dates), eventually appended to Section 402 of Public Resolution 122, was introduced as an amendment to the Second Deficiency Appropriation Bill for the fiscal year 1938 (H.R. 10851, 75th Cong., 3d Sess.), then pending in the House. 83 Cong.Rec. 8522-8569. A point of order was made against the amendment on the ground that it was legislation in an appropriation bill; Representative Woodrum, who had charge of the amendment, admitted that the point of order was good, and the Chair sustained it. 83 Cong.Rec. 8567. The amendment was then offered in the Senate, where the Presiding Officer also sustained a point of order that it was legislation in an appropriation bill.³ 83 Cong.Rec. 9189.

The provision was thereafter included by the conference committee as a proviso to Section 402 of H.J.Res. 679 (which later became Pub. Res. No. 122). See 83 Cong.Rec. 9512, 9677. It was passed by the

"In the first place, I wish to emphasize the fact that the language in the amendment only asks to continue this legislation for the fiscal year 1938. . . . We ask in this amendment that during the next fiscal year this reenlistment bonus be not allowed; and I may say, Mr. Speaker, this is not taking one solitary thing away from any enlisted man in the Army, Navy, or Marine Corps. He is getting exactly the pay that was promised him, and every member of the Army, Navy, and Marine Corps who enlisted during the last 3 years enlisted with the knowledge there was no reenlistment bonus going to be paid to him if he did reenlist. . . .

". . . they know now what they knew when they reenlisted, that the time has not yet come when the Congress can offer a bonus to people working for the Government."

³ Senator Byrnes, who had offered the amendment on behalf of the Appropriations Committee, then engaged in the following colloquy with Senator Walsh (83 Cong.Rec. 9189, 9190):

"Mr. Byrnes. . . . I will say to the Senator from Massachusetts, in the light of the ruling of the Chair, that before the Congress adjourns I shall certainly make an effort to do something to bring about a change, so that there will not be dissatisfaction among the various services. If the bounties were all restored, millions of dollars would be involved.

"Mr. Walsh. Is not the situation that under existing law there is now an authorization of funds to be paid to those who reenlist in the Army, Navy, Marine Corps, and Public Health Service? Is not that the situation?

"Mr. Byrnes. There is authority to pay the bounty. It has not been paid for 6 years.

"Mr. Walsh. No funds are available.

"Mr. Byrnes. No funds are available.

"Mr. Walsh. The House Bill did seek to provide funds for reenlistment bounties in the Army. Of course, it would be highly discriminatory to have reenlistment bounties paid to those who reenlist in the Army, and none paid to those who reenlist in the other branches of the military service.

"Mr. Byrnes. It would certainly be discriminatory, and cause great dissatisfaction among the services.

"Mr. Walsh. Is the bill now in such shape that no funds are provided for reenlistment bounties for any branch of the military service?

"Mr. Byrnes. That is correct.

"Mr. Walsh. What the Senator sought to do was to have Congress declare as its policy that it did not intend in the future to pay such reenlistment bounties, so as to prevent possible claims; is not that true?

"Mr. Byrnes. Mr. President, the sole position of the Committee is that no funds being provided, we should not leave open the opportunity for numbers of persons to file claims in the Court of Claims in behalf of men who reenlist, with the result that a year from now, or 2 years from now, some men would receive the reenlistment bounty or some part of it, after the attorneys received their fees.

"Mr. Walsh. I think I understand."

Senate without much debate.⁴ In the House, the debate disclosed that the amendment had the same purpose and effect as the provision inserted in the various appropriation bills for the preceding years. Representative Woodrum, in presenting the amendment to the House, described it as follows (83 Cong.Rec. 9677):

" . . . we are providing a further inhibition for 1 year against payment of the reenlistment allowances in the military and naval services.

"No reenlistment allowances have been paid for the past 5 fiscal years in any of the services, and in the absence of permanent law stopping it, the inhibition has been shuttled about in economy bills and appropriation bills at one time or another. We have not paid them for 5 years, and the latter part of this amendment now before the House is a Senate amendment which discontinues for another year the payment of the reenlistment allowances." The opponents of the amendment, while questioning its wisdom, were in general agreement with its sponsors concerning its purpose and effect. 83 Cong.Rec. 9678-9679. The amendment was then adopted by the House. 83 Cong.Rec. 9679.

We are of opinion that Congress intended in Section 402 to suspend the enlistment allowance authorized by Section 9 during the fiscal year ending on the 30th of June, 1939. The legislative history, summarized above, discloses that Congress intended the legislation concerning the allowance during the fiscal years 1938 and 1939 as a continuation of the suspension enacted in each of the four preceding years. The adoption in the act of May 28, 1937, of different terminology might in other circumstances indicate an intent to change the object of the legislation. Compare *Brewster v. Gage*, 280 U.S. 327, 337, 50 S.Ct. 115, 117, 74 L.Ed. 457; *Crawford v. Burke*, 195 U.S. 176, 190, 25 S.Ct. 9, 12, 49 L.Ed. 147; *Pirie v. Chicago Title & Trust Co.*, 182 U.S. 438, 448, 21 S.Ct. 906, 910, 45 L.Ed. 1171. But the drawing of such an inference is a workable rule of construction, not an infallible guide to legislative intent, and cannot overcome more persuasive evidence where, as here, it exists. Compare *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48, 49 S.Ct. 52, 53, 73 L.Ed. 170.

The respondent contends that the words of Section 402 are plain and unambiguous and that other aids to construction may not be utilized. It is sufficient answer to deny that such words when used

⁴ The debate in the Senate was as follows (83 Cong.Rec. 9512):

"Mr. Walsh. Mr. President, I understand that the bill as it passed the House contained a provision for the use of funds from this appropriation for reenlistments in the Army, and no provisions were made for the use of any of the appropriation for the payment of reenlistments in the Navy, the Marine Corps, or the Coast Guard.

"Mr. Adams. That is correct.

"Mr. Walsh. The purpose of the amendment is to eliminate the provision for payment in case of reenlistments in the Army because it is discriminatory against the other services and civil forces, which formerly received reenlistment pay and allowances.

"Mr. Adams. That is correct, and it is to open the way for statutory clearing of the whole situation.

in an appropriation bill are words of art or have a settled meaning. See *United States v. Perry*, 8 Cir., 50 F. 743, 748.⁵ The very legislative materials which respondent would exclude refute his assumption. It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. See *Boston Sand & Gravel Co. v. United States*, supra, 278 U.S. at page 48, 49 S.Ct. at page 53, 73 L.Ed. 170. The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.⁶ These lead to the conclusion that the judgment of the court below must be reversed.

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE McREYNOLDS, MR. JUSTICE STONE, and MR. JUSTICE ROBERTS are of opinion that the judgment should be affirmed on the views expressed by the Court of Claims.

NOTE

The principal case is the subject of comment in 29 Geo.L.J. 256 (1940).

BEACH v. UNITED STATES

United States Court of Appeals for the District of Columbia, 1944.
79 App.D.C. 208, 144 F.2d 533.

[The case appears supra, p. 1057.]

WESTERN UNION TELEGRAPH CO. v. LENROOT *

Supreme Court of the United States, 1945.
323 U.S. 490, 65 S.Ct. 335, 89 L.Ed. 414.

MR. JUSTICE JACKSON delivered the opinion of the Court.

. . . The major events of the recorded legislative history of this Act so far as relevant were as follows: After the President's labor message of May 24, 1937 (House Doc. No. 255, 75th Cong., 1st Sess., p. 2), reminded Congress that "A self-respecting and self-supporting democracy can plead no justification for the existence of child labor," bills carefully drawn to carry out his recommendations were introduced in the Senate by Senator Black and in the House by Repre-

⁵ Compare Luce, *Legislative Problems* (1935), pp. 421 et seq., 432.

⁶ "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived" *United States v. Fisher*, 2 Cranch 358, 386, 2 L.Ed. 304.

* See statement of the case supra, p. 729.

sentative Connery. These bills expressly and comprehensively prohibited the employment of child labor either in interstate commerce or in production of goods intended for shipment in interstate commerce, as well as prohibiting shipment of goods made by child labor.³ When the Black bill came to vote in the Senate, however, all of its child-labor provisions were stricken, and the provisions of another bill recommended by the Committee on Interstate Commerce were substituted.⁴ This prohibited the shipment in interstate commerce of goods made by child labor, but it did not prohibit the use of it in carrying on the commerce itself. Thus the Senate deleted a direct prohibition of the employment under question here. But the House, in turn, struck out all of the child labor provisions of the Senate bill and substituted those of the Connery bill,⁵ which was a counterpart of the Black bill. This was much amended, but as passed at length it contained a provision forbidding child labor in interstate commerce "in any industry affecting commerce" and a prohibition of shipment of child-labor-made goods.⁶ The Senate, however, did not agree to the House bill, but meanwhile

³ "Sec. 7. It shall be unlawful for any person, directly or indirectly—

"(1) to transport or cause to be transported in interstate commerce, or to aid or assist in transporting, or obtaining transportation in interstate commerce for, or to ship or deliver or sell in interstate commerce, or to ship or deliver or sell with knowledge that shipment or delivery or sale thereof in interstate commerce is intended, any unfair goods; or

"(2) to employ under any substandard labor conditions any employee engaged in interstate commerce or in the production of goods intended for transportation or sale in violation of clause (1) of this section." This was the provision in the bill S. 2475 as reported, respectively, by the Senate Committee on Education and Labor, July 6, 1937, and by the House Committee on Labor, August 6, 1937. "Unfair goods" was defined to mean goods produced by any substandard labor condition, and the latter was defined to include child labor. §§ 2(a) (11) and (15).

⁴ This was S. 2226, reported in Sen.Rep.No.726, 75th Cong., 1st Sess. It was incorporated into the Black bill July 31, 1937, 81 Cong.Rec. 7949-51. It provided: "Sec. 4 [§ 27 in the amended Black bill]. It shall be unlawful for any person who—

"(a) has produced goods, wares, or merchandise in any State or Territory, wholly or in part through the use of child labor, on or after January 1, 1938; or

"(b) has taken delivery of such goods, wares, or merchandise in any State or Territory with notice of their character whether by purchase or on consignment, as commission merchant, agent for forwarding or other purposes, or otherwise, to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting such goods, wares, or merchandise in interstate or foreign commerce or to sell such goods, wares, or merchandise for shipment in interstate or foreign commerce or with knowledge that shipment thereof in interstate or foreign commerce is intended." Other provisions subjected child-labor-made goods to the laws of the states into which they were shipped regardless of their interstate character, forbade transportation into states in violation of their laws, and forbade shipment in interstate commerce of goods not labelled as to their child-labor character. The bill represented the view that several methods of circumventing *Hammer v. Dagenhart*, *infra*, should be tried at the same time, in case any should be held invalid.

⁵ See S. 2475 as reported by House Committee on Labor, August 6, 1937, H.R.Rep. 1452, 75th Cong., 1st Sess.

⁶ "Sec. 10(a). No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within 30 days prior to the removal of such goods therefrom any oppressive child labor has been employed. . . .

"(b) No employer engaged in commerce in any industry affecting commerce shall employ any employee under any oppressive child-labor condition." 83 Cong.Rec. 7441; passed, *id.* at 7450 (75th Cong., 3d Sess.)

had passed as a separate measure its own child-labor bill as recommended by the Interstate Commerce Committee.⁷ This did not prohibit child labor in interstate commerce. In this posture the Fair Labor Standards bill went to conference. The Conference Report says that the Committee "adopts the child labor provisions of the House amendment, with one exception. In view of the omission from the conference agreement of the principle of section 6 of the House amendment, subsection (b) of section 10 of the House amendment has been omitted."⁸ The formula covering every employer "in commerce in an industry affecting commerce" had been employed in the wage and hour as well as the child-labor provisions of the House bill, and § 6 conferred on the Secretary of Labor the power to decide whether an industry was one "affecting commerce." With the elimination of this delegation to the Secretary, the formula was changed in the wage and hour provisions, making them apply to "every employee engaged in commerce or in the production of goods for commerce." Instead of making a corresponding change in the child-labor section, the conference committee dropped the whole clause. No reason for this different treatment of the child-labor section was given.

No controversy appears to have arisen on the floor of Congress as to inclusion of a direct prohibition applicable to interstate commerce. On the contrary, the advocates of the different versions passed by the Senate and House seem to have overlooked the fact that one contained the prohibition and the other did not; controversy was chiefly over whether the Act should simply reenact the method of the 1916 Act, which had been held unconstitutional, or should hedge by including labelling and other remedies which might have a better chance of being upheld, whether state-issued age certificates should be utilized, how much discretion should be vested in the Department of Labor, and whether particular goods only or all goods from a particular establishment should be excluded from commerce.⁹ So far as coverage was concerned, all proponents were aware that any of the suggested versions of legislation would reach only a small fraction of existing child labor,¹⁰ and the chief concern seems to have been to eliminate child la-

⁷ S. 2226, identical with the child-labor provisions previously incorporated by the Senate in the Black bill in lieu of the latter's child-labor provisions. See note 4, *supra*. 81 Cong.Rec. 9320.

⁸ Conference Report, H.R.Rep.No.2738, 75th Cong., 3d Sess., 32.

⁹ See 82 Cong.Rec. 1411-14, 1597-98, 1691-95, 1780-83, 1822; 83 Cong.Rec. 7399-7400.

¹⁰ . . .

The following exchange during the Senate Interstate Commerce Committee hearings is also of interest, in view of the Senate's rejection of the Black-Connelly child-labor provisions in favor of the Commerce Committee proposal:

"Miss Lenroot. . . . There has been a decided shift in the employment of children between the ages of 14 and 16 years from factories to miscellaneous occupations in trade and service industries, which would not be covered by any of the bills now pending before this committee, and which involve very often employment of children for long hours at very low wages.

"The Chairman. Let me ask you this question right there: Do you think newsboys should be prohibited from working? I propound that question to you because it has been put up to me.

bor in mining and manufacturing industries shipping goods in interstate commerce,¹¹ which was the most objectionable use of child labor.¹² This had been the only object of the earlier legislation which had been held unconstitutional; neither the Act of 1916,¹³ held unconstitutional in *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L. Ed. 1101, 3 A.L.R. 649, Ann.Cas.1918E, 724, nor the Act of 1919,¹⁴ held unconstitutional in *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 42 S.Ct. 449, 66 L.Ed. 817, 21 A.L.R. 1432, had prohibited child labor in interstate commerce, but both applied only to child labor in mines, quarries, mills, canneries, workshops, factories, and manufacturing establishments.

Both parties contend on the basis of legislative history that the omission of a direct prohibition was deliberate; the Company arguing that it was unwanted, the Government that it was believed superfluous. We think that dispassionate reading will not disclose what either advocate sees in this history.

It is nowhere stated that Congress did, and no reason is stated or is obvious why Congress should, purposely leave untouched child labor

"Miss Lenroot. I think under any powers that I can see that Congress has or that it may be construed to have now, it would be very difficult if not impossible to bring newsboys in.

"The Chairman. But do you think they should be prohibited from such employment?

"Miss Lenroot. I think if Congress had broad power to legislate on the subject of child labor it would be desirable to work out some standard which would be somewhat different from factory employment.

"Senator Minton. In other words, you think it is improper to use newsboys on the streets to sell newspapers?

"Miss Lenroot. Under a certain age, and under certain conditions; yes. I would make the age somewhat lower than the age for factory employment, however."

Hearings, supra, p. 43.

¹¹ Thus Senator Wheeler, one of the authors of the measure adopted by the Senate, said, "We are trying to give you something of a practical nature that can be passed, that will perhaps not go as far as some of us would like to see it go, but something which we can uphold as constitutional, that will affect child labor, stop it, and prevent it effectively in the factories, particularly in the sweatshops and southern textile mills." "We want to keep them out of the factories where they are being exploited and are in competition with men and in competition with women who need work." Joint Hearings, supra note 10, pp. 33-34, 36. Representative Schneider, who was apparently in charge of the child-labor provisions of the Labor Committee's bill on the floor, reminded the members that although the bill went as far as it could, "the child labor that is used in the production of articles for interstate commerce constitutes only 25 percent of nonagricultural child labor that exists today," and hence ratification of the child-labor amendment was still essential. 82 Cong.Rec. 1823 (ital. supplied). And Senator Thomas, who was one of the Senate managers in the conference which produced the final bill, interpreted the result of the compromise as follows in his report to the Senate: "Neither House nor Senate yielded its convictions, but both Houses obtained their common objective, which was to abolish traffic in interstate commerce in the products of child labor and in the products of underpaid and overworked labor." 83 Cong.Rec. 9163.

¹² See generally the hearings preceding the enactment of the Child Labor Act of 1916. Hearings on H.R.8234, House Committee on Labor, 64th Cong., 1st Sess.; Hearings on H.R.8234, Senate Committee on Interstate Commerce, 64th Cong., 1st Sess.

¹³ Act of Sept. 1, 1916, c. 432, § 1, 39 Stat. 675.

¹⁴ Act of Feb. 24, 1919. c. 18 § 1200 40 Stat 1057 1160

employed directly in interstate commerce. It is true that no opponent of child labor appeared to want to strike at all of it. Agriculture, which accounts for from one-half to two-thirds of it, was expressly exempted. Child actors, almost negligible in number, were exempted. Telegraph messengers, so far as the evidence reveals, although a familiar form of child labor, were in no one's mind in connection with this prohibition, although the peculiarities of that service were recognized in allowing them under certain conditions to be employed at lower than minimum wages under the Act.¹⁵ But whether a majority of Congress, had this question come to its attention, would have regarded messenger service as more like agriculture in being a relatively inoffensive type of child labor or as more like mining and manufacturing, considered more harmful, is a question on which we have no information whatever.

On the other hand, we find nothing to sustain the Government's position that "the omission resulted from the realization that the indirect sanction of forbidding interstate shipment, coupled with broad statutory definitions" would be construed to eliminate child labor from interstate commerce. No such realization appears in any committee report, in the speech of any sponsor of the bills, nor in debate either on the part of those supporting or of those opposing the bills. The only explanation advanced for the hypothesis that Congress deliberately chose indirection instead of forthright prohibition is an assumption that there were doubts of its constitutional power to enact direct legislation. It is true that in *Hammer v. Dagenhart*, 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101, 3 A.L.R. 649, Ann.Cas.1918E, 724, this Court had held that an earlier attempt to exclude from interstate commerce products of mines and mills that employed child labor was an invalid attempt to reach employment matters within the control of the states. But even the prevailing opinion in that case expressly conceded that Congress had ample power to control the means by which interstate commerce is carried on. 247 U.S. at page 272, 38 S.Ct. at page 531, 62 L.Ed. 1101, 3 A.L.R. 649, Ann.Cas.1918E, 724. There was never a holding or an intimation in this or any other decision of this Court that a direct prohibition of child labor in interstate commerce would not be sustained. Restrictive interpretation in this field reached its maximum in *Hammer v. Dagenhart*. It was decided by a closely divided Court and at the time this bill was pending it was undermined by later decisions and was thought to be marked, even then, for consignment to the limbo of overruled cases, a prediction that was shortly fulfilled. *United States v. Darby*, 312 U.S. 100, 657, 61 S.Ct. 451, 85 L. Ed. 609, 132 A.L.R. 1430. Moreover, the purpose of the proponents of this Act to challenge the decision in *Hammer v. Dagenhart* and require this Court to re-examine its soundness is manifest in many

¹⁵ "The Administrator, . . . shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, . . . at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe" § 14, 29 U.S.C. § 214, 29 U.S.C.A. § 214.

ways. It can hardly be supposed that Congress, while reasserting a power once denied to it, feared to exercise directly a power often conceded and never denied.

Our search of legislative history yields nothing to support the Company's contention that Congress did not want to reach such child labor as we have here. And it yields no more to support the Government's contention that Congress wanted to forego direct prohibition in favor of indirect sanctions. Indeed, we are unable to say that elimination of the direct prohibitions from the final form of the bill was purposeful at all or that it did not happen from sheer inadvertence, due to concentration on more vital and controversial aspects of the legislation. The most that we can make of it is that no definite policy either way appears in reference to such an employment as we have in this case, no legislative intent is manifest as to the facts of this case which we should strain to effectuate by interpretation. Of course, if by fair construction the indirect sanctions of the Act apply to this employment, courts may not refuse to enforce them merely because we cannot understand why a simpler and more direct method was not used. But we take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it. . . .

[The remainder of this opinion is printed *supra*, p. 729.]

NOTES

1. Cf. the treatment of legislative history by Jackson, J., in *Boone v. Lightner*, 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed. 1587 (1943).

2. In *Federal Communications Comm. v. Columbia B. System*, 311 U.S. 132, 61 S.Ct. 152, 85 L.Ed. 87 (1940), the court, after making a contextual interpretation, said: "What thus appears clear from a reading of the Communications Act itself is not modified by the collateral materials which have been pressed upon us. That both sides invoke the same extrinsic aids, one to fortify and the other to nullify the conclusion we have reached, in itself proves what dubious light they shed. What was said in Committee Reports and some remarks by the proponent of the measure in the Senate are sufficiently ambiguous, insofar as this narrow issue is concerned, to invite mutually destructive dialectic but not strong enough either to strengthen or weaken the force of what Congress has enacted."

MAX RADIN, A CASE STUDY IN STATUTORY INTERPRETATION

33 Calif.L.Rev. 219, 222-225 (1945).*

. . . . Nowhere has the futility of attempting to determine what was in the minds of legislators by means of the "legislative history" been so incisively and effectively—I should like to say, so wittily—shown as in Justice Jackson's own opinion when he examined the legislative history of the statute. The successive stages of the bill,

* [Footnotes are omitted. Ed.]

the deletions here, the striking out there, the failure to strike out somewhere else, prove precisely that the bill had several stages, that some things were stricken out and other things were not. So far as legislation is a human activity, they are instructive data for social psychology, but they tell us nothing about what we are to do in order to carry out purposes of the statute. We can make no sense of all these things, unless we treat the final result, the statute, as a sort of accord and satisfaction, an Aquilian stipulation, summing up and superseding a vast deal of negotiating hither and yon, and rendering it not only superfluous but improper to go back of it.

That we have taken "legislative history" to our bosom as a method of interpretation is an instance of following after strange gods when we had a better one at home. The common law had developed the rule that the debates in Parliament were not merely inconclusive about the "intention" of a statute, but were incompetent. Doubtless this goes too far, but it had enormous advantages over the cult of "materials," i. e., debates, drafts, reports, etc., which was the characteristic of the Continental approach to the understanding of statutes. This was found to be a great burden by progressive jurists and it is unfortunate that we chose just this excrescence in the systems of Continental law for invitation, when we were so notably and unreasonably supercilious about other elements in these foreign systems. The phrase, *la loi parle par elle-même*, ought to be received back into its former seat of honor. . . .

So far as legislative history is concerned, Justice Jackson examines it in detail for the majority and finds that it adds up to zero. Justice Murphy scarcely mentions it. I think we may properly say that Justice Jackson's brilliant presentation amply justifies the deliberate neglect by Justice Murphy.

ARCHIBALD COX, JUDGE LEARNED HAND AND THE INTERPRETATION OF STATUTES *

60 Harv.L.Rev. 370, 384-390 (1947).

Legislative materials, while still subordinated to implementation of the general statutory purpose, may also serve a broader function. In seeking to determine how persons actuated by such a purpose would have dealt with a particular situation if it had been presented to them at the time, a court labors under handicaps. It lacks much of the information which was before the Congress and cannot feel in the same degree the conflicting interests from which the statute resulted. The men in the legislative and executive branches who had special charge of a pending bill, however, were familiar with the factual background and responsive to such pressures. Since they were charged with determining in the light of those conditions how to fulfill in detail the general design, their conclusions are likely to corre-

*[Footnotes are omitted. Ed.]

spond to the disposition Congress would have made if it could have foreseen the final impact of the purposes it had formulated. Since the duty of the courts is "to manifest such purposes in their completeness," it would seem proper for them to consider the specific applications projected by committees as evidence of what Congress would have done if it had faced the problem. This technique has the great merit that it takes account of the fundamental object of all interpretation and treats evidence of the specific intent drawn from committee reports, like textual considerations, as an aid in the search for the half-understood meaning embraced in the general purpose, rather than as the only means of ascertaining congressional intent. The difference in technique and its effect upon the ultimate decision is so strikingly revealed in the opinions in the *Western Union* case as to require some comment. . . .

It is hard to escape the conclusion that the arguments of the majority were based on textual trivialities on which so large an issue should not turn. In the *Western Union* case there stood out above all else the will of Congress to use its constitutional power to eliminate substandard labor conditions and oppressive child labor. It was from the point of view of this purpose, manifest in the history of the times and the legislative processes as well as in the declaration of policy in Section 2, that Judge Hand dealt with the issue. . . .

Whatever the merits of the ultimate decision, Judge Hand's approach seems clearly preferable. The weakness in the Supreme Court opinion lies in the implicit assumption that the only legislative intent which can be relevant in interpreting a statute is some specific, conscious determination "as to the facts of this case." "We take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it." To attribute so much importance to evidence of a specific intent "as to the facts of this case," without looking to the general purpose, seems likely to lead to unwarranted reliance on stray bits of legislative history when they can be found and, when they cannot, as in the *Western Union* case, to a scholastic analysis of dictionary definitions. The legislature frequently cannot anticipate the specific questions which may arise under its enactments; in that event, as we have seen, it is the function of the courts to search out the fundamental and pervasive will and give it specific application. "We can best reach the meaning here, as always, by recourse to the underlying purpose, and with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time. To say that that is a hazardous process is indeed a truism, but we cannot escape it, once we abandon literal interpretation—a method far more unreliable."

NOTES

1. In *Trailmobile Co. v. Whirls*, 331 U.S. 40, 67 S.Ct. 982, 91 L.Ed. — (1947), Rutledge, J., rejecting an interpretation based on a presentation of legislative his-

tory in favor of "the literal construction of the statute and the policy clearly evident on its face," said at 331 U. S. p. 61: ". . . the most important committee changes relied on were made without explanation. The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers."

In *Hust v. Moore-McCormack Lines*, 328 U.S. 707, 66 S.Ct. 1218, 90 L.Ed. 1534 (1946), the same judge said at 328 U.S. p. 733: "Both parties have relied strongly on excerpted portions (of legislative history) thought to support their respective views. As is true with respect to all such materials, it is possible to extract particular segments from the immediate and total context and come out with road signs pointing in opposite directions."

2. "The Administrative Procedure Act (60 Stat. 237 (1946), 5 U.S.C.A. 1005 et seq.) contains the following provision": "Sec. 6 (c). Subpenas.—Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply."

In his speech in the House of Representatives explaining the bill for the Administrative Procedure Act, Mr. Walter, a co-author, said: "Subsection (c) of section 6 provides that . . . where administrative subpoenas are contested, the court is to inquire into the situation and issue an order of enforcement only so far as the subpoena is found to be in accordance with law. This is a definite statutory right and is applicable to subpoenas of every kind addressed to any person under authority of any law. The effect of the subsection is thus to do more than merely restate the existing constitutional safeguards which in some cases, such as those involving public contractors—see *Endicott Johnson Corp. v. Perkins* (317 U.S. 501, 63 S.Ct. 35, 87 L.Ed. 492 (1943), have been held inapplicable. Also, the term 'in accordance with law' does not mean that a subpoena is valid merely because issued with due formality. It means that the legal situation, including the necessary facts, demonstrates that the persons and subject matter to which the subpoena is directed are within the jurisdiction of the agency which has issued the subpoena." (Senate Document No. 248, 79th Congress, 2d Session at p. 363 (1946).)

On the following date Representative Hobbs had a memorandum from the Department of Justice inserted as an extension of his remarks in the Congressional Record which stated:

Under section 6(c) it is provided that "upon contest the court shall sustain any such subpoena or similar process or demand to the extent that is found it is in accordance with law." This provision is not intended to change the law as expounded in *Endicott Johnson v. Perkins* (317 U.S. 501, 63 S.Ct. 35, 87 L.Ed. 492, 1943), in which the Supreme Court held that subpoenas issued by an agency will be accorded due respect by the Court if they are within the agency's power and that there would be no independent inquiry as to whether the particular person subpoenaed comes within the coverage of the act enforced by the agency. The law as expounded in *Endicott Johnson v. Perkins* is still applicable. All that this section requires is that the court determine whether the subpoena issued comes within the general power of that agency. There need be no in limine inquiries as to whether the person subpoenaed is or is not covered by the act.

In the light of the foregoing legislative history should Section 6, subsection (c) of the Administrative Procedure Act be interpreted to overrule the *Endicott John-*

son case? Cf. *Harrison v. Northern Trust Co.*, 317 U.S. 476, 63 S.Ct. 361, 87 L.Ed. 407 (1943).

AMERICAN STEVEDORES v. PORELLO

Supreme Court of the United States, 1947.

330 U.S. 446, 67 S.Ct. 847, 91 L.Ed. —.

MR. JUSTICE REED delivered the opinion of the Court.

Porello, a longshoreman, was injured in 1942 while working in the hold of the U. S. S. *Thomas Stone*, a public vessel of the United States. His employer, American Stevedores, Inc. (called American hereinafter), was engaged in loading the vessel under a stevedoring contract with the United States. Within two weeks of the accident which caused the injuries American's insurance carrier, in compliance with § 14 of the Longshoremen's and Harbor Workers' Compensation Act,¹ 33 U.S.C. §§ 901-950, 33 U.S.C.A. §§ 901-950, and without the compulsion of an award of compensation by a deputy commissioner under § 19, began compensation payments to Porello, who negotiated the checks he received. In March of 1943 Porello gave notice in accordance with § 33(a) of election to sue the United States as a third party tortfeasor rather than to receive compensation. In the same month he filed a libel, amended in November, 1943, to recover damages from the United States under the Public Vessels Act of 1925,² 46 U.S.C. § 781 et seq., 46 U.S.C.A. § 781 et seq., for the injuries to his person sustained in the accident. Exceptions to the libel being overruled, the United States answered, denying fault on its part and claiming sovereign immunity from suit. Later, by a petition charging American with fault and setting forth an indemnity provision of the stevedoring contract, the United States impleaded American.³ American then answered the libel, denying fault and asserting as an affirmative defense that, by accepting compensation payments, Porello had lost his right to sue a third party tortfeasor.

The District Court held that Porello was not barred from maintaining the action. At trial it appeared that a beam lying athwart a hatch had fallen into the hold and struck Porello, causing the injuries complained of. The court held that the United States was negligent in not providing a locking device on the end of the beam, and held that American was negligent through its foreman, whose orders to the operator of a cargo boom caused the beam to be dislodged. Porello was awarded damages from the United States, the United States to receive contribution from American as a joint tortfeasor to the

¹ 44 Stat. 1424, as amended by 52 Stat. 1164.

² 43 Stat. 1112:

" . . . a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States"

³ See Rule 56, Rules of Practice for U. S. Courts in Admiralty and Maritime Jurisdiction, 28 U.S.C.A. following section 723.

extent of half the damages less the compensation payments received by Porello. On cross appeals by the United States and American the Circuit Court of Appeals held that American was bound by the indemnity provision of the stevedoring contract to make the United States completely whole. With that modification it affirmed the decree below. 2 Cir., 153 F.2d 605. The important issue in this proceeding is whether the Public Vessels Act makes the United States liable for damages on account of personal injuries. The Circuit Court of Appeals thought that this question was decided by the Canadian Aviator case,⁴ but since the issue was not squarely posed in that case we granted certiorari in order to determine it at this time. 328 U.S. 827, 66 S.Ct. 1013, 90 L.Ed. 1605.

The Public Vessels Act provides that a "libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States" ⁵ Petitioner argues that the Act only provides a remedy for damage to property. "Damages," however, have historically been awarded both for injury to property and injury to the person—a fact too well-known to have been overlooked by the Congress in enacting this statute.⁶ Nor is it easy to conceive any reason, absent intent to the contrary, not to have inserted the word "property" in the statute, an obvious method of imposing the limitation for which the petitioner here contends. Petitioner nonetheless argues that the legislative history of the statute conclusively shows that the congressional intent was to limit redress to property damage.

The history of the Act may be briefly detailed. Starting in 1920 various bills were introduced which provided for liability of the Government to suit for damages caused by its vessels.⁷ We need only consider, however, the bills that were pending in the 68th Congress by which the present act was passed: H.R. 6989, H.R. 9075 and H.R. 9535. The first provided for suits against the United States "for damages cause by collision by a public vessel." The second, designed as an amendment to the Suits in Admiralty Act, and supported by the Maritime Law Association of the United States,⁸ would have amended that act so that it would not be limited to vessels operated by the Government as merchant vessels, and would thus have made the United States unquestionably liable to suit for personal injuries

⁴ Canadian Aviator, Ltd., v. United States, 324 U.S. 215, 65 S.Ct. 639, 89 L.Ed. 901.

⁵ 43 Stat. 1112, 46 U.S.C. § 781, 46 U.S.C.A. § 781.

⁶ It might be noted here that there is a distinction between damage and damages. Black's Law Dictionary cautions that the word "damage," meaning "Loss, injury, or deterioration," is "to be distinguished from its plural,—damages,—which means a compensation in money for a loss or damage."

⁷ H.R.15977, 66th Cong., 3d Sess.; H.R.6256, 67th Cong., 1st Sess.; H.R.6989, 68th Cong., 1st Sess.; H.R.9075, 68th Cong., 1st Sess.; H.R.9535, 68th Cong., 1st Sess.

⁸ See Hearings before the Committee on the Judiciary of the House of Representatives, on H.R.9075, 68th Cong., 1st Sess., May 21, 1924.

caused by public vessels.⁹ This bill never reached the floor of Congress. The third bill, H.R. 9535, was enacted and became the present Public Vessels Act. Although "designed as a substitute for H.R. 6989,"¹⁰ it omitted the words "by collision" which would have limited the liability of the United States to damages resulting from collisions by public vessels. The only discussion of any significance to the present inquiry related to the last of these bills. It is true, as petitioner points out, that the proponent of the bill in the House, Mr. Underhill, said, when the bill was introduced, that the Act would allow "suits in admiralty to be brought by owners of vessels whose property has been damaged. . . ." ¹¹ Further, on inquiry as to whether suit could be brought only where blame was charged to the Government, he answered: "Not entirely; where a man's property is damaged, he can bring a suit." ¹² These statements were not, however, answers to questions whether the Act would provide a remedy for injury to the person as well as to property, nor does it appear that the speaker was at the time attentive to such possible distinctions. It is also true that the Committee report said that "the chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as the result of a collision with any Government-owned vessel." ¹³ However, in the same report a letter from the Attorney General was incorporated, which, while it was addressed to the predecessor bill, H.R. 6989, serves, in the absence of contradiction by the report, as an indication of the Committee's opinion on the intended effect of the act. That letter explicitly stated that "The proposed bill intends to give the same relief against the Government for damages . . . caused by its public vessels . . . as is now given against the United States in the operation of its merchant vessels, as provided by the suits

⁹ 46 U.S.C. §§ 741, 742, 46 U.S.C.A. §§ 741, 742:

"No vessel owned by the United States . . . shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions . . ."

"In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. . . ."

Johnson v. United States Shipping Board Emergency Fleet Corporation, 280 U.S. 320, 50 S.Ct. 118, 74 L.Ed. 451; Brady v. Roosevelt S. S. Co., 317 U.S. 575, 63 S.Ct. 425, 87 L.Ed. 471.

¹⁰ S.Rep.No.941, 68th Cong., 2d Sess.

¹¹ 66 Cong.Rec. 2087.

¹² 66 Cong.Rec. 2088.

¹³ S.Rep.No.941, 68th Cong., 2d Sess., p. 1. Of course the chief purpose of the bill was to provide a remedy for those who chiefly urged the bill—the vessel owners. But the committee, in so stating, cannot be taken to have made that purpose the only one. By that token the purpose would be to provide a remedy only for collision damages, a limitation clearly discarded by omitting the words "by collision" from the Act. Canadian Aviator, Ltd. v. United States, *supra*, n. 4.

in admiralty act of March 9, 1920." As the right to sue for personal injuries under the Suits in Admiralty Act was clear, it may be inferred, at least as strongly as the opposite is implied by Mr. Underhill's remarks, that the Committee understood that the Act would provide a remedy to persons suffering personal injuries as well as property damage.¹⁴ Moreover, when the bill reached the floor of the Senate there was not the least indication that the members of that body believed that the Act limited relief to owners of damaged property.¹⁵

The passage of the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act¹⁶ attests to the growing feeling of Congress that the United States should put aside its sovereign armor in cases where federal employees have tortiously caused personal injury or property damage. To hold now that the Public Vessels Act does not provide a remedy against the United States for personal injuries would in the future only throw this form of maritime action under the Federal Tort Claims Act; for that Act excepts from its coverage "Any claim for which a remedy is provided by the Act . . . of March 3, 1925 [The Public Vessels Act] (U.S.C., title 46, secs. 781-790, inclusive) . . ."¹⁷ We cannot believe that the Public Vessels Act, read in the light of its legislative history evinces a Congressional intent only to provide a remedy to the owners of damaged property. . . .

Affirmed in part and reversed in part; question answered.

MR. JUSTICE FRANKFURTER, with whom THE CHIEF JUSTICE concurs, dissenting.

¹⁴ See note 9, *supra*.

¹⁵ So the only pertinent comments follow, 66 Cong. Rec. 3580:

"Mr. Robinson. I think the Senator from Delaware should state briefly to the Senate the effect of the bill. It seems to be a measure of considerable importance.

"Mr. Bayard. Mr. President, the Senator from Arkansas is quite right; it is a measure of great importance. There are continuous applications being made to the Claims Committee of both Houses for the consideration of bills to reimburse people who have suffered damage from maritime accidents in which United States vessels are concerned, to enable them to present their suits in the various district courts. In this last Congress there were nearly 200 such claim bills introduced in the two Houses.

" . . . It would give a person aggrieved because of an accident by reason of the shortcomings of a United States ship the right to go into a district court and prosecute his action. It provides for the appearance of the Attorney General of the United States, and all maritime accidents of any kind resulting from collision, and so on, are taken care of. A great deal of money would be saved to the Government.

"Incidentally, the bill would accomplish something which should have been done in this country a long time ago. It would give an opportunity to do justice when Federal employees have committed an offense against an individual. . . .

"Mr. Robinson. If enacted, it would relieve Congress of the consideration of a great many measures in the nature of private claims.

"Mr. Bayard. All claims of this nature."

¹⁶ Public Law No. 601, 79th Cong., 2d Sess., §§ 401-424, 28 U.S.C.A. §§ 921-946.

¹⁷ *Id.*, § 421.

Without disregarding the significance which we have heretofore attached to legislative history, I cannot give the Public Vessels Act the scope given it by the Court.

It can hardly be maintained that, in the setting of legal history, the phrase "damages caused by a public vessel" must cover personal injuries due to failure to provide proper working conditions for a long-shoreman. The problem for construction is not whether the term "damages" may be applied to money compensation for hurt to person or property. What is to be construed is "damages caused by a public vessel". Standing by itself, that phrase, spontaneously read, may well mean damage inflicted by a public vessel rather than "damages" incurred in connection with its operation. All we held in *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 65 S.Ct. 639, 89 L. Ed. 901, was that its personnel was part of the public vessel for purposes of "causing" damage to another vessel.

The words do not stand alone. They are illumined by the legislative history of the Public Vessels Act. This history has been so accurately summarized in the Government's brief that we shall avail ourselves of it:

"On May 29, 1924, Mr. Underhill introduced H.R. 9535, 68th Cong., 1st Sess., which became the Public Vessels Act without change so far as the present provision is concerned. At that time, there were already pending two other bills, H.R. 6989 and H.R. 9075, both of which would also have authorized suit in case of damage by a public vessel. H.R. 6989, likewise introduced by Mr. Underhill, was the successor of a series of bills introduced at each session of Congress since 1920. It provided for suit 'for damages caused by collision by a public vessel,' and had the approval of all interested Government departments. H.R. 9075, a new measure, was designed to revise the Suits in Admiralty Act and, at the same time, remove its existing limitation to only such vessels as are operated by the Government as merchant vessels. It would have resulted in making the United States liable for personal injuries by all public vessels exactly as it was already for those by its merchant vessels. H.R. 9075 had the powerful support of the Maritime Law Association of the United States and of Judge Hough, then the country's outstanding admiralty judge. It did not have the unqualified approval of the interested departments, which were insisting on important changes.

"The omission of H.R. 6989 and its predecessors to cover personal injuries had been the subject of criticisms, some of which are cited in the brief of respondent Porello. But protracted delays were apparent if an attempt were made to rewrite H.R. 9075 so as to meet the objections thereto. Instead of proceeding further with either H.R. 6989 or H.R. 9075, Mr. Underhill, for the Committee, introduced H.R. 9535, which, in place of limiting its grant of jurisdiction to suits 'for damages caused by collision by a public vessel,' covered all suits 'for damages caused by a public vessel.' The purpose of this change is nowhere discussed. Mr. Underhill, in explaining the intent of the proposed legislation, stated, however (66 Cong.Rec. 2087): 'The bill

I have introduced simply allows suits in admiralty to be brought by owners of vessels whose property has been damaged by collision or other fault of Government vessels and Government agents.' Never at any time in the course of the debates in the House or Senate was it expressly stated that the bill extended to suits for personal injuries. Many statements in the course of the debates, some of which are cited in petitioner's brief, seem to indicate that only relief for property damage was intended. We accordingly submit that, if decisive weight is to be given to the legislative history, it would appear that the Public Vessels Act was not intended to cover suits for personal injury."

In scores of cases in recent years this Court has given "decisive weight" to legislative history. It has done so even when the mere words of an enactment carried a clear meaning. An impressive course of decisions enjoins upon us not to disregard the legislative history of the Public Vessels Act unless it is so completely at war with the terms of the statute itself that we must deny one or the other. We can find such a conflict only by reading the Act itself with dogmatic inhospitality to the usual illuminations from without.

We cannot escape the conclusion that there was no jurisdiction for this libel in the District Court.¹

K. Methods of Presentation of Extrinsic Aids

Extrinsic aids may be presented to the court either by testimony at the trial or by inclusion in counsel's brief in the manner devised by Mr. Justice Brandeis in the brief presented by him while at the bar to the Supreme Court of the United States in *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann.Cas. 957 (1908). This so-called "Brandeis Brief", while originally used to bring before the court the economic and social facts underlying a statute for the purpose of establishing constitutionality, is now also commonly used to present extrinsic aids. Illustrations of the former use are the *Nebbia Case*, and Appellee's Brief therein, *supra*, pp. 260-267; and the *Leighton Case*,

¹ This conclusion is reinforced by the Report of the Senate Committee that "The chief purpose of this bill is to grant private owners of vessels and of merchandise a right of action when their vessels or goods have been damaged as the result of a collision with any Government-owned vessel". S.Rep.No.941, 68th Cong., 2d Sess., p. 1. The Court's opinion finds overriding significance in a letter by the Attorney General commenting on the Bill, in which he stated that it "intends to give the same relief against the Government for damages caused . . . by its public vessels" as was given by the Suits in Admiralty Act. That Act did afford the right to sue for personal injuries. To prefer the Attorney General's view to that expressed by those in charge of a measure would in itself be not the normal choice. And this letter of the Attorney General antedated the Report of the Committee and the statement of Representative Underhill. Compare *United States v. Durkee Famous Foods*, 306 U.S. 68, 71, 59 S.Ct. 456, 457, 458, 83 L.Ed. 492, where the Committee Report "stated that the purpose of the bill was set out in a letter from the Attorney General which it quoted." To reject the subsequent authoritative statements of the Congressional proponents of the legislation and to accept the view of the Attorney General to which the Government now does not even refer, is to discard in favor of dim remote light what heretofore has been deemed controlling illumination.

supra, p. 445, where almost the entire finding of the state court was derived from the contents of a "Brandeis Brief". Reliance on that type of presentation is reflected in most of the recent United States Supreme Court opinions that appear in this Chapter. (See for example express reference in footnote 4 to *Social Security Board v. Nierotko*, supra, p. 1118.) The disadvantage of this sort of presentation is that the court is not compelled to consider it since it is not a part of the record, as demonstrated in *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238 (1923). Proof of extrinsic aids at the trial, however, encounters the inhibitions of technical rules of evidence.

NOTES

1. See Bikle, "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action", 38 Harv.L.Rev. 6 (1924); Note, "The Presentation of Facts Underlying the Constitutionality of Statutes", 40 Harv.L.Rev. 631 (1930).

2. Excerpt from Appellants' Brief in *United States v. American Trucking Ass'n's* (see opinion supra, p. 1051):

"1. The Legislative History of Section 204(a) (1) and (2).—As first introduced on February 4, 1935, the bill which later became the Motor Carrier Act (S.1620, 74th Cong., 1st Sess.) contained no provision authorizing the Interstate Commerce Commission to regulate qualifications or maximum hours of service of any employees, but merely empowered the Commission to investigate the need for establishing qualifications and maximum hours of service of employees of motor carriers (S. 1620, Section 325). On February 27, 1935, Mr. Frank McManamy, then Chairman of the Legislative Committee of the Interstate Commerce Commission, appeared before the Senate Committee on Interstate Commerce and urged that the bill be amended so as to include the provision for regulation of qualifications and maximum hours of service of employees of common and contract motor carriers now contained in Section 204(a) (1) and (2) of the Motor Carrier Act. Mr. McManamy's testimony shows plainly that he contemplated empowering the Commission to regulate the qualifications and maximum hours of service of only those employees whose duties affect safety of operation. His testimony follows:

"Mr. McManamy. The other amendment to which I refer I think is more important because it relates to *safety*. In Section 2(a) (1) and (2) of S.304 there are provisions authorizing the Commission to establish reasonable requirements with respect to certain matters including "*qualifications of maximum hours of service of employees.*" Somewhat similar provisions appear in S.1620, but they omitted the words above quoted. Instead, Section 325 authorizes the Commission to investigate and report on the need for such regulation. *Further investigation of the need for regulation of the hours of service of employees engaged in interstate transportation should hardly be necessary because the hours of service of railroad employees have been regulated by law for 27 years and it has proven to be one of the most important provisions of all the safety legislation.*

"*The regulation of the hours of service of bus and truck operators is far more important from a safety standpoint than the regulation of the hours of service of railroad employees because the danger is greater.* . . .

"It is my view, therefore, that definite hours of service provisions should be included in the bill. This could be accomplished by inserting in Section 304(a) (1) and (2) lines 9 and 15, page 8, following the word "records" in both lines, the words

which appear in S.394, as follows: "*qualifications and maximum hours of service of employees*" (Hearings on S.1629 before the Committee on Interstate Commerce, United States Senate, 74th Cong., 1st Sess., pp. 122-123). [Italics supplied.] . . .'

"Following Commissioner McManamy's testimony, the Senate Committee on Interstate Commerce amended the bill to include the provision suggested by the Commissioner, which is now contained in Section 204(a) (1) and (2) of the Motor Carrier Act. That the Committee was granting to the Commission only the power for which it had asked through Commissioner McManamy, is shown by the statement of Senator Wheeler on the floor of the Senate. Senator Wheeler, the Chairman of the Senate Committee on Interstate Commerce and the sponsor of the bill, stated:

"'. . . the committee amended paragraphs (1) and (2) to confer power on the Commission to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of common and contract carriers, thus restoring provisions that were in the Rayburn bill, introduced in the 73rd Congress. This suggestion came to us, I think, from the chairman of the legislative committee of the Interstate Commerce Commission. Suggestions were made to us by some of the labor organizations that we ought to put in the bill at this time provisions specifically limiting the hours of labor; but by reason of the fact that the Commission felt that they would like first to make a study of the matter, and then come back and report to Congress, or be given permission to establish these requirements later, *we left it as the Commission suggested*, giving them power to make the investigation and, if and when they found it necessary, to put in effect such rules and regulations as they might deem necessary' (79 Cong. Rec. 5652). [Italics supplied.]

"That the purpose of Congress was to give the Commission power to regulate hours of service of only those employees whose duties affect safety of operation is likewise clear from the legislative history of the bill in the House of Representatives. The report of the House Committee on Interstate and Foreign Commerce expressly stated that one of the 'basic principles of regulation of motor carriers as prescribed under this bill' was to:

"'(9) Establish reasonable requirements to promote safety of operation and to that end prescribe qualifications and maximum hours of service of employees and standards of equipment for all carriers (H. Rept. No. 1645, 74th Cong., 1st Sess., p. 3)'. . . ."

3. From your research in attempting to discover the pre-natal history of statutes and in preparation for drafting bills, you will have discovered the paucity of authentic data in most states, where, for example, legislative debates and committee proceedings are not recorded. Publication of the "New York State Legislative Annual, 1946", by the N. Y. Legislative Service, provides for that state an unofficial compilation of supporting memoranda filed by agencies that recommended bills enacted in that year.

SECTION 4. CURRENT POINTS OF VIEW ON BASIC THEORY

INTRODUCTORY NOTE

You should analyze the material in this Section critically in the light of your study of all of the cases and materials preceding it. Compare both generally and in detail the differences and similarities between: (a) the theories, (b) the techniques, and (c) the limitations on judicial action, expressly and impliedly advocated by each author.

ROSCOE POUND, ENFORCEMENT OF LAW

20 Green Bag 401, 404-406 (1908).

. . . After Germany, under the influence of the historical school, had held out her common law for nearly one hundred years, a period of enacted law has brought on a controversy among German jurists that is very instructive for us in America. Three schools may be distinguished in Germany today, differentiated according to the manner in which they apply code provisions and the point of view from which they approach the code. First, there is what we may call the literal school. The adherents of this school ask, "What do the several code provisions mean as they stand, applying the canons of genuine interpretation? They endeavor to find the proper code-pigeonhole for each concrete cause, to put the cause in hand into it by a pure logical process, and to formulate the result in a judgment. Their standpoint is essentially analytical; and it is significant that analytical theories of jurisprudence and analytical methods of legal science have arisen in Germany only within the last thirty years with the growth and development of legislation under the Empire. For the analytical theory has always been a concomitant of periods of legislation.¹ A recent German controversial writer has described the point of view of this school thus:

"A superior magistrate with academic training, sits in his cell armed only with a thinking-machine, although one of the finest type. His sole furniture is a green table upon which there lies before him the official statute-book. One may hand him any case you please, actual or moot, and, performing his duty, he is prepared by the aid of pure logical operations and a secret technique intelligible only to himself, to indicate with absolute exactness the decision already determined by the law-maker in the statute-book."²

In other words, the whole human element is excluded. The process and the result are conceived of as something purely logical and scientific. If the result chances to be just, so much the better. But justice in the cause in hand is not the chief end. The facts of concrete causes are to be thrown into the judicial sausage-mill and are to be ground

¹ See my pamphlet "A New School of Jurists." (1904).

² Gnaeus Flavius (Hermann Kantorowicz), *Der Kampf um die Rechtswissenschaft*, 7.

into uniformity; and the resulting sausage is to be labeled justice. Absolute uniformity of decision of cases logically alike and entire certainty in advance as to the outcome on any given state of facts are the ends it seeks.

Secondly, there is an historical school. With the adherents of this school the code provisions are assumed to be in the main declaratory of the law as it previously existed; the code is regarded as a continuation and development of pre-existing law. With them, all exposition of the code and of any provision thereof must begin by an elaborate inquiry into the pre-existing law and the history and development of the competing juristic theories among which the framers of the code had to choose. Their method of application of the law, however, is substantially the same as that of the literal school. While they see in a code provision, not the command of the sovereign, to be regarded in and of itself in applying it, but a development out of the juristic theory of the past, they agree that when it is interpreted and its content is ascertained, the process of application is a purely logical one. Do the facts come within or fail to come within the rule? Such, according to this school also, is the sole question for the judge. Ethical questions are for the legislator. When the judge has, by historical investigation, found out what the rule is, he has simply to fit it to just and unjust alike.

A third school, which one might call the equitable school, has sprung up and waxed strong in Germany in the last ten years.³ The starting point of this school is philosophical or sociological. To this school the essential thing is a reasonable and just solution of the individual controversy. It conceives of the legislative rule as a general guide to the judge, leading him toward the just result; but it insists that within wide limits he should be free to deal with the individual case so as to meet the demands of justice between the parties and accord with the reason and moral sense of ordinary men. It insists that application of law is not a purely mechanical process. It contends that the process involves, not logic merely, but discretion; that the cause is not to be fitted to the rule but the rule to the cause. "Whoever deals with juristic questions," says a contributor to this controversy, "must always at the same time be a bit legislator"⁴ that is, to a certain extent he must *make* law for the case in hand. This theory and the school that contends for it are modern developments, under the influence of sociological thought, of the perennial notion of natural law, fruitful in so many epochs of legal history. It has always been the function of this notion to preserve or restore juristic ideals of reason and justice in times of matured or stable or rigid law.

³ See Ehrlich, *Freie Rechtsfindung und Freie Rechtswissenschaft*, 1903, *Stammeler Die Lehre von dem richtigen Rechte*, 1902, Gnaeus Flavius (Kantorowicz), *Der Kampf um die Rechtswissenschaft*, 1906, Brütt, *Die Kunst der Rechtsanwendung*, 1907, Bozl, *Die Weltanschauung der Jurisprudenz*, 1907. A similar controversy has been raised in France, Lambert, *La fonction de droit civil compare*, 1903.

⁴ Zitelmann, *Die Gefahren des BGB. für die Rechtswissenschaft*, 19. This is taken for a motto by Brütt, *Die Kunst der Rechtsanwendung*.

Although we do not acknowledge it, we have the same problem in American law. Valuable as the historical method is in order to understand how a rule came into being and to judge how far it is now applicable, when the codifier or the legislator is at work, it may be doubted whether it has value for the immediate administration of justice. Whatever the original reason for rules, they are in force today for reasons of today, even if those reasons come to no more than *vis inertiae*. For the legislator it is all-important not to be deceived by specious modern "reasons" for ancient rules. But for the judge, who has to apply the rules, there is a great deal to be said for such *ex post facto* reasons. They fix his mind upon the vital point that the rule is applying here and now to men of this day. Hence we may leave the historical school out of account for the purpose in hand. Between the other two schools the line is as sharp and the conflict as acute under the surface with us as it is openly in Germany. The theory of our legal system is that the court finds the law in statute or in adjudicated cases and applies it hard and fast to the facts of the case in hand. Many courts carry out this theory conscientiously in practice. But to a large and apparently growing extent the practice of our application of the law is, after all, that jurors or courts, as the case may be, take the rules of law as a general guide, determine what the equities of the cause demand, and contrive to find a verdict or render a judgment accordingly, wrenching the law no more than is necessary. Many courts today are suspected of ascertaining what the equities of a controversy require, and then raking up adjudicated cases to justify the result desired. Occasionally we find a judge avowing frankly that he looks chiefly at the ethical situation *inter partes* and does not allow the law to interfere therewith beyond what is inevitable.⁵ This is essentially what the German equitable school contends for, and it is something of which complaint may be heard in this country today wherever a knot of lawyers is met with discussing recent decisions of the courts.

NOTE

See Gutteridge, "A Comparative View of the Interpretation of Statute Law," 8 Tulane L.Rev. 1 (1933).

JAMES M. MITCHELL, LEGISLATIVE AND JUDICIAL
DESIDERATA

25 Rep. N. Y. S. B. A. 289, 300-301 (1902).

If every statute was applied literally wherever its application was possible in a civil or criminal action, the community at large would gain a far more intelligent appreciation of the work of its representatives in the halls of the Legislature than is now the case, where many laws are but dead-letters, and the palpable intention of others is ignored or ameliorated by a process of judicial refinement or the law it-

⁵ e.g. the frank statement of Mr. Justice Carter in 1 Ill.Law Rev. 151.

self is pronounced unconstitutional for an alleged transgression of the constitutional provision which safeguards the individual's "liberty." Aside from its so-called police power the Legislature has, undoubtedly an unclassified *residuum* of legislative power, which should sanction the enactment of any statute, no matter how unwise, inexpedient or inequitable its operation in a given instance, that did not clearly violate an express constitutional provision. If the judiciary, influenced doubtless by the sincerest motives for the public welfare, did not tend to assume a quasi-legislative attitude in the interpretation and application of enactments of this character, the popular demand would necessitate the repeal of the laws in question or their amendment in accordance with the dictates of reason and justice. It is at least certain that an unexceptional and strict enforcement of all statutory law by the judiciary would react to awaken the civic consciousness to the necessity of selecting legislators who would declare the law in strict accordance with the people's will. Where the law, as declared, is judicially conformed to accord with the people's will, as conceived by the court, the generality of people remain in ignorance of their representatives' actual declarations. There is a necessary fiction in the administration of justice that all men know the law. The citizen who gains an actual knowledge of a law through its application to his own case and is dissatisfied therewith, may vote to compass its repeal. Knowledge in this regard is power. There is no more certain manner in which this knowledge can be disseminated than by the literal application and enforcement of all statutes by the courts.

MAX RADIN, STATUTORY INTERPRETATION

43 Harv.L.Rev. 863, 870-884 (1930).

That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. . . .

And if it were discoverable, it would be powerless to bind us. What gives the intention of the legislature obligating force? In theology or in literature, that question answers itself; but in law, the specific individuals who make up the legislature are men to whom a specialized function has been temporarily assigned. That function is not to impose their will even within limits on their fellow-citizens, but to "pass statutes," which is a fairly precise operation. That is, they make statements in general terms of undesirable and desirable situations, from which flow certain results. As a rule, the statements must be made in the words of a specified language. A statute made in Latin at the present time is no statute, although the intention of the legislature can be as well or as ill made out from Latin as from English. A statute which presented a photograph of two automobiles and printed the legend beneath it that drivers who get into the situation pictured above would be prosecuted would not be a statute, although intention would be no less easily, and perhaps more easily, discoverable in this way than in set words. When the legislature has uttered the words of

a statute, it is *functus officio*, not because of the Montesquieuan separation of powers, but because that is what legislating means. The legislature might also be a court and an executive, but it can never be all three things simultaneously.

And once the words are out, recorded, engrossed, registered, proclaimed, inscribed in bronze, they in turn become instrumentalities which administrators and courts must use in performing their own specialized functions. The principal use is that of "interpretation." Interpretation is an act which requires an existing determinate event—the issue to be litigated—and obviously that determinate event can not exist until after the statute has come into force. To say that the intent of the legislature decides the interpretation is to say that the legislature interprets in advance by undertaking the impossibility of examining a determinable to see whether it can cover a situation which does not exist. . . .

Our search for a method of finding a meaning in the statute will readily bring us to two which have at various times been employed or suggested, consideration of its purpose and consideration of its results. These are very different things, and any effort to combine them may lead to what was called in the case of Heck, "methodological bigamy," in which the offspring of the one or the other union must necessarily be illegitimate.

If by the purpose of a statute we mean the actual purpose entertained by those who framed it or voted it, the purpose is indistinguishable from the intention, and we should have the same difficulty already noted, that this purpose is practically undiscoverable and would be irrelevant if discovered. But the purpose of many entities may be something far simpler and more apparent, something which is evident in the character of the thing itself, the end or final cause in the Aristotelian sense as distinguished from its efficient or its material cause. So, a razor is something to shave with, and we should know this without the least speculation as to the ideas which were in the manufacturer's mind when the razor was made. There are some objects the purpose or end of which we can not decide on so easily. Doubtless only a technical expert could tell from looking at one of many machine parts, what it was for, but in most concrete objects, the purpose is self-evident.

In the case of statutes also, it is rare indeed that we can not say positively what any particular statute is for, by reading it. A statute is quite generally a fairly specific statement. It asserts that something is to be done, and whatever uncertainty or vagueness or ambiguities may exist as to the conditions under which it should be done, as a rule there is none as to the situation which the conditions are to give rise to. A statute which declares gambling contracts to be void may need a deal of interpretation, but its obvious purpose is to discourage gambling.

But as a matter of fact, can we be quite sure about it? There are purposes and purposes. It is not so much that the same statute

may be an obvious instrument to several ends simultaneously, which is, after all, unlikely, but that nearly every end is a means to another end. We distinguish in our conduct and our thinking between immediate and ulterior purposes. And in most cases we contemplate a final or ultimate purpose which is in all likelihood vague and remote enough but is certainly not to be disregarded.

If we then return to our gambling statute, can we say simply that its purpose is to discourage gambling? That is obviously a remoter purpose, but the immediate purpose is something less. It is to make it impossible to sue on gambling contracts, or at any rate to make their gambling character a defense. And it must be apparent that the immediate purpose will depend largely on the remoter purpose. Again, a statute making murder capital has as its immediate purpose the putting to death of murderers. But certainly a further purpose is to discourage murder. It may be said that its better and larger purpose is that its immediate one may never be effectuated.

When we recall that the avowed and ultimate purposes of all statutes, because of all law, are justice and security, we have an additional fact to keep in mind. Surely it is not open to us to say that these purposes are too remote to be regarded, and in some cases there are solemn constitutional declarations that they must be considered paramount. At all events, the long concatenation of means and ends leads to a final end or to a final group of ends, and if the immediately apparent or the "primary" purpose of a statute seems to point away from it, courts are quite properly and justly perturbed.

There could be no better example of all this than the Statute of Frauds. The original statute passed by Parliament in 1677 states its purpose in the very name. It is to prevent frauds and perjuries. The means whereby this was to be achieved make up the immediate purpose of the statute. It was to make invalid to some extent many groups of oral contracts. There has probably never been a statute in which the immediate purpose has so frequently defeated the ulterior purpose as has been the case in this statute, and there is scarcely a group of these oral contracts in which the court has not struggled vigorously to prevent such a result. As a consequence, the number of determinate situations to which each of the larger determinables described by the statute might be reduced, has been constantly lessened, and this has surely gone on without much attention to those which the framers of the statute might have imagined.

In fact, we must qualify the statement that the immediate purpose of the statute is generally apparent. It is commonly rather the ulterior purposes which are apparent. Only when we have made up our minds what the ulterior purpose really was shall we know, for example, the immediate purpose of a statute which makes gambling contracts "void."

A contradiction between the primary and the ulterior purposes of the statute or the ultimate purpose of all statutes, will become apparent, if at all, only when we actually carry out or attempt to

carry out the primary purpose. The method of "interpreting" a statute by its results is therefore an almost inevitable consequence of the existence of a chain of purposes in every piece of legislation. If courts tell us, and they often do, that the result is never to be considered, they are announcing a psychological impossibility.

The immediate result of interpreting a statute is plain enough. The given determinate situation is or is not to be treated as one of the reductions of the larger determinable which the statute describes. But that can not be the result which will tell us how to interpret a statute, because we find this result only after we have interpreted. What we mean therefore when we use a result as a method of interpreting statutes, is that we ask ourselves what remoter results will follow if this immediate one is effected. Courts are fond of pointing to the dangers incident to the interpretation they reject. It is curious that an apprehensive glance at disastrous future consequences is likely to be the mark of a court which considers itself conservative and which would repudiate as a radical and intolerable innovation a method of interpretation consciously based on results.

The method of results involves prophecy, which is in itself not a damning indictment. A certain amount of forecasting of probabilities is an essential element of human conduct; and there is no reason in the world to command judges not to indulge in it. Our difficulty lies in the skill with which the forecasting is done. When a court declares that a certain interpretation will lead to undesirable consequences and is therefore to be avoided, the striking quality of this declaration is usually the grave doubt it elicits as to the accuracy of the forecast.

We may sum up by saying that to interpret a law by its purposes requires the court to select one of a concatenated sequence of purposes, and this choice is to be determined by motives which are usually suppressed. To interpret it by its results is to prophecy probable consequences for one or another of several interpretations, and the basis of the calculus is equally undisclosed. And yet these two types of interpretation are not merely the commonest in actual operation but are in most cases imperfectly concealed under so-called technical interpretations. . . .

There would then be two questions of importance in the interpretative process. The first would be: Can the statutory determinable in the widest range be taken to include the determinate before the court? The more nearly determinate the statute is, the easier that question will be to answer. It is far easier to make a statute which contains large determinables than limited ones, but if we wish to see clearly and with brief consideration what the maximum and minimum of extension is, in any determinable, we must avoid words like "just" and "reasonable" and "property" and similar almost indefinitely extensible terms. These words have so little color of their own that they can be made to take almost any hue we desire.

The second question would be: Will the inclusion of this particular determinate in the statutory determinable lead to a desirable result? What is desirable will be what is just, what is proper, what satisfies the social emotions of the judge, what fits into the ideal scheme of society which he entertains. The dangers, whatever they are, which are involved in a *Gefühlsjurisprudenz* can in no system be completely avoided. An attempt to avoid them by declaring that judges must be guided by broad principles and not by particular situations is inevitably futile, because the broader the principle, the wider the scope of the personal predilections of the judge. If there is a glaring contradiction between what the judge thinks desirable and what the great majority of the community so considers, the community must, in its legislative function, limit as carefully as it can by more easily determinable categories the range within which the judge shall select his desirables. But the legislature can not both have its cake and eat it. It can not indulge itself in using large, round, sonorous words and then complain that courts do not treat them as precise, definite, and unreverberant. . . .

JAMES M. LANDIS, A NOTE ON "STATUTORY INTER-
PRETATION"

43 Harv.L.Rev. 886 (1930).

A passing acquaintance with the literature of statutory interpretation evokes sympathy with the eminent judge who remarked that books on spiritualism and statutory interpretation were two types of literary ebullitions that he had learned not to read. Mr. Radin's plea for realism in the science of interpreting statutes must thus fall on not unwilling ears. With such a slogan, volunteers for the fray should readily spring to his standard. But to learn, when the smoke of battle has cleared away, that the prize of victory is but *Gefühlsjurisprudenz* savors too much of the saddening process of making the world safe for democracy. Surely what Broom, Coke, Bacon, Austin and Lieber dignified with the conception of a science deserves a better fate than the surrender implicit in the resort to *Gefühlsjurisprudenz*.

The Anglo-American scheme of government conceives of lawgivers apart from and at times paramount over courts. Such a function, commonly vested in a legislature, presupposes an intelligible method of making known to the organs of administration, courts or otherwise, its desires and hopes. That method centuries ago crystallized into the formalism of passing statutes. It is from such a conception that one derives the rule of statutory interpretation emphasizing the intent of the passer of statutes.

The fact that in the name of such a rule fictitious intents of legislatures have been derived by courts to conceal the fact that they, rather than the legislature, were in this instance the lawgivers, does not impeach the validity of the rule, but merely demonstrates an inapposite case for its application. The more multitudinous such

cases, the more necessary the insistence upon the limits of such a rule. A hundred years ago Austin sought to define its boundaries by distinguishing between genuine and spurious interpretation, always a nice and often an elusive distinction. Even the distinction fades in the face of Mr. Radin's attack that regards the intent of the legislature as undiscoverable, and if discoverable, irrelevant, and thus limits legislative power to the crypticism of "passing statutes."

That a discoverable intent—record evidence that a particular determinate underlay a general determinable—is irrelevant to the judge called upon to decide the same concrete case theretofore presented to the legislature in a hypothetical form, disregards not only theoretical but practical considerations of Anglo-American government. It is a commonplace of our political thought that it is the task of the legislature to express the state's changing conceptions of legal relationships and to make these conceptions effective. The tenure of the legislator, his parochial interests, his opportunities for extended investigation and debate, his unlimited powers of choice between competing devices, the numbers that he must convince, and the ephemerality of his conclusions, all make for emphasizing the importance of his intent. One further consideration, especially significant to those who advocate the principles of *Gefühlsjurisprudenz*, and pointing to the necessity of preferring from the sociological standpoint the *Gefühl* of the legislator to the *Gefühl* of the judge, is epigrammatically summed up by Dicey when he says: "If a statute . . . is apt to reproduce the public opinion not so much of today as of yesterday, judge-made law occasionally represents the opinion of the day before yesterday."

The real difficulty is not that the intent is irrelevant but that the intent is often undiscoverable, especially when the passer of statutes is, in most cases, a representative assembly. Intent is unfortunately a confusing word, carrying within it both the teleological concept of purpose and the more immediate concept of meaning—the assumption that one or more determinates are embraced within a given determinable. Purpose and meaning commonly react upon each other. Their exact differentiation would require an extended philosophical essay. But it may be noted that intent when used to mean purpose usually will be found to accompany the process of spurious interpretation, whereas intent when used as equivalent to meaning commonly accompanies the process of genuine interpretation, although, as I have said, the distinction between these processes is a nice one.

The assumption that the meaning of a representative assembly attached to the words used in a particular statute is rarely discoverable, has little foundation in fact. The records of legislative assemblies once opened and read with a knowledge of legislative procedure often reveal the richest kind of evidence. To insist that each individual legislator besides his aye vote must also have expressed the meaning he attaches to the bill as a condition precedent to predicating an intent on the part of the legislator, is to disregard the realities of legislative procedure. Through the committee report, the explanation

of the committee chairman, and otherwise, a mere expression of assent becomes in reality a concurrence in the expressed views of another. A particular determinate thus becomes the common possession of the majority of the legislature, and as such a real discoverable intent.

Legislative history similarly affords in many instances accurate and compelling guides to legislative meaning. . . . The real difficulty is twofold: that strong judges prefer to override the intent of the legislature in order to make law according to their own views, and that barbaric rules of interpretation too often exclude the opportunity to get at legislative meaning in a realistic fashion. The latter, originating at a time when records of legislative assemblies were not in existence, deserve no adherence in these days of carefully kept journals, debates, and reports. Unfortunately they persist with that tenaciousness characteristic of outworn legal rules. Strong judges are always with us; no science of interpretation can ever hope to curb their propensities. But the effort should be to restrain their tendencies, not to give them free rein in the name of scientific jurisprudence.

When the intent or meaning of the legislature is discoverable, statutory interpretation posits no serious problem except the political one of insistence upon judicial humility. The real problems arise where the meaning of the legislature is not discoverable. Here the gravest sins are perpetrated in the name of the intent of the legislature. Judges are rarely willing to admit their role as actual lawgivers, and such admissions as are wrung from their unwilling lips lie in the field of common and not statute law. To condone in these instances the practice of talking in terms of the intent of the legislature, as if the legislature had attributed a particular meaning to certain words, when it is apparent that the intent is that of the judge, is to condone atavistic practices too reminiscent of the medicine man. No compromise can be had on this issue. But is the alternative *Gefühlsjurisprudenz* or, better, *Freiegesetzfindung*?

A statute rarely stands alone. Back of Minerva was the brain of Jove, and behind Venus the spume of the ocean. So of the statute, it is the culmination often of long legislative processes, too rarely understood by the mere lawyer, and too rarely studied to have been lifted from the contempt bred of ignorance. Such material frequently affords a guide to the intent of the legislature conceived of in terms of purpose. To deal, for example, with the Trade Disputes Act of 1906 without regard to the fact that it followed upon a Liberal-Labor victory, would be to thwart known legislative hopes and desires. It is done unquestionably. The mutilated Clayton Act bears ample testimony to the "day before yesterday" that judges insist is today. But this is simply the price we pay for judicial independence. To ignore legislative processes and legislative history in the processes of interpretation, is to turn one's back on whatever history may reveal as to the direction of the political and economic forces of our time.

It must be insisted that the legislative purposes and aims are the important guideposts for statutory interpretation, not the desiderata of the judge. And there is a world of difference between an attitude of mind that honestly seeks to grasp these and give them effect, and one that cavalierly throws them overboard and leaves us to the mercy of the judge's "day before yesterday." The so-called rules of interpretation are not rules that automatically reach results, but ways of attuning the mind to a vision comparable to that possessed by the legislature. The vision of itself rarely actually grasps the particular determinate, but the eye once aligned in the same direction will more probably place a particular determinate in its appropriate spot. The despised rules of *expressio unius exclusio alterius*, presumptions of strict and liberal interpretation, are of this character. They predicate attitudes of mind more likely to recreate the atmosphere surrounding the statute in its passage and thus more likely to give effect accurately to the real legislative purpose. Like most "rules of law," they solve only the obvious case, and give a direction for profitable thinking about the difficult ones. And it is true of them, as of most "rules of law," that occasions will arise when they must be broken.

The use of extrinsic aids to statutory interpretation thus has real and not illusory significance. Hopeful developments toward a science of statutory interpretation must be in the direction of devising means of properly evaluating the effectiveness to be given such extrinsic aids. Of course, guessing will not thereby be eliminated; but what science, natural or otherwise, has eliminated the necessity for guesswork? Nevertheless the emphasis must lie upon the honest effort of courts to give effect to the legislature's aims, even though their perception be perforce through a glass darkly. There will and must remain that group of cases—smaller than is generally supposed—where no meaning, aim, or purpose of the legislature is at all capable of apprehension. Here and here alone does talk of the intent of the legislature become meaningless and barbaric. And here society and the legislature both entrust themselves to the law-making powers of courts. No science of law has yet done away with the need for such occasional legislation; a science of statutory interpretation can hardly hope to fare better. But the insistence of both must be that judicial legislation shall concern itself only with the interstitial tissues of the body politic and not its gristle.

FRANK E. HORACK, IN THE NAME OF LEGISLATIVE INTENTION

38 W.Va.L.Q. 119, 126-127 (1932).

There always exists, however, the practical necessity of giving some effect to the legislative enactment. Upon occasion legislatures have seen fit to enact legislation without a definite enunciation of policy, have failed to express their policy adequately, or because of the elapse of time their intention has become uncertain. In these situa-

tions it seems commensurate with our ideals of efficiency and economy to allow the court to apply the legislation according to the rule which they believe the legislature would have provided. This is admittedly "judicial law-making" but the exercise of the power in this limited field of application in no way hinders the legislature from altering the rule or standard if they do not approve of the interpretation adopted by the court. The objection to this, of course, is that it permits the subjective determination of policy to rest with the courts and not with the legislatures. But it is not to be overlooked that in the determination of every case the policy involved and the result to be reached is not overlooked by the judge. It is a psychological impossibility. . . . This states the difficulty but it is no basis for concluding that the use of legislative intention as a guide to the interpretation of statutes should be abandoned. True, it is desirable that the discretionary power of the courts which tends to make them lawmakers should be limited; but it is also desirable that legislation be applied to cases which the legislature did not contemplate but would have regulated if they could have foreseen them. Some adjustment is necessary and apparently it is some device by which the courts can apply these "doubtful" statutes (which probably is a more sociologically desirable thing to do than to declare that in as much as the legislature has not clearly stated its will the court will not attempt to deal with the case at all) in as objective a manner as possible. The "intention of the legislature" rightly applied reaches this result with the least difficulty and with the greatest protection to those who fear oppression from judicial discretion.

FREDERICK J. DE SLOOVERE, THE EQUITY AND REASON OF A STATUTE

21 Cornell L.Q. 591, 608-609 (1936).

. . . To reach satisfactory results in view of the individual and social interests involved and yet remain within the realm of genuine interpretation, courts must (1) find the possible meanings upon the basis of definite techniques which will properly harmonize the textual and contextual processes, in view of extrinsic aids, other legislation, and the common law; (2) permit the statutory purpose to direct a choice from such meanings; and (3) exercise judicial discretion with good judgment, good faith, and common sense at points where such techniques and the reason (purpose) of the statute fail to direct a solution. Fortunately, however, courts often find and apply proper meanings without consciously employing established techniques of genuine interpretation. Techniques carefully worked out in detail in statutory interpretation would, it is submitted, greatly reduce guessing, would eliminate the taking of *a priori* attitudes toward legislation when choosing meanings for ambiguous texts, and would avoid recourse in the first instance in difficult cases to the spirit or equity of the statute,—all forms of spurious interpretation. . . .

ROBERT J. FARLEY, INTERPRETATION REINTERPRETED

11 *Tulane L.Rev.* 266, 276 (1937).

Theoretically the test of meaning for any and all statutes is legislative intent and the primary method of ascertaining the legislative intent is plain meaning. Actually, legislative intent means what a mythical, composite legislator would have meant (a) if he were not now in the court's position, or (b) if he were now in the court's position; plain meaning means what a casual reader of variable intelligence would understand from the statute (a) if he were not now in the court's position, and (b) if he were now in the court's position. Procedurally each of these two major attitudes has within its own terms an escape from itself, except that if (a) of either is chosen for the rationalization, the decision will most likely be couched in the matter of purpose, while if (b) of either is chosen the decision will most usually turn upon the result to be reached or the mischief to be remedied. Together they furnish an escape each from the other, depending upon the dramatic incidents involved as to which of the predominant ideals shall be exemplified at the expense of the other, immediately discernible subjectively to the court in the intrinsic merit of the specific application. As will be noted, the result is procedural further in the determination of what evidence is material and admissible, historical, lexicographical, or customary, and the like, whereupon all the remaining rules of interpretation or construction, as you will, become aids or subsidiary and are helpful or hurtful as emphasizing each litigant's particular theory, relatively dependent upon how closely the court is determined to examine the actual problem before it. The court probably is never concerned with true and false interpretation as such, but it is actually confronted with doctrinal functions for the expression of ideals that are as implicit a part of the organic law of the jurisdiction as the Constitution, and that can be reconciled only in terms of political, economic and social values which must be weighed by no other intelligence than its own.

MAX RADIN, A SHORT WAY WITH STATUTES

56 *Harv.L.Rev.* 388, 405-407 (1942).

The American legislature has no authority that is in any way higher than that of the administrative or judicial officials, or the wholly nonofficial members of the public who jointly with the states are specifically declared in the Constitution to be invested with all non-distributed governmental power. Its function is to issue directives to these officers, not because it is sovereign but because in our constitutional system that is the duty of the legislature. We are not required to stand in awe of, admire, or approve these directives, but, so far as we can understand these statutes, we must obey them.

If we can keep this relationship straight in our mind we can see that the problem is not what "interpretation" is often taken to be. It is

not to determine exactly and precisely what the words of the statute "meant." This notion is based on the doctrine that words singly and in combination contain some secretion called a "meaning" and that this secretion can be removed from the words and applied either to acts directly, or to other words which can be more readily made into the sources for action or for refraining from action. It is in this second aspect that the process of "translation" is necessary, for the process of "construction" has left us with a sentence only half intelligible even after analysis. . . .

. . . . The main thing is to know what we are doing. If we persist in saying that the main and fundamental purpose is to carry out the will of a specific person, when we know that we are dealing with a person who can have no will, as we understand it, and who has no more right to impose his unexpressed will on the administrators and judges than the latter may impose their will as such on the legislature—if we persist in saying this, we shall continue to be driven to a disingenuousness that irks a great many lawyers and should be extremely unpleasant to all of them. . . .

Some time ago in an article in the *Harvard Law Review*, I gave reasons for disregarding materials which were strongly controverted by Dean James M. Landis, then Professor of Law at the Harvard Law School. My statements were undoubtedly somewhat too sweeping. They suggested approval of the English method of dealing with debates, reports and the like, a method that regards these matters as incompetent as well as irrelevant. I intended then—and I certainly should like to take the position now—that they are neither irrelevant nor incompetent, but that they are in no sense controlling. If they were, the implication of the suggestion of Judge John Clark that the *Congressional Record* be adequately indexed for use in courts is impossible to refute.

It would seem that all these materials are entitled to just the consideration their character justifies, and this character must be determined by whatever critical methods are applicable elsewhere. The statement of a sponsor of a bill in the legislature may be the basis of a judgment as to the manner of translating the purpose of a bill into action, not because he was a member of the legislature that enacted it, but by reason of the fact, if it is a fact, that his statement commends itself to the administrator and the court. The various changes made in the drafts of a bill are important for the history of legislative action, but they give less assistance than their constant use would seem to indicate. They are as rarely controlling as the technical rules of interpretation, and like these they form another instance of the rationalizing technique which is so important a part of legal exposition.

Undoubtedly, the entire report of a committee which has investigated a situation and then has proposed legislation is of first-rate value. But it need no more bind the court than does a legislative debate. It is likely that the study of the report, when the general purpose—the ground design—is not sufficiently indicated, will greatly aid in

making the purpose apparent, as well as in discovering what other values are to be kept intact so far as possible. But there is no legislative force in the report. And if the statute as a whole can reasonably be taken to be directed to an outcome which is different from the one which seems to animate the report, the court has the power, and indeed it is part of its function, to direct the application of the statute to this reasonably determined goal.

That the court may take what is called a statesmanlike view of the statute is often denied. But the denial is again based on the imputation of sovereignty to the legislature. There is no reason why administrators and judges may not be called statesmen in the same manner as the members of the legislature are. The statesmanlike view is, it is true, more clearly and definitely a characteristic of the duty of the legislature. Indeed, except as an exercise of statesmanship, there is no reason for a statute at all. And the legislature may, if they can find apt words for it, foreclose any attempt by the administration and judiciary to displace what the legislature regards as the more important of the purposes to be achieved. But if they do not quite specifically foreclose it, a statesmanlike concept of the statute is definitely the normal and necessary basis of the court's judgment on the statute. . . .

If Heydon's Case were recast to serve a modern need, the steps in dealing with a statute might run somewhat as follows:

The first question the interpreter asks is: What is the purpose of the statute as a whole? It makes little difference whether it is called the "program" or the "policy" instead of the "purpose." If we wish to retain the traditional language, we can call it the mandate, or the intent of the legislature, provided we do not really mean intent. It is a little more dangerous to call it the legislative "will" or "wish," although if we know what these words mean, there is no harm in it.

Second: Is this statutory purpose one that the court feels is good? We need not trouble ourselves about the statement that the court must not legislate. Both the judicial and the executive branches participate in the legislative process. They cannot help doing so by the mere act of "enforcing" or "applying" laws or carrying out the legislative purpose. They may not rephrase the statute. They may not reject the purpose, even if they do not find it to be good. But they may—indeed, nothing can prevent their doing so—exercise a judgment on the value of the purpose, and make that judgment the basis of their enforcement of the law. There is, moreover, no reason to assume that their judgment will not be an honest one based on a real consideration of public needs.

Third: Is the implemental portion of the statute declared to be exclusive? If so, it is clear that those who framed the statute were uncertain about the value of its program and the court may not disregard that fact even if the court is quite certain. On the other hand, if no such exclusive use of statutory methods is prescribed, it is open to a disapproving court to find them exclusive.

I believe this is the way strong and self-confident courts—and we ought to have no other—do in fact deal with statutes. Since they are Anglo-American courts, they will not disregard precedent, but will use it as strong courts do, namely to avoid doing specific injustice, and not merely to satisfy the requirement of logical consistency. A statute interpreted “restrictively” for a period long enough to have induced men to adjust their affairs to this interpretation, ought not suddenly to be interpreted “liberally,” and vice versa. For precisely the same reason administrative interpretation, continued long enough to cause this adjustment, should only be changed if the “mischief” caused by the change would be less than the “mischief” of maintaining the practice. . . .

In all this what room is there for the standard “canons of interpretations,” for *ejusdem generis*, *expressio unius*, and the entire coterie or band of phrases and tags and shibboleths which are so wearisomely familiar? I should be tempted to deny that they have ever resolved an honest doubt, if a general negative were provable. Certainly it is hard to find an instance in which they did more than invest with the appropriate symbolic uniform a conclusion that should have been quite as respectable in the ordinary civilian clothes of sober common sense.

Evidently, “canons of interpretation” cannot always be rejected. There are statutes whose purpose is exhausted in the statute itself. These are for the most part procedural statutes, in which the word “procedural” is used in the broadest possible manner. The purpose of a statute limiting the time of appeal to sixty days is clearly that and nothing more. Its purpose is to apprise all parties concerned as to when an appeal will no longer lie. There is no question of strictness or liberality of interpretation. It may, however, be important to know the type of appeal or appealable determination involved, but ordinarily there is no reason why this would involve a large number of cases. All that is envisaged is clarity. And if *ejusdem generis* can make it clear, by all means let us use it.

Our short way with statutes will undoubtedly add to, rather than lighten, the burden of courts. But it will relieve them from one burden, that of feigning an inferiority complex that they really do not have. That would be something gained.

GUISEPPI v. WALLING

Circuit Court of Appeals of the United States, 1944.⁷
144 F.2d 608, 620-622.

FRANK, CIRCUIT JUDGE. . . . The power of courts in general to interpret statutes has been said by some persons to be, in practical effect, a sort of supplementary legislation which the legislature necessarily leaves to the courts.

Indeed, those who today criticize the transfer of “subsidiary legislation” to administrative officers forget that, inspired by somewhat similar motives, there has been and still is much criticism of the

power exercised by judges in construing statutes, that Bentham, Livingston, and their disciples (some even in our time)¹ have insisted that all "law" must emanate solely from the legislature, and have tried, through codification, to destroy all "judicial legislation."² Repeated attempts on the European continent to exploit that notion have invariably proved disappointing.³ Legal certainty to be attained by eliminating, via codification, all judicial law making is a fatuous dream.⁴ Courts in their interpretation of statutes often cannot avoid some such legislation. The enactment of many a statute thus, by implication, calls on the courts to engage in supplemental law making. That activity should always, of course, be modest in scope.⁵ But the necessary generality in the wording of many statutes, and ineptness in the drafting of others, frequently compels the courts, as best they can, to fill in the gaps, an activity which, no matter how one may label it, is in part legislative.⁶ Sagacious legal scholars of high repute, such as, for instance, John Chipman Gray, Wigmore, Allen and Radin, have said that courts, in discharging their duty of carrying out the express will of the legislature as faithfully as they can, are fre-

[Footnotes are re-numbered. Ed.]

¹ Cf. Franklin, *The Judiciary State*, 3 Natl. Lawyers Guild Q. (1941) 26.

² See, e. g., the remarks of Edward Livingston and his colleagues in their preliminary report, in 1823, on the Louisiana Civil Code, Louisiana Legal Archives, Vol. 1, A Republican of the Projet of the Civil Code of Louisiana of 1825 (1937) xvii-xviii.

³ See, e. g., Seagle, *The Quest For Law* (1941) Chapter XVIII.

⁴ The notion of a "Ministry of Justice" or Law Revision Committee is another matter. See Stone and Peittec, *Revision of Private Law*, 54 Harv.L.Rev. (1940) 221.

⁵ *Com'r v. Beck's Estate*, 2 Cir., 129 F.2d 243, 245, 246; *New England Coal & Coke Co. v. Rutland R. Co.*, 2 Cir., 143 F.2d 179.

⁶ The remark of Bishop Hoadly, usually quoted in discussions of judicial legislation—"Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law Giver to all intents and purposes, and not the persons who first spoke and wrote them"—has been given a specific application to statutory interpretation. That judicial legislation is an inherent part of the work of the courts in the development of legal rules when no statutes are involved has been avowed by at least eight Supreme Court Justices—Holmes, Hughes, Brandeis, Stone, Cardozo, Frankfurter, Douglas and Jackson; see citations in *New England Coal & Coke Co. v. Rutland R. Co.*, 2 Cir., 143 F.2d 179, note 31.

Many learned commentators have said the same; see, e. g., the citations in *Commissioner v. Beck's Estate*, 2 Cir., 129 F.2d 243, 245, note 3; Waite, *Judge-Made Law And The Education of Lawyers*, 30 Am.Bar. Ass'n J. (1944) 253.

There has, however, been greater reluctance to admit that, similarly, interpretation of statutes often requires such legislation. Yet it is difficult to justify a differentiation. Several students of continental legal systems have recognized that statutory construction often necessitates judge-made law. See Kiss, *Equity and Law*, in *The Science of Legal Method* (transl. 1917) 146; Lambert, *Codified and Case Law*, in the same volume, 251; Wurzel, *Juridical Thinking* (in the same volume), 286; Alvarez, *Methods For Codes* (in the same volume) 429. As Mr. Justice Jackson recently noted, the Swiss Code candidly calls for such law-making by the judges; *State Tax Commission v. Aldrich*, 316 U.S. 174, 202, note 23, 62 S.Ct. 1008, 86 L.Ed. 1358, 139 A.L.R. 1436.

Paul, *Federal Estate and Gift Taxation* (1924) I, 43-44, 62, 86-87, has observed that narrow or liberal construction of statutes often involves judicial legislation; cf. Jackson, *The Struggle For Judicial Supremacy* (1941) 58.

Seagle suggests that legislation actually leads to an increase of legislative activity by the courts. Seagle, *The Quest For Law* (1941) 298; cf. 196. See also Calhoun, *Introduction to Greek Legal Science* (1944) Ch. IV.

quently unable to escape the responsibility of engaging in supplemental legislation.⁷ As Chief Justice Hughes said in 1928, "a federal statute finally means what the [Supreme] Court says it means."⁸ Thus the courts in their way, as administrators in their way, perform the task of supplementing statutes. In the case of the courts, we call it "interpretation" or "filling in the gaps"; in the case of administrators we call it "delegation" of authority to "supply the details." In both instances, the task is unavoidable.

ARCHIBALD COX, JUDGE LEARNED HAND AND THE INTERPRETATION OF STATUTES *

60 Harv.L.Rev. 370-375 (1947).

I

In the beginning it may be appropriate to say a word about "the intent of Congress"—the phrase which dominates so much thinking on questions of construction. Here, as throughout the law, the various connotations of "intent" create unfortunate confusion. In one sense, it carries a concept of *purpose* and signifies the general aim or policy which pervades a statute but has yet to find specific application. Some such purpose lies behind all intelligible legislation, for while individual congressmen may occasionally disagree even as to the broad purposes to be accomplished by a bill they all support, nevertheless their conflicting views may be fairly said to blend in a resultant, just as their differences regarding the words to be enacted are merged by the legislative process into a final product. The resultant we metaphorically describe as the "intent of Congress." In a second sense the metaphor carries the more immediate concept of *meaning* and indicates the specific, particularized application which the statute was "intended" to be given.¹ In enacting the Fair Labor

⁷ In the *Nature and Sources of Law* (2d ed. 1921) § 370, Gray said "Interpretation is generally spoken of as if its function was to discover what the meaning of the legislature really was. But when the legislature has had a real intention, one way or another on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that the judge had to do with the statute, interpretation of the statutes, instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind had the point been present." He also said that "when the judges are professing to declare what the legislature meant, they are in truth themselves legislating to fill up" the gaps.

See Wigmore, *The Judicial Function*, in *The Science of Legal Method* (1917) xxvi; Allen, *Law in The Making* (1927) 283, 286-287; Radin, *The Law and Mr. Smith* (1938) Chapter XIV.

⁸ Hughes, *The Supreme Court of the United States* (1928) 230.

* The writer is indebted to Mac Q. Asbill, Jr., member of the second-year class in Harvard Law School, for his valuable assistance in the preparation of this article.

¹ Compare Radin, *Statutory Interpretation* (1930) 43 Harv.L.Rev. 863, 869-72, with Landis, *A Note On "Statutory Interpretation"* (1930) 43 Harv.L.Rev. 886, 888.

Standards Act,² for example, it was the "purpose" of Congress to raise the standard of living of workers engaged in interstate commerce or in the production of goods for commerce. When it defined production to include "any process or occupation necessary to the production thereof,"³ Congress "intended" (in the second sense) to make the act applicable to maintenance workers in the executive offices of interstate producers.⁴ Precision requires, moreover, some bifurcation of the second definition. The phrase is used ambiguously to mean both a particularization which the legislature consciously intended but failed to state explicitly, and also, where that is lacking, the specific application of the general, more pervasive purpose which the interpreter believes the legislature would have made, had it foreseen and faced the controversy.

There can be little objection to using "the purpose of Congress" as a metaphor to describe its general aims. Nor is there much ground for objection to speaking of "intent" to denote meaning, provided that the intended application is tolerably clear and specific; in such a case one may fairly say that the individual legislators had a common intention which our system of government requires the courts to follow. It is when there is no conscious, specific intent that the phrase causes trouble. Few, if any, legislators think in terms of the specific controversies which courts must settle by giving a statute one or another meaning. Many such controversies cannot be foreseen because they spring from circumstances which no one can anticipate when enacting legislation. In consequence, the charge is easily and often made that the courts which purport to seek out the legislative intent in doubtful cases indulge themselves in a shameless fiction devised, consciously or in self-deception, to cloak the fact that they are not interpreting, but making law according to their own notions. But judges who have laid bare far better-established fictions, never shrinking from questions concerning their own role nor seeking to conceal the true nature of their function, have frequently described the duty of the courts as that of searching out the legislative intention.⁵ The charge misapprehends the lesson which the meta-

There are, of course, numerous instances in which the "general purpose" of a statute and the "specific intent" are more or less coincident; the narrower the purpose the more likely this is to be true. Nevertheless, the distinction seems helpful for purposes of analysis.

² 52 Stat. 1060 (1938), 29 U.S.C. § 201 et seq. (1940).

³ *Id.* at 1061, 29 U.S.C. at § 203(j).

⁴ *Borella v. Borden Co.*, 145 F.2d 63 (C.C.A.2d, 1944), *aff'd*, 325 U.S. 679, 65 S.Ct. 1223, 89 L.Ed. 1865, 161 A.L.R. 1258 (1945). Unless the contrary is stated, the opinions of the Circuit Court of Appeals for the Second Circuit cited in this article are opinions by Judge Learned Hand.

⁵ This is implicit, of course, in the often quoted opinion of Mr. Justice Holmes, on circuit, in *Johnson v. United States*, 163 F. 30, 32 (C.C.A. 1st, 1908): "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

phor seeks to teach. The metaphor does not state an all-sufficient rule; it enjoins a point of view and sets a goal to which the judge aspires even while he knows it is beyond attainment.

Under our traditions the judge's role, while final, is still subordinate. To some extent at least, he must apply laws made by the people's chosen representatives regardless of his own opinions; the pinch comes when the legislators had no clearly discernible and particularized intention. In such a case the judge must choose between looking to his own heart for his decision and seeking to divine out of the confused, often conflicting and half-conscious aspirations which lie behind a statute some resultant of those forces in keeping with what was consciously contemplated. The former choice is not unthinkable. The adjudication of such cases might have been committed to the courts with no mandate save that they should not disregard whatever meaning is reasonably apparent. Such is the practice with administrative agencies and there are judges who seemingly suggest that this is the path the courts should follow.⁶ Thus far, however, our law has made the second choice, casting the judge as interpreter of the will of Congress.

To some extent the explanation of this choice may lie in the desire for consistent application of the tradition which binds the judge to follow the clear intent of Congress; for the clear and the doubtful cases shade into one another. But I think that Judge Hand found a more convincing reason in the need for judicial responsibility. Society will not long tolerate the wisest judge who, knowing no master, decides cases only according to his individual sense of justice. Either society will pull him down and choose from time to time the judge whose decisions please its strongest members—measuring the strength of each by force, or votes, or some other standard then prevailing—or else he must accept responsibility—in the Judge's phrase—"to these books about us." It is the acceptance of law as a force stronger than those who impose it that makes possible our society. "Of the contrivances which mankind has devised to lift itself from savagery there are few to compare with the habit of assent, not to a factitious common will, but to the law as it is. We need not go so far as Hobbes, though we should do well to remember the bitter experience which made him so docile. Yet we can say with him that the state of nature is 'short, brutish and nasty,' and that it chiefly differs from civilized society in that the will of each is by habit and training tuned to accept some public, fixed and ascertainable standard of reference by which conduct can be judged and to which in the end men will conform."⁷ Hence, to throw over our traditions and make the courts acknowledged instruments of those in power would be a serious retrogression.

⁶ For a qualified statement of the judge's role as lawmaker, see Judge Frank's opinion in *Guiseppi v. Walling*, 144 F.2d 608, 620-22 (C.C.A.2d, 1944). . . .

⁷ L.Hand, *Is There A Common Will* (1929) 28 Mich.L.Rev. 46, 52.

In fields unoccupied by legislation, the courts, even while they must acknowledge loyalty to past decisions, must also shape the law in keeping with current needs and aspirations and so must serve two inconsistent principles.⁸ In dealing with statutes, they can escape this antinomy to some degree, for the competing interests have been evaluated and adjusted in the legislature established for that purpose, leaving less occasion for the courts to strike the balance. While legislators do not always deal with the specific controversies which the courts decide, behind the statutory words there lies the general purpose embodying specific meanings, half understood, half inarticulate; and by these the courts may judge specific cases. "Life overflows its molds and the will outstrips its own universals. Men cannot know their own meaning till the variety of its manifestations is disclosed in its final impacts, and the full content of no design is grasped till it has got beyond its general formulation and become differentiated in its last incidence. It should be, and it may be, the function of the profession to manifest such purposes in their completeness if it can achieve the genuine loyalty which comes not from obedience, but from the according will, for interpretation is a mode of the will and understanding is a choice."⁹

In stating thus the function of the courts in interpreting acts of Congress, Judge Hand did not imply that they do nothing more than voice the unconscious meaning of the legislature; to say that one must seek out the intent of Congress is, as I have said, to state a point of view, an aspiration. There are cases in which the limits of the broad design are so uncertain that it gives no guidance; there are others in which a decision one way or the other will not affect the general purpose. Moreover, to read an act with sympathy and imagination sufficient to discover and then particularize its half-framed purposes requires the court to know, not from outside society but as a member, the needs which gave the statute birth, and thus invites an adjustment of conflicting interests in which it is impossible wholly to separate the judge's sense of right and wrong from that which he attributes to the legislature. There is truth, in short, in the words of those who say that in applying a statute a court cannot interpret only but must make new law to supplement the legislation. Yet the courts, while making law, must somehow manage to interpret.¹⁰ The dilemma is insoluble. But there are ways of going about a solution, and the method chosen makes a difference. Here, I think, lies the lesson in Judge Hand's opinions. While those who say the court must recognize that it is making law have done the necessary work of teaching the profession the importance of this aspect of deciding cases, they sometimes come too quickly to a point at which they cease to search for the legislature's meaning and either restrict

⁸ L. Hand, Mr. Justice Cardozo (1930) 52 Harv.L.Rev. 361.

⁹ L. Hand, The Speech of Justice (1916) 29 Harv.L.Rev. 617, 620.

¹⁰ Compare L. Hand, How Far is a Judge Free in Rendering a Decision? in Law Series I (National Advisory Council on Radio in Education, 1933).

the statute, deciding the case according to judicial precedent, or else make their own adjustment of the interests, extending the enactment into fields the legislature did not enter. The metaphor asserts another point of view, requiring the court as best it can to submerge individual notions to that which was determined in another forum; commanding it to manifest the legislative purposes in their completeness and there to stop, remembering that the policy of a statute inheres as much in its limitations as in its affirmations.¹¹

FELIX FRANKFURTER,¹ SOME REFLECTIONS ON THE READING OF STATUTES

The Sixth Annual Benjamin N. Cardozo Lecture delivered before the
Association of the Bar of the City of New York, 1947.

2 Rec.A.B.C. N.Y. No. 6, 47 Colum.L.Rev. 527 (1947).

. . . A problem in statutory construction can seriously bother courts only when there is a contest between probabilities of meaning.

Difficulties of Construction

Though it has its own preoccupations and its own mysteries, and above all its own jargon, judicial construction ought not to be torn from its wider, non-legal context. Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. Apart from the ambiguity inherent in its symbols, a statute suffers from dubieties. It is not an equation or a formula representing a clearly marked process, nor is it an expression of individual thought to which is imparted the definiteness a single authorship can give. A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts. With one of his flashes of insight, Mr. Justice Johnson called the science of government "the science of experiment."² The phrase, uttered a hundred

¹¹ See *Borella v. Borden Co.*, 145 F.2d 63, 65 (C.C.A.2d, 1944), *aff'd*, 325 U.S. 679, 65 S.Ct. 1223, 80 L.Ed. 1865, 161 A.L.R. 1258 (1945). See also L. Hand, *supra* note 10, at 5: "But the judge must always remember that he should go no further than the government would have gone had it been faced with the case before him. If he is in doubt, he must stop for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result would be."

¹ It gives me pleasure to make acknowledgment to my learned friends, Philip Elman, Louis Henkin and Philip Kurland, Esqs. They have no responsibility for what I have said; they are merely subjected to my gratitude.

² *Anderson v. Dunn*, 6 Wheat. 204, 226 (U.S. 1821).

and twenty-five years ago, has a very modern ring, for time has only served to emphasize its accuracy. To be sure, laws can measurably be improved with improvement in the mechanics of legislation, and the need for interpretation is usually in inverse ratio to the care and imagination of draftsmen. The area for judicial construction may be contracted. A large area is bound to remain.

The difficulties are inherent not only in the nature of words, of composition, and of legislation generally. They are often intensified by the subject matter of an enactment. The imagination which can draw an income tax statute to cover the myriad transactions of a society like ours, capable of producing the necessary revenue without producing a flood of litigation, has not yet revealed itself.³ Moreover, government sometimes solves problems by shelving them temporarily. The legislative process reflects that attitude. Statutes as well as constitutional provisions at times embody purposeful ambiguity or are expressed with a generality for future unfolding. "The prohibition contained in the Fifth Amendment refers to infamous crimes—a term obviously inviting interpretation in harmony with conditions and opinions prevailing from time to time."⁴ And Mr. Justice Cardozo once remarked, "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective."⁵

The intrinsic difficulties of language and the emergence after enactment of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction. The process of construction, therefore, is not an exercise in logic or dialectic: The aids of formal reasoning are not irrelevant; they may simply be inadequate. The purpose of construction being the ascertainment of meaning, every consideration brought to bear for the solution of that problem must be devoted to that end alone. To speak of it as a practical problem is not to indulge a fashion in words. It must be that, not something else. Not, for instance, an opportunity for a judge to use words as "empty vessels into which he can pour anything he will"—his caprices; fixed notions, even statesmanlike beliefs in a particular policy. Nor, on the other hand, is the process a ritual to be observed by unimaginative adherence to well-worn professional phrases. To be sure, it is inescapably a problem in the keeping of the legal profession and subject to all the limitations of our adversary system of adjudication. When the judge, selected by society to give meaning to what the legislature has done, examines the statute, he does so not in a laboratory or in a classroom. Damage has been done or exactions made, interests are divided, passions have been aroused, sides have been taken. But the judge, if he is worth his salt, must be above the

³ 1 Report of Income Tax Codification Committee, Cmd. 5131, pp. 16-19 (England 1936).

⁴ See Mr. Justice Brandeis in *United States v. Moreland*, 258 U.S. 433, 451, 42 S.Ct. 368, 66 L.Ed. 700, 24 A.L.R. 992 (1922).

⁵ *Carter v. Carter Coal Co.*, 298 U.S. 238, 327, 56 S.Ct. 855, 80 L.Ed. 1160 (1936).

[Footnotes 6-10 are omitted. Ed.]

battle. We must assume in him not only personal impartiality but intellectual disinterestedness. In matters of statutory construction also it makes a great deal of difference whether you start with an answer or with a problem.

The Judge's Task

Everyone has his own way of phrasing the task confronting judges when the meaning of a statute is in controversy. Judge Learned Hand speaks of the art of interpretation as "the proliferation of purpose." Who am I not to be satisfied with Learned Hand's felicities? And yet that phrase might mislead judges intellectually less disciplined than Judge Hand. It might justify interpretations by judicial libertines, not merely judicial libertarians. My own rephrasing of what we are driving at is probably no more helpful, and is much longer than Judge Hand's epigram. I should say that the troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye. . . .

When one wants to understand or at least get the feeling of great painting, one does not go to books on the art of painting. One goes to the great masters. And so I have gone to great masters to get a sense of their practise of the art of interpretation. However, the art of painting and the art of interpretation are very different arts. Law, Holmes told us, becomes civilized to the extent that it is self-conscious of what it is doing. And so the avowals of great judges regarding their process of interpretation and the considerations that enter into it are of vital importance, though that ultimate something called the judgment upon the avowed factors escapes formulation and often, I suspect, even awareness. Nevertheless, an examination of some 2,000 cases, the bulk of which directly or indirectly involves matters of construction, ought to shed light on the encounter between the judicial and the legislative processes, whether that light be conveyed by hints, by explicit elucidation, or, to mix the metaphor, through the ancient test, by their fruits.

And so I have examined the opinions of Holmes, Brandeis and Cardozo and sought to derive from their treatment of legislation what conclusions I could fairly draw, freed as much as I could be from impressions I had formed in the course of the years. . . .

Scope of the Judicial Function

From the hundreds of cases in which our three Justices construed statutes one thing clearly emerges. The area of free judicial movement is considerable. These three remembered that laws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends. The difficulty is that the legislative ideas which laws embody are both explicit and immanent. And so the bottom problem is: What

is below the surface of the words and yet fairly a part of them? Words in statutes are not unlike words in a foreign language in that they too have "associations, echoes, and overtones."¹¹ Judges must retain the associations, hear the echoes, and capture the overtones. In one of his very last opinions, dealing with legislation taxing the husband on the basis of the combined income of husband and wife, Holmes wrote: "The statutes are the outcome of a thousand years of history. . . . They form a system with echoes of different moments, none of which is entitled to prevail over the other."¹²

What exactions such a duty of construction places upon judges, and with what freedom it entrusts them! John Chipman Gray was fond of quoting from a sermon by Bishop Hoadley that "Whoever hath an *absolute authority to interpret* any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them."¹³ By admitting that there is some substance to the good Bishop's statement, one does not subscribe to the notion that they are law-givers in any but a very qualified sense.

Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction. "If there is no meaning in it," said Alice's King, "that saves a world of trouble, you know, as we needn't try to find any." Legislative words presumably have meaning and so we must try to find it.

This duty of restraint, this humility of function as merely the translator of another's command, is a constant theme of our Justices. It is on the lips of all judges, but seldom, I venture to believe, has the restraint which it expresses, or the duty which it enjoins, been observed with so consistent a realization that its observance depends on self-conscious discipline. Cardozo put it this way: "We do not pause to consider whether a statute differently conceived and framed would

¹¹ Barker, *The Politics of Aristotle* lxiii (1946).

¹² *Hoeper v. Tax Comm'n*, 284 U.S. 206, 219, 52 S.Ct. 120, 76 L.Ed. 248, 78 A.L.R. 346 (1931).

¹³ Gray, *Nature and Sources of the Law* 102, 125, 172 (2d ed. 1921).

yield results more consonant with fairness and reason. We take this statute as we find it." ¹⁴ . . .

The vital difference between initiating policy, often involving a decided break with the past, and merely carrying out a formulated policy, indicates the relatively narrow limits within which choice is fairly open to courts and the extent to which interpreting law is inescapably making law. To say that, because of this restricted field of interpretive declaration, courts make law just as do legislatures is to deny essential features in the history of our democracy. It denies that legislation and adjudication have had different lines of growth, serve vitally different purposes, function under different conditions, and bear different responsibilities. The judicial process of dealing with words is not at all Alice in Wonderland's way of dealing with them. Even in matters legal some words and phrases, though very few, approach mathematical symbols and mean substantially the same to all who have occasion to use them. Other law terms like "police power" are not symbols at all but labels for the results of the whole process of adjudication. In between lies a gamut of words with different denotations as well as connotations. There are varying shades of compulsion for judges behind different words, differences that are due to the words themselves, their setting in a text, their setting in history. In short, judges are not unfettered glossators. They are under a special duty not to over-emphasize the episodic aspects of life and not to undervalue its organic processes—its continuities and relationships. For judges at least it is important to remember that continuity with the past is not only a necessity but even a duty.

There are not wanting those who deem naive the notion that judges are expected to refrain from legislating in construing statutes. They may point to cases where even our three Justices apparently supplied an omission or engrafted a limitation. Such an accusation cannot be rebutted or judged in the abstract. In some ways, as Holmes once remarked, every statute is unique. Whether a judge does violence to language in its total context is not always free from doubt. Statutes come out of the past and aim at the future. They may carry implicit residues or mere hints of purpose. Perhaps the most delicate aspect of statutory construction is not to find more residues than are implicit nor purposes beyond the bound of hints. Even for a judge most sensitive to the traditional limitation of his function, this is a matter for judgment not always easy of answer. But a line does exist between omission and what Holmes called "misprision or abbreviation that does not conceal the purpose." ¹⁶ Judges may differ as to the point at which the line should be drawn, but the only sure safeguard against crossing the line between adjudication and legisla-

¹⁴ *Anderson v. Wilson*, 289 U.S. 20, 27 (1933).

[Footnote 15 is omitted. Ed.]

¹⁶ *St. Louis-San Francisco Ry. v. Middlekamp*, 256 U.S. 226, 232, 41 S.Ct. 489, 65 L.Ed. 905 (1921).

[Footnotes 17-27 are omitted. Ed.]

tion is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so.

In those realms where judges directly formulate law because the chosen lawmakers have not acted, judges have the duty of adaptation and adjustment of old principles to new conditions. But where policy is expressed by the primary law-making agency in a democracy, that is by the legislature, judges must respect such expressions by adding to or subtracting from the explicit terms which the lawmakers use no more than is called for by the shorthand nature of language. Admonitions like that of Justice Brandeis in the *Iselin* case that courts should leave even desirable enlargement to Congress will not by itself furnish the meaning appropriate for the next statute under scrutiny. But as is true of other important principles, the intensity with which it is believed may be decisive of the outcome. . . .

Proliferation of Purpose

You may have observed that I have not yet used the word "intention." All these years I have avoided speaking of the "legislative intent" and I shall continue to be on my guard against using it. The objection to "intention" was indicated in a letter by Mr. Justice Holmes which the recipient kindly put at my disposal:

"Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean. Of course the phrase often is used to express a conviction not exactly thought out—that you construe a particular clause or expression by considering the whole instrument and any dominant purposes that it may express. In fact intention is a residuary clause intended to gather up whatever other aids there may be to interpretation beside the particular words and the dictionary."

If that is what the term means, it is better to use a less beclouding characterization. Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not to be led off the trail by tests that have overtones of subjective design. We are not concerned with anything subjective. We do not delve into the mind of legislators or their draftsmen, or committee members. Against what he believed to be such an attempt Cardozo once protested:

"The judgment of the court, if I interpret the reasoning aright, does not rest upon a ruling that Congress would have gone beyond its power if the purpose that it professed was the purpose truly cherished. The judgment of the court rests upon the ruling that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed the statute is destroyed. Thus the process of psychoanalysis has spread to unaccustomed fields. There is a wise

and ancient doctrine that a court will not inquire into the motives of a legislative body. . . . " ²⁸

The difficulty in many instances where a problem of meaning arises is that the enactment was not directed towards the troubling question. The problem might then be stated, as once it was by Mr. Justice Cardozo, "which choice is it the more likely that Congress would have made?" ²⁹ While in its context the significance and limitations of this question are clear, thus to frame the question too often tempts inquiry into the subjective and might seem to warrant the court in giving answers based on an unmanifested legislative state of mind. But the purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms. . . .

Search for Purpose

How then does the purpose which a statute expresses reveal itself, particularly when the path of purpose is not straight and narrow? The English courts say: look at the statute and look at nothing else. . . .

The rigidity of English courts in interpreting language merely by reading it disregards the fact that enactments are, as it were, organisms which exist in their environment. One wonders whether English judges are confined psychologically as they purport to be legally. The judges deem themselves limited to reading the words of a statute. But can they really escape placing the words in the context of their minds, which after all are not automata applying legal logic but repositories of all sorts of assumptions and impressions? Such a modest if not mechanical view of the task of construction disregards legal history. In earlier centuries the judges recognized that the exercise of their judicial function to understand and apply legislative policy is not to be hindered by artificial canons and limitations. The well known resolutions in *Heydon's Case*,³³ have the flavor of Elizabethan English but they express the substance of a current volume of U. S. Reports as to the considerations relevant to statutory interpretation. To be sure, early English legislation helped ascertainment of purpose by explicit recitals; at least to the extent of defining the mischief against which the enactment was directed. . . .

When not so long ago the Parliamentary mechanism was under scrutiny of the Lord Chancellor's Committee, dissatisfaction was expressed with the prevailing practice of English courts not to go out-

²⁸ *United States v. Constantine*, 296 U.S. 287, 298, 299, 56 S.Ct. 223, 80 L.Ed. 233 (1936) (dissenting).

²⁹ *Burnet v. Guggenheim*, 288 U.S. 280, 285, 53 S.Ct. 369, 77 L.Ed. 748 (1933).

[Footnotes 30-32 are omitted. Ed.]

³³ 3 Co. 7a, 76 Eng.Rep. 637 (1584).

side the statutes. It was urged that the old practise of preambles be restored or that a memorandum of explanation go with proposed legislation.³⁶

At the beginning, the Supreme Court reflected the early English attitude. With characteristic hardheadedness Chief Justice Marshall struck at the core of the matter with the observation "Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived."³⁷ This commonsensical way of dealing with statutes fell into disuse, and more or less catchpenny canons of construction did service instead. To no small degree a more wooden treatment of legislation was due, I suspect, to the fact that the need for keeping vividly in mind the occasions for drawing on all aids in the process of distilling meaning from legislation was comparatively limited. As the area of regulation steadily widened, the impact of the legislative process upon the judicial brought into being, and compelled consideration of, all that convincingly illumines an enactment, instead of merely that which is called, with delusive simplicity, "the end result." Legislatures themselves provided illumination by general definitions, special definitions, explicit recitals of policy, and even directions of attitudes appropriate for judicial construction. Legislative reports were increasingly drawn upon, statements by those in charge of legislation, reports of investigating committees, recommendations of agencies entrusted with the enforcement of laws, etc. When Mr. Justice Holmes came to the Court, the U. S. Reports were practically barren of references to legislative materials. These swarm in current volumes. And let me say in passing that the importance that such materials play in Supreme Court litigation carry far-reaching implications for bench and bar. . . .

Unhappily, there is no table of logarithms for statutory construction. No item of evidence has a fixed or even average weight. One or another may be decisive in one set of circumstances, while of little value elsewhere. A painstaking, detailed report by a Senate Committee bearing directly on the immediate question may settle the matter. A loose statement even by a chairman of a committee, made impromptu in the heat of debate, less informing in cold type than when heard on the floor, will hardly be accorded the weight of an encyclical.

Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature. Unless indeed no doubt can be left that the legislature has in fact used a private code, so that what appears to be violence to language is merely respect to

[Footnotes 34 and 35 are omitted. Ed.]

³⁶ Laski, Note to the Report of the Committee on Minister's Powers, Cmd. 4060, Annex V, 135 (1932).

³⁷ United States v. Fisher, 2 Oranch 358, 386 (U.S. 1805).

special usage. In the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment. Only if its premises are emptied of their human variables, can the process of statutory construction have the precision of a syllogism. We cannot avoid what Mr. Justice Cardozo deemed inherent in the problem of construction, making "a choice between uncertainties. We must be content to choose the lesser." But to the careful and disinterested eye, the scales will hardly escape appearing to tip slightly on the side of a more probable meaning.

Canons of Construction

Nor can canons of construction save us from the anguish of judgment. Such canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements. All our three Justices have at one time or another leaned on the crutch of a canon. But they have done so only rarely, and with a recognition that these rules of construction are not in any true sense rules of law. So far as valid, they are what Mr. Justice Holmes called them, axioms of experience. . . .

Insofar as canons of construction are generalizations of experience, they all have worth. In the abstract, they rarely arouse controversy. Difficulties emerge when canons compete in soliciting judgment, because they conflict rather than converge. For the demands of judgment underlying the art of interpretation, there is no *vademecum*. . . .

NOTE

See also Crawford, "The Construction of Statutes" (1940), section 175, p. 281. This is a useful text book.

Chapter 8

FITTING LEGISLATION INTO A UNIFIED LEGAL SYSTEM

SECTION 1. INTRODUCTORY

ROSCOE POUND, COMMON LAW AND LEGISLATION

21 *HARV. L. REV.* 383, 385-6, 406-7 (1908) *

Four ways may be conceived of in which courts in such a legal system as ours might deal with a legislative innovation. (1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them. (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or co-ordinate authority in this respect with judge-made rules upon the same general subject. (3) They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover. (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly. The fourth hypothesis represents the orthodox common law attitude towards legislative innovations. Probably the third hypothesis, however, represents more nearly the attitude toward which we are tending. The second and first hypotheses doubtless appeal to the common law lawyer as absurd. He can hardly conceive that a rule of statutory origin may be treated as a permanent part of the general body of the law. But it is submitted that the course of legal development upon which we have entered already must lead us to adopt the method of the second and eventually the method of the first hypothesis. . . .

Formerly it was argued that common law was superior to legislation because it was customary and rested upon the consent of the governed. Today we recognize that the so-called custom is a custom of judicial decision, not a custom of popular action. We recognize that legislation is the more truly democratic form of law-making. We see in legislation the more direct and accurate expression of the general will. We are told that law-making of the future will consist in putting the sanction of society on what has been worked out in the sociological laboratory. That courts cannot conduct such laboratories is self evident. Courts are fond of saying that they apply old prin-

*[Footnotes are omitted. Ed.]

ciples to new situations. But at times they must apply new principles to situations both old and new. The new principles are in legislation. The old principles are in common law. The former are as much to be respected and made effective as the latter—probably more so as our legislation improves. The public cannot be relied upon permanently to tolerate judicial obstruction or nullification of the social policies to which more and more it is compelled to be committed.

HARLAN F. STONE, THE COMMON LAW IN THE UNITED STATES*

50 *Harv.L.Rev.* 4, 12-16 (1936); *The Future of the Common Law*, 1937 (Harvard Univ. Press), 130-135.¹

The reception which the courts have accorded to statutes presents a curiously illogical chapter in the history of the common law. Notwithstanding their genius for the generation of new law from that already established, the common-law courts have given little recognition to statutes as starting points for judicial law-making comparable to judicial decisions. They have long recognized the supremacy of statutes over judge-made law, but it has been the supremacy of a command to be obeyed according to its letter, to be treated as otherwise of little consequence. The fact that the command involves recognition of a policy by the supreme lawmaking body has seldom been regarded by courts as significant, either as a social datum or as a point of departure for the process of judicial reasoning by which the common law has been expanded.

The attitude of our courts toward statute law presents a contrast to that of the civilians who have been more ready to regard statutes in the light of the thesis of the civil law that its precepts are statements of general principles, to be used as guides to decision. Under that system a new statute may be viewed as an exemplification of a general principle which is to take its place beside other precepts, whether found in codes or accepted expositions of the jurists, as an integral part of the system, there to be extended to analogous situations not within its precise terms. With the modern practice of drawing a statute as a statement of a general rule, I can perceive no obstacle which need have precluded our adoption of a similar attitude except our unfamiliarity with the civilian habit of thought. The Scottish law, with its Roman law foundation, took this position, and the House of Lords, common-law learning and background notwithstanding, found no difficulty in approving it as applied to local statutes, in passing on appeals from the Scottish courts.

But quite apart from such a possibility, I can find in the history and principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a

*[Footnotes are omitted. Ed.]

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declaration and a source of law, and as a premise for legal reasoning. We have done practically that with our ancient statutes, such as the statutes of limitations, frauds and wills, readily molding them to fit new conditions within their spirit, though not their letter, possibly because their antiquity tends to make us forget or minimize their legislative origin. . . . Apart from its command, the social policy and judgment, expressed in legislation by the lawmaking agency which is supreme, would seem to merit that judicial recognition which is freely accorded to the like expression in judicial precedent. But only to a limited extent do modern courts feel free, by resort to standards of conduct set up by legislation, to impose liability or attach consequences for the failure to maintain those or similar standards in similar but not identical situations, or to make the statutory recognition of a new type of right the basis for the judicial creation of rights in circumstances not dissimilar. . . . The legislative function has been reduced to mere rule making by the process of narrow judicial interpretation of statutes, and in consequence of the renunciation by the courts, where statutes are concerned, of some of their own lawmaking powers.

That such has been the course of the common law in the United States seems to be attributable to the fact that, long before its important legislative expansion, the theories of Coke and Blackstone of the self-sufficiency and ideal perfection of the common law, and the notion of the separation of powers and of judicial independence, had come to dominate our juristic thinking. The statute was looked upon as in the law but not of it, a formal rule to be obeyed, it is true, since it is the command of the sovereign, but to be obeyed grudgingly, by construing it narrowly and treating it as though it did not exist for any purpose other than that embraced within the strict construction of its words. It is difficult to appraise the consequences of the perpetuation of incongruities and injustices in the law by this habit of narrow construction of statutes and by the failure to recognize that, as recognitions of social policy, they are as significant and rightly as much a part of the law, as the rules declared by judges. A generation ago no feature of our law administration tended quite so much to discredit law and lawyers in the lay mind. A narrow literalism too often defeated the purpose of remedial legislation, while a seeming contest went on with the apparent purpose of ascertaining whether the legislatures would ultimately secure a desired reform or the courts would succeed in resisting it.

Happily the abrasive effect of the never-ending judicial labor of making a workable system of our law, so largely composed of statutes, is bringing about a more liberal attitude on the part of the courts. Fortunately, too, law schools have begun to study and investigate the problem involved in an adequate union of judge-made with statute law. They are developing the underlying principles for its solution, which rest basically on a more adequate recognition that a statute is not an alien intruder in the house of the common law, but a guest to be welcomed and made at home there as a new and powerful aid in the ac-

complishment of its appointed task of accommodating the law to social needs. But there still remains much to be done. The better organization of judge-made and statute law into a coordinated system is one of the major problems of the common law in the United States. I would invite those who doubt to survey almost any new field of legislation and particularly to consider the published studies of the Law Revision Commission of the State of New York, disclosing the results of its five years' search of the laws of New York for inequitable and anachronistic rules.

Unfortunately we cannot revise *ab initio* our philosophy of interpretation of statutes, but we can still give them a more hospitable reception as an aid and not a detriment to the system of judge-made law, and we can turn to better account than we have our theory that statutes are commands, and the illusion that in interpreting them our only task is to discover the legislative will. We can at least let the statute reveal more fully the reasons for its enactment, and we can let its command prescribe the treatment which courts are to accord to it. I observe in recent statutes a revival of the ancient practice of stating in them the reasons for their enactment. The reasons were addressed, it is true, to the removal of constitutional doubts, but the practice can similarly be made an aid to construction. As the force of judicial decision is enhanced by the reasons given in support of it, so the union of statute with judge-made law may be aided by the statement of legislative reasons for its enactment, or by a more adequate preservation of the record of them in its legislative history. On occasion legislatures have made so bold as to direct that a statute shall be extended to cases plainly within its reason and spirit, though not within the strict letter, a practice which, if skillfully employed, may yet restore to courts a privilege which they renounced only because they have mistakenly regarded statutory enactments as in some degree less a part of the law than their own decisions.

NOTE

In Julius Stone, "The Province and Function of Law", (1946), the author states at p. 198: "The civilian variety of abuses of logic in statutory construction has been flavored in England by the deep rooted common law tradition of judicial hostility to legislation. It has indeed been suggested that this hostility itself derived from an aesthetic ideal of logical symmetry, *elegantia*, with which the court identifies the common law, and which it regards as disturbed when the legislature intervenes." (For citation of illustrative material see especially his footnotes 275-284.) The author continues: "It is submitted . . . that it is in professional thought-ways rather than in mere unconscious personal or even class prejudice that the main root of this phenomenon is to be sought, though the other causes cannot, as Scrutton, L. J., has observed, be lightly dismissed. . . ."

JOHN WILLIS, STATUTE INTERPRETATION IN
A NUTSHELL

16 Can. Bar. Rev. 1, 17-18 (1938).*

Where the meaning of an expression is not clear, neither the literal rule nor the golden rule can have any application; for both of them do no more than assume a clear meaning and indicate what a court may do when the meaning is clear. Modern statutes, being for the use of laymen, are framed in wide and general language and consequently fall outside the ambit of these rules as to clear meaning: in dealing with them a court will, after it has exhausted the device of its ordinary technique, usually find itself faced with the necessity of choosing between the "mischief rule" and the presumptions. The presumptions are of particular importance in three classes of statutes, which together account for almost the whole of contemporary legislation: they are social reform Acts, Acts imposing penalties and taxing Acts. It becomes important, therefore, to say something about the origin of the presumptions, and the way in which they are used by the courts today.

In origin the presumptions were, as the name indicates, canons of legislative intent. When the courts leaned against construing a section so as to exclude the subject from the courts or so as to bring him within a taxing section, they did so because shutting up the courts or imposing new taxes was something legislatures were not in the habit of doing. The doctrine of *stare decisis* erected this leaning of the courts into rules of the common law relating to the interpretation of statutes. But times have changed and today finality of administrative decrees and a whole host of taxes are mere commonplaces. If, in 1937, a court resorts to these old presumptions, it is doing something very different from attempting to ascertain the probable intention of the legislature, it is flying in the face of the legislature. Only one conclusion can be drawn from the present judicial addiction to the ancient presumptions and that is that the presumptions have no longer anything to do with the intent of the legislature; they are a means of controlling that intent. Together they form a sort of common law "Bill of Rights." English and Canadian judges have no power to declare Acts unconstitutional merely because they depart from the good old ways of thought; they can, however, use the presumptions to mould legislative innovation into some accord with the old notions. The presumptions are in short "an ideal constitution" for England and Canada.

By origin devices for ascertaining the intent of the legislature, by present practice devices for controlling it, the presumptions are affected by all the uncertainty in application which is inherent in a device, and in addition by further uncertainties derived from their present dual position as canons of legislative intent and weapons of judicial control. Hence comes a variety of problems. First, the effect of a change in legislative practice on the status of a presumption—will a

*[Footnotes are omitted. Ed.]

court meet the reversal of a legislative policy with a weakening of the relevant presumption, or with a more rigorous application of it, or with no change at all? What effect, for instance, will the recent increase in the number of taxing Acts have upon the traditional attitude of the courts towards them? Second, what will a court do in a case in which there is a conflict of presumptions: what, for instance, will it do when the leaning of the courts in favour of personal liberty is met by their desire to protect the existence of the state in wartime, or when the leaning in favour of the constitutionality of legislative Acts conflicts with their desire to protect the subject from taxation? Third, on what occasions, if ever, will a court disregard a conventional canon of legislative intent in favour of an attempt to effectuate the actual social purpose of the Act; when, that is, will it counter a presumption with the "mischievous rule"?

In guessing what your court will do with an ambiguous expression you should therefore always ask yourself three questions: (1) is the relevant presumption coming into increasing use, declining, or is it in a state of uncertainty: (2) are there any circumstances in your case which might make the judges desert the ordinarily relevant presumption in favour of another: (3) are the members of your court aware of the purpose for which the Act was passed, and if so are they in sympathy with it?

SECTION 2. PRESUMPTIONS OF LEGISLATIVE INTENT. HEREIN OF STRICT AND LIBERAL INTERPRETATION

A. Concerning Changes From the Common Law

THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE
COMMON LAW. 292-298, (3rd ed. 1940)

[This material appears *supra*, p. 979. See especially at pp. 982-983.]

SAMUEL E. THORNE, INTRODUCTION TO ELLESMERE "A DIS-
COURSE UPON THE STATUTES", 42-68 (1942).

[This material appears *supra*, p. 985. See especially at p. 986.]

ASH v. ABDY

Chancery, 1678. 3 Swans.App. 664, 36 E.R. 1014.

[This case appears *supra*, p. 102.]

ROBINSON'S CASE

Supreme Judicial Court of Massachusetts, 1881.
131 Mass. 376, 41 Am.Rep. 239.

GRAY, C. J. The question presented by this petition, and by the report on which it has been reserved for our determination, is whether, under the laws of the Commonwealth, an unmarried woman is entitled to be examined for admission as an attorney and counsellor of this court.

This being the first application of the kind in Massachusetts, the court, desirous that it should be fully argued, informed the executive committee of the Bar Association of the city of Boston of the application, and has received elaborate briefs from the petitioner in support of her petition, and from two gentlemen of the bar as *amici curiae* in opposition thereto.

The statute under which the application is made is as follows: "A citizen of this State, or an alien who has made the primary declaration of his intention to become a citizen of the United States, and who is an inhabitant of this State, of the age of twenty-one years and of good moral character, may, on the recommendation of an attorney, petition the Supreme Judicial or Superior Court to be examined for admission as an attorney, whereupon the court shall assign a time and place for the examination, and if satisfied with his acquirements and qualifications he shall be admitted." St.1876, c. 197.

The word "citizen," when used in its most common and most comprehensive sense, doubtless includes women; but a woman is not, by virtue of her citizenship, vested by the Constitution of the United States, or by the Constitution of the Commonwealth, with any absolute right, independent of legislation, to take part in the government, either as a voter or as an officer, or to be admitted to practice as an attorney. . . .

The rule that "words importing the masculine gender may be applied to females," like all other general rules of construction of statutes, must yield when such construction would be either "repugnant to the context of the same statute," or "inconsistent with the manifest intent of the Legislature." Gen.Sts. c. 3, sec. 7.

The intention of the Legislature in enacting a particular statute is not to be ascertained by interpreting the statute by itself alone, and according to the mere literal meaning of its words. Every statute must be construed in connection with the whole system of which it forms part, and in the light of the common law and of previous statutes upon the same subject. And the Legislature is not to be lightly presumed to have intended to reverse the policy of its predecessors or to introduce a fundamental change in long-established principles of law.

By the law of England, which was our law from the first settlement of the country until the American Revolution, the Crown, with

all its inherent rights and prerogatives, might indeed descend to a woman or to an infant; but, under the degree of a queen, no woman, married or unmarried, could take part in the government of the state. Women could not sit in the House of Commons or the House of Lords, nor vote for members of Parliament. 4 Inst. 5. Countess of Rutland's case, 6 Rep. 52 b. *Chorlton v. Lings*, L.R. 4 C.P. 374, 391, 392. They could not take part in the administration of justice, either as judges or as jurors, with the single exception of inquiries by a jury of matrons upon a suggestion of pregnancy. . . .

There is nothing in the action of the Legislature or of the Judiciary of the Commonwealth which has any tendency to prove such a change in the law and usage prevailing at the time of our separation from the mother country as to admit women to the exercise of any office that concerns the administration of justice.

In 1871 the Governor and Council required the opinion of the justices of this court, under c. 3, art. 2, of the Constitution of the Commonwealth, upon the following questions: "First. Under the Constitution of this Commonwealth, can a woman, if duly appointed and qualified as a justice of the peace, legally perform all acts pertaining to such office? Second. Under the laws of this Commonwealth, would oaths and acknowledgments of deeds, taken before a married or unmarried woman, duly appointed and qualified as a justice of the peace, be legal and valid?" Although the provisions of the Constitution and statutes of the Commonwealth regarding the office of justice of the peace, while they do not mention women, are not in terms limited to men, yet the justices answered both the questions proposed in the negative, for the following reasons: "By the Constitution of the Commonwealth, the office of justice of the peace is a judicial office, and must be exercised by the officer in person, and a woman, whether married or unmarried, cannot be appointed to such an office. The law of Massachusetts at the time of the adoption of the Constitution, the whole frame and purport of the instrument itself, and the universal understanding and unbroken practical construction for the greater part of a century afterwards, all support this conclusion, and are inconsistent with any other. It follows that, if a woman should be formally appointed and commissioned as a justice of the peace, she would have no constitutional or legal authority to exercise any of the functions appertaining to that office." Opinion of Justices, 107 Mass. 604.

Whenever the Legislature has intended to make a change in the legal rights or capacities of women, it has used words clearly manifesting its intent and the extent of the change intended. . . .

It is hardly necessary to add that our duty is limited to declaring the law as it is, and that whether any change in that law would be wise or expedient is a question for the legislative and not for the judicial department of the government.

Petition dismissed.

BENJAMIN N. CARDOZO, THE PARADOXES OF
LEGAL SCIENCE

New York: 1928. Columbia University Press 9-10

The truth is that many of us, bred in common law traditions, view statutes with a distrust which we may deplore, but not deny. This has led . . . to the maxim of construction that statutes derogating from the common law are to be strictly construed, a maxim which recalls what has been said by Sir Frederick Pollock of rules of statutory construction generally: they cannot well be accounted for except on the theory that the legislature generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds.

CORAL GABLES v. CHRISTOPHER

Supreme Court of Vermont, 1937. 108 Vt. 414, 189 A 147, 109 A.L.R. 474.

POWERS, CHIEF JUSTICE. The plaintiff seeks to recover on a promissory note executed in Florida on October 30, 1925, on which the last payment was made on September 3, 1926. The suit was brought on June 12, 1935. The complaint counts upon the note and contains a copy of it. The defendant's answer sets up our six-year statute of limitations (P.L. 1648) as a bar to the action. To this answer, the plaintiff demurs.

There appears on the face of the note, after the defendant's signature, the printed word "seal" in parentheses. The only question for our consideration is whether this is enough to make the note a specialty within the meaning of P.L. 1645. . . . That the instrument before us is not a common-law specialty seems plain enough. A "specialty" in a common-law sense is a writing sealed and delivered—a contract under seal. *Brainard v. Stewart*, 33 Vt. 402, 404. The common law required that a seal be of wax or a wafer or something which would take an impression. The word "seal" after a signature is not enough to make the instrument a specialty at common law. *Beardsley v. Knight*, 4 Vt. 471, 479. It is quite true that the ancient dignity and importance of a seal has been much affected by statutes and long usage in some of the states, and the seal has been wholly abolished in others. Our own Legislature has modified the law of seals since the case last cited was decided. P.L. 35 provides that when the private seal of a person or corporation is required on an instrument or writing to make such instrument or writing legal and valid, such seal shall consist of "an impression . . . or the word 'seal' or the letters 'L. S.' opposite the signature."

The question before us comes down to a proper construction of this statute.

The defendant contends that it means just what it says; that is, that the word "seal" added to the signature is a valid seal only when it appears on an instrument which the law requires to be executed un-

der the seal of the signer, like a deed, for instance. The plaintiff maintains that the section means just what it would if it read, "when the private seal of a person . . . is required on an instrument or writing to make such instrument or writing legal and valid as a *sealed instrument*," etc.

That this statute is in derogation of the common law is plain enough, for it changes that law to a material extent at least. How far it changes it is the question we must decide. This depends upon the intention of the Legislature as expressed in the act creating the change. That "the intention of the law-maker constitutes the law," *Atkins v. Fiber Disintegrating Co.*, 18 Wall. 272, 301, 21 L.Ed. 841, 844, is a terse and familiar statement of the rule governing the construction of statutory law. It is the pole-star in the construction of a statute. *Simonds v. Powers' Estate*, 28 Vt. 354, 355. To aid in ascertaining that intention, certain rules have been adopted, one of which, predicated upon what is regarded as a matter of wise policy, is that statutes in derogation of the common law are to be strictly construed. . . .

The rule of strict construction of such statutes is very generally adopted. A few of the cases now at hand may be here referred to. Thus it is said that a statute in derogation of the common law, or which affects a common-law right will be strictly construed, and will not change the common law or common-law rights, unless an intention to effect such change plainly appears from the express words of the statute or by necessary implication. [Citing cases.]

Such statutes "cannot be extended beyond the words used," says the United States Supreme Court. *Brunswick Terminal Co. v. National Bank*, 192 U.S. 386, 24 S.Ct. 314, 316, 48 L.Ed. 491, 493.

Since this case was argued, the November number of the Harvard Law Review has come to hand. It contains (page 4) an interesting and instructive article on the "Common Law in the United States," by Mr. Justice Stone of the Federal Supreme Court. Therein, he makes reference to what he evidently regards as the hostile attitude of the courts to acts of the Legislatures. He gives approval (page 15) to the idea that "a statute is not an alien intruder in the house of common law, but a guest to be welcomed and made at home there as a new and powerful aid in the accomplishment of its appointed task of accommodating the law to social needs." He appears to regret that we cannot revise ab initio our philosophy of interpretation of statutes, but suggests that we can give them a more hospitable reception as an aid to judge-made law, can turn to better account than we have our theory that statutes are commands, and "the illusion that in interpreting them our only task is to discover the legislative will." If this means, as it seems to, that the true function of the court is not only to ascertain the intent of the Legislature, but also to expand that intention, and, by construction, make it apply to and effect cognate and related cases not within the terms of the act in question, it would result in a complete overturn of the established theory of

statutory construction, and very largely increase the output of judicial legislation. Whether such results would be desirable we need not now consider. We are satisfied that no court has yet given approval to such theories. Certainly, that is not the law of this court. It is not the law of the great court of which Mr. Justice Stone is a distinguished member. This appears from what we have already said and from the cases already cited, to which we may add *Brown v. Barry*, 3 Dall. 365, 1 L.Ed. 638; *Ransom v. Williams*, 2 Wall. 313, 17 L.Ed. 803; *Ross v. Jones*, 22 Wall. 576, 22 L.Ed. 730, 735; *Nudd v. Burrows*, 91 U.S. 426, 23 L.Ed. 286, 290.

We are unable to say that the Legislature intended that the provisions of P.L. 35 should apply to cases not within its terms. If it had, it would have been a very simple matter to have expressed it in the act. It is very plain that the note before us is not covered by the terms of the act, and under the rule herein discussed we cannot construe the act in a way to include it.

We hold, therefore, that the six-year limitation was well pleaded, and the judgment was correct. . . .

Judgment affirmed.

NOTE

In *State v. M., St. P. & S. S. M. Ry. Co.*, 190 Minn. 162, 165, 251 N.W. 275 (1933), Stone, J., said: "That rule (that statutes in derogation of the common law are to be strictly construed), although an ancient working tool of adjudication, is not altogether obsolete. On occasion it is a convenient and appropriate instrument in adjusting a new rule of statute so that it will work smoothly in reciprocal operation with the old machinery of the common law. But the rule is misused, inexcusably and dangerously so, when it disguises extra-constitutional obstacles to, or hindrances of, legislative purpose. . . . Judges have neither higher function, nor more pressing duty, than to ascertain and give full scope to declared legislative policy when within the competency of the enacting body." See comment on this case in 14 Ore.L.Rev. 290 (1935).

TEDERS v. ROTHERMEL

Supreme Court of Minnesota, 1939. 205 Minn. 470, 286 N.W. 353.

STONE, JUSTICE. Action for personal injuries. From an order sustaining a demurrer to one part of his answer, defendant appeals.

The complaint avers as follows. In July, 1937, plaintiff, defendant, and two others planned a motor trip. The common intent was to travel from Omaha, Nebraska, to Florida and return, in defendant's car. There was in advance an agreement that each would pay one-fourth of the cost of the needed gasoline and oil. Accordingly each of the four did contribute to a fund from which those expenses were paid. In Florida plaintiff was injured in a collision caused by defendant's negligence.

Defendant answered, admitting the common purpose of the parties and their agreement to share expense of gasoline and oil, but setting

out the Florida "guest" statute as one defense. The demurrer to that defense was sustained.

I General Laws, Florida, 1937, c. 18033, § 1, provides: ". . . no person, transported by the owner or operator of a motor vehicle as his guest or passenger, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury . . . unless . . . caused by the gross negligence or wilful and wanton misconduct of the owner or operator. . . ."

The one question now is whether plaintiff was being carried as a "guest or passenger, without payment for such transportation." To our regret and embarrassment there is no Florida case to rule construction. But many similar statutes of other states have been judicially construed. Determination of the factors distinguishing between a mere gratuitous guest or passenger on the one hand, and, on the other, one who makes "payment" for his transportation, has not resulted in unanimity of judicial expression. The statutes present differences in phraseology which in some cases have been considered conclusive. Counsel have been unable to reduce the decisions to a rational classification so as to put them in reconcilable categories.

We refrain from any such attempt and simply do our best to determine the intention of the Florida statute. . . .

1. At the outset, we do not consider ourselves at liberty to apply any rule of "strict construction" to this or any other statute, simply because it happens to be in derogation of common law. Legislatures intend by such statutes to replace or change rules of the common law. Too much judicial indulgence in "strict construction" of statutes has heretofore disguised "extraconstitutional obstacles to, or hindrances of, legislative purpose." . . .

However radical the change, we do not permit ourselves, because it is an innovation, so to limit a statute by construction as to defeat or even hinder its purpose. Our effort is rather to give any statute "a fair construction, with the purpose of its enactment in view, not narrowed or restricted because it is a substitute for the discarded common law." *Wells-Dickey Trust Co. v. Chicago, B. & Q. R. Co.*, 159 Minn. 417, 199 N.W. 101, 103. It is with that rule, rather than any notion either of duty or right to construe strictly, as a guide, that we attempt interpretation of the Florida statute.

2. To be within its reach the rider in the car of another must not only be "guest or passenger," but also riding "without payment for such transportation." It is significant that the thing determinative is not "hire" or "compensation," but "payment." "Compensation," accurately used, means payment in money, or other benefit, which will compensate in the strict sense, that is make even, or be measurably the equivalent of that for which it is given. *Kerstetter v. Elfman*, *supra*. "Hire" might apply only where both machine and driver are hired for the occasion.

The words of the Florida law can properly be given no such narrow scope. Payment is all that is required. The amount of money or other thing constituting the payment need not compensate or make even, nor need it be given, in the technical sense, as "hire" of driver and car. Any sum agreed upon as payment and paid, as under the facts presented by these pleadings, amounts to payment for transportation so as to prevent application of the statute.

That follows because the purpose of the agreement disclosed by the pleadings was on the one hand to assure plaintiff and the other passengers the right to travel as such in defendant's car on the southern jaunt which all were to enjoy. In return, the benefit to defendant was the substantial reduction of three-fourths of the amount which otherwise would have come out of his own pocket for fuel and lubricants. It is not persuasive for the opposite view that he got nothing for use of his car or his own services as chauffeur. The money he received was nonetheless "payment" because it was not compensatory payment for all the items of car use and driving which defendant furnished. Payment for plaintiff's transportation there was. That, in our view, was enough to take the case outside the operation of the Florida statute.

The demurrer was properly sustained, and the order is affirmed.

NOTE

The principal case is subject of comment in 24 Minn.L.Rev. 710 (1940).

B. Concerning Derogation of Common Right.

IN RE HALL

Supreme Court of Errors of Connecticut, 1882. 50 Conn. 131, 47 Am.Rep. 625.

[The case appears *supra*, p. 402.]

BECK v. WALLANDER

Supreme Court of New York, 1947. 71 N.Y.S.2d 237.

[The case appears *supra*, p. 219.]

C. Concerning Deprivation of Life and Liberty: "Penal Laws"

SAMUEL E. THORNE, INTRODUCTION TO ELLESMERE "A DISCOURSE UPON THE STATUTES", 46-68 (1942)

[This material appears *supra*, p. 985. See especially at p. 987.]

SPENCER v. THE STATE

Supreme Court of Indiana, 1853. 5 Ind. 41.

[The case appears *supra*, p. 995.]

O'DAY v. PEOPLE

Supreme Court of Colorado, 1946. 114 Colo. 373, 166 P.2d 789.

ALTER, JUSTICE. An information containing three counts was filed in the district court charging William O'Day, alias George C. Lane, alias James J. Stewart, in the first count thereof with aggravated robbery, and in the second and third counts with having been convicted of violations of "the Burglary Statutes" of the states of California and Missouri, respectively, so as to bring him within the provisions of sections 551, 552 and 554, chapter 48, '35 C.S.A., if he was convicted of the offense charged in the first count of the information. The jury returned a verdict finding the defendant "guilty of aggravated robbery as charged in the information." A motion for a new trial was interposed and overruled and no error is assigned to such ruling. Defendant was sentenced to confinement in the state penitentiary "at hard labor, for the remainder of his natural life."

Defendant sued out a writ of error and his assignments may be comprehended in the brief statement, that, under the record, the trial court was without authority to impose a life sentence. . . .

The statute (section 84, *supra*) provides that one found guilty of aggravated robbery ". . . shall be confined in the penitentiary for a term of not less than two years, or for life. . . ." If the trial judge construed this statute as authorizing the imposition of a life sentence for aggravated robbery and acted accordingly in pronouncing the sentence herein, we believe his action is unprecedented and that error was committed.

Section 545, chapter 48, '35 C.S.A., provides: "When a convict is sentenced to the state penitentiary, otherwise than for life, for an offense or crime committed after the passage of this subdivision, the court imposing the sentence shall not fix a definite term of imprisonment, but shall establish a maximum and a minimum term for which said convict may be held in said prison. The maximum term shall not be longer than the longest term fixed by law for the punishment of the offense of which he was convicted, and the minimum term shall not be less than the shortest term fixed by law for the punishment of the offense of which he was convicted."

Section 545, *supra*, was enacted in 1899 and clearly indicates that it was the general policy of the legislature to favor the fixing of minimum and maximum sentences for the violation of state criminal statutes. Obviously, if the statute makes the imposition of a life sentence mandatory upon the conviction of some offense, there can be neither a minimum nor maximum term as section 545, *supra*, contemplates. It

will be noted that the statute (section 84, *supra*) reads, “. . . not less than two years, or for life.” Historically it may be of interest to note that this penalty for aggravated robbery first came into our statutes by an amendment in 1907, since which time the penalty for the violation of the statute.

We are convinced that the phrase “not less than two years, or for life” has been consistently construed by the courts to mean a term of two years *to* life, and we are supported in this construction by the following decisions in our own courts where convictions were obtained for aggravated robbery. *Funk v. People*, 90 Colo. 167, 7 P.2d 823, ten to eleven years; *Rowan v. People*, 93 Colo. 473, 26 P.2d 1066, five to seven years; *Dockerty v. People*, 96 Colo. 338, 44 P.2d 1013, twenty-five to thirty years. These sentences indicate that courts heretofore construing section 84, *supra*, have consistently imposed sentences as if the statute had read, “a minimum of two years to a maximum of life.” The legislature, by the enactment of section 545, *supra*, has indicated a general policy, and we believe it should be so construed as to carry that general policy into effect. It is a general rule of construction that criminal statutes shall be strictly construed, and in accordance therewith we hold that the penalty authorized under section 84, *supra*, is for a term of two years to life. The section does not authorize the imposition of a specific life sentence, and if the trial court construed it as authorizing the imposition of such a sentence, it committed error. . . .

NOTE

Of. Chatwin v. United States, supra, p. 1129.

UNITED STATES v. GASKIN

Supreme Court of the United States, 1944.
320 U.S. 527, 64 S.Ct. 318, 38 L.Ed. 287.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

An indictment was returned against the appellee in the District Court for Northern Florida which charged that he arrested one Johnson “to a condition of peonage,” upon a claim that Johnson was indebted to him, and with intent to cause Johnson to perform labor in satisfaction of the debt, and that he forcibly arrested and detained Johnson against his will and transported him from one place to another within Florida. There was no allegation that Johnson rendered any labor or service in consequence of the arrest. From a judgment sustaining a demurrer, the United States appealed.

The charge is laid under § 269 of the Criminal Code, which is: “Whoever holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be fined . . . or imprisoned”

The District Court held that the statute imposes no penalty for an arrest with intent

the person arrested renders labor or service for a master following the arrest.

We think this was error. Section 269 derives from § 1 of the Act of March 2, 1867, which abolished and prohibited the system known as peonage in any territory or state, nullified any law, ordinance, regulation, or usage inconsistent with the prohibition, and added criminal sanctions in the language now constituting § 269. The Act was passed further to implement the Thirteenth Amendment and is directed at individuals whether or not acting under color of law or ordinance.

The section makes arrest of a person with intent to place him in a state of peonage a separate and independent offense. It penalizes "whoever holds, arrests, returns, or causes to be held, arrested, or returned . . . any person to a condition of peonage." The language is inartistic. The appropriate qualifying preposition for the word "holds" is "in." An accurate qualifying phrase for the verb "arrests" would be "to place in or return to" peonage. But the compactness of phrasing and the lack of strict grammatical construction does not obscure the intent of the Act. Years ago this Court indicated that the disjunctive phrasing imports that each of the acts,—holding, arresting, or returning,—may be the subject of indictment and punishment. We think that view is sound apart from any consideration of the legislative history of the enactment. But when viewed in its setting no doubt of the purpose of the statute remains.

The Act of 1867 was passed as the result of agitation in Congress for further legislation because of the use of federal troops to arrest persons who had escaped from a condition of peonage. The first section abolished and prohibited peonage and made certain practices in connection therewith criminal. The second section imposed a duty on all in the military and civil service to aid in the enforcement of the first, and provided that if any officer or other person in the military service should offend against the Act's provisions he should, upon conviction by a court martial, be dishonorably dismissed from the service. It is plain that arrest for the purpose of placing a person in or returning him to a condition of peonage was one of the evils to be suppressed.

The appellee invokes the rule that criminal laws are to be strictly construed and defendants are not to be convicted under statutes too vague to apprise the citizen of the nature of the offense. The principle, however, does not require distortion or nullification of the evident meaning and purpose of the legislation.

The judgment is reversed.

MR. JUSTICE MURPHY, dissenting. We are dealing here with a criminal statute, the penalties of which circumscribe personal freedom. Before we sanction the imposition of such penalties no doubts should exist as to the statutory prescription of the acts in question. Otherwise individuals are punished without having been adequately warned as to those actions which subjected them to liability.

It is doubtful whether an arrest not followed by actual peonage clearly and unmistakably falls within the prohibition of § 269 of the

Criminal Code, 18 U.S.C.A. § 444. The court below, at least, felt that the statute did not cover such a situation. Other judges have expressed similar doubts. *United States v. Eberhart*, C.C., 127 F. 252; dissenting opinion in *Taylor v. United States*, 4 Cir., 244 F. 321, 332, 333. And in order to reach the opposite conclusion, this Court labels the statutory language as "inartistic" and as lacking in "strict grammatical construction." It then proceeds to rewrite the statute, in conformity with what it conceives to have been the original intention of Congress, so as to penalize "whoever . . . arrests . . . any person for the purpose of placing him in a condition of peonage." I cannot assent to this judicial revision of a criminal law. Congress alone has power to amend or clarify the criminal sanctions of a statute.

Apologia for inadequate legislative draftsmanship and reliance on the admitted evils of peonage cannot replace the right of each individual to a fair warning from Congress as to those actions for which penalties are inflicted. Punishment without clear legislative authority might conceivably contain more potential seeds of oppression than the arrest of a person "to a condition of peonage."

LIVINGSTON HALL, STRICT OR LIBERAL CONSTRUCTION OF PENAL STATUTES

48 Harv.L.Rev. 748, 756-768 (1935).

The common-law rule requires the strict construction of all penal statutes. The statutory rules, on the other hand, commonly require a liberalized construction of all penal statutes, or, at least, of all those found in the penal code. But the reasons given for the rules, while establishing that *some* penal statutes should be construed strictly, and *some* liberally, do not, and cannot, show that the same rule should be applied to *all* statutes. A brief analysis will make it clear that the result of either rule is a Procrustean bed, necessitating the undue extension, or decapitation, of those unlucky instances of legislative intent which do not naturally fit into the particular rule adopted.

For Strict Construction. Potentially the most serious argument is that the rule is founded "on the plain principle that the power of punishment is vested in the legislative, not in the judicial department."¹ For if this were true, a liberal construction statute would be an unconstitutional delegation of legislative power to the judiciary. But

¹ Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat. 76, 95 (U.S. 1820). This statement has often been quoted by state courts; a somewhat different formulation of the same reason is found in *State v. Mims*, 26 Minn. 191, 192, 2 N.W. 492 (1879), where the court found the rule of strict construction necessary "to guard against the creation, by judicial construction, of criminal offenses not within the contemplation of the legislature"; and in *State v. A. H. Read Co.*, 33 Wyo. 387, 403, 240 P. 208, 213 (1925), where the rule was said to require "a sufficient degree of certainty in a criminal statute, that will place it outside the necessity of judicial determination, through mere implication or construction, of who or what acts are punishable under it."

this objection is clearly unsound. Liberal construction does not involve going beyond the intention of the legislature. Want of power to depart from the legislative intent exists as clearly in remedial as in penal statutes; yet this objection has never been urged against a liberal construction of remedial statutes. Where liberal construction statutes have been passed, courts have never raised this objection to their enforcement, and only one court has doubted the power of the legislature to "direct the judiciary in the interpretation of existing statutes".

It has further been claimed that as the state makes the laws, they should be most strongly construed against it. But the contract analogy is weak, for the state is presumably acting in the public interest in enacting criminal statutes, and need not in every case be subjected to a rule of interpretation designed to secure justice between private parties. Nor can the rule be justly defended as a bulwark against tyranny in a country where both executive and legislature are elected by the people; the rule has never achieved the dignity of a constitutional amendment.

Obviously, the original reason for the growth of the rule, to mitigate the extension of capital felonies, no longer applies to all penal statutes, if indeed it was ever of such widespread application; this has often been recognized in states where the rule has been abrogated, and where this argument is still made, it has been limited to those few statutes carrying punishments believed by the courts to be disproportionately severe as compared with the acts sought to be punished.

There remains for consideration only Mr. Justice Holmes' statement in *McBoyle v. United States*² that it is "reasonable" for penal statutes to be construed to give "fair warning" of "what the law intends to do if a certain line is passed" in language "that the common world will understand". Why such warning should be needed in murder and theft, two crimes as to which Mr. Justice Holmes himself

² 283 U.S. 25, 51 S.Ct. 340, 75 L.Ed. 816 (1931). The Court held that an airplane was not "an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not running on rails" and hence did not come under the National Motor Vehicle Theft Act. 41 Stat. 324 (1919), 18 U.S.C.A. § 408 (1927). The result does not seem improper, but the language has already served to mislead federal district courts. In *United States v. Linehouse*, 58 F.2d 395, 398 (E.D.S.C.1931), rev'd, 285 U.S. 424, 52 S.Ct. 412, 76 L.Ed. 843 (1932), it was cited as an authority for a strict construction of 35 Stat. 1129 (1909), 18 U.S.C.A. § 334 (1927), penalizing sending "every obscene, lewd or lascivious and every filthy" book or letter through the mails. And in *Metro-Goldwyn-Mayer Dist. Corp. v. Bijou Theatre Co.*, 50 F.2d 908, 910 (D.Mass.1931), the case was cited as authority for the proposition that a new invention (motion pictures) was not within the copyright statute; this decision was reversed in 59 F.2d 70 (C.C.A.1st, 1932). Nor is the *McBoyle* case consistent with earlier cases holding that the offense of "unduly restraining competition or unduly restraining trade to the prejudice of the public" under the Supreme Court's interpretation of the Sherman Anti-trust Act is sufficiently definite. *Nash v. United States*, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232 (1913), upheld the constitutionality of the Act against attack on grounds of indefiniteness. This hardly describes the offense "in language that the common world will understand".

admits that "it is not likely that a criminal will carefully consider the text of the law before he murders or steals," or especially in transporting stolen property, as in the McBoyle case itself, where the offense was clearly a crime under the state laws, and the only question was as to federal prosecution, is far from self-evident.³ Even if "fair warning" had been called for in the particular case, as it undoubtedly is in many crimes, it was unnecessary to lay down a general rule. Simply because a liberal construction might work injustice in some cases is no proper reason for inflicting on the people the rule of strict construction in all cases.

For Liberal Construction. The argument for liberal construction of non-penal statutes has been put forcibly by Dean Pound nearly 20 years ago in an article concluding: "The public cannot be relied upon permanently to tolerate judicial obstruction or nullification of the social policies to which more and more it is compelled to be committed."⁴ This argument is equally applicable to penal statutes, except insofar as "political liberty requires clear and exact definition of the offense." The public is already impatient with the refined, and for practical purposes unnecessary, distinctions embodied in the penal codes. To make Hauptmann's conviction for murder in the first degree turn on whether the window in the nursery was open or shut, with the law until comparatively recently unsettled if the window were partially open, does not commend itself to the average man. Strict construction of such statutes has completed the degradation of the substantive criminal law in his mind,⁵ equaled in futility only by the disgraceful pyrotechnics with which the procedure is carried on in a *cause celebre*. An attitude of liberal construction goes far, on the other hand, to make the law appear rational.

Changing conditions of modern civilization, and the growth of scientific knowledge on criminology, render imperative a new approach to the problems of crime. New categories of crimes and criminals cannot always be accurately defined on the first attempt. Shall the

³ The point at issue here should not be confused with prosecution under regulations having the force of law but which have never been published. Griswold, "Government in Ignorance of the Law—A Plea For Better Publication of Executive Legislation" (1934) 48 Harv.L.Rev. 198. The publication of a statute, no matter how liberally it may be construed, gives notice of the approximate limits of the crime. It is only if punishment is regarded as retributive (that is, where one who has freely committed the prohibited act, knowing that it was prohibited, is punished in order to expiate the evil which he has done) that it should be important that every criminal be afforded an opportunity to know precisely what acts are prohibited. Clearly retribution should have little part in determining present-day principles of criminal law. See Glueck, "Principles of a Rational Penal Code" (1928) 41 Harv.L.Rev. 453, 456-458.

⁴ "Common Law and Legislation" (1908) 21 Harv.L.Rev. 383, 407.

⁵ See the biting criticism in Waite, *Criminal Law in Action* (1934) 16: "But for a century or more it has been the policy of the judiciary—a policy now gradually changing—to utilize casuistic plausibility or any dubiety of the situation for the benefit of the accused rather than for the immediate safety of society." This was apropos of the reversals of convictions in *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906), and *People v. Rizzo*, 246 N.Y. 334, 158 N.E. 888 (1927), upon a strict construction of the New York attempt statute; but it has general application

new machinery be nullified from the start under the guise of "strict construction", or shall it be carried out liberally in the spirit in which it is conceived? Merely to state the issue is to answer it.

But this does not mean that *all* penal statutes should be liberally construed. Political liberty does require that people should be able to pursue certain types of conduct with definite assurance of the bounds of criminal liability.⁶ Carelessly drafted legislation may still require limitation to avoid unforeseen consequences. The doctrine of strict construction often returns like Banquo's ghost to trouble courts committed by legislation and decision to the principle that it has ceased to exist. Doubtless some courts have deliberately ignored their liberal construction statutes, preferring to hold to strict construction than to have to apply the new doctrine in all cases, with the inevitable occasional injustice which it would bring. Some compromise is necessary.

The conclusions which may be drawn from the foregoing are two-fold: first, that there is no sound reason for a general doctrine of strict construction of penal statutes, and *prima facie* all such should have as liberal a construction as statutes generally, and second, that certain penal statutes should be strictly construed to avoid injustice. These exceptions range themselves into a few fairly well defined categories.

⁶ Although there is usually a twilight zone between honest conduct and crime, in which the defendant should move at his peril, so that notice of the precise boundaries of the crime is not necessary to prevent injustice, this is by no means true of all penal statutes. For instance, *Rehnecke v. People*, 15 Ill.App. 241 (1884), where a mine owner paying his men by the day and using mining machinery was held not within a statute requiring mine owners to buy a track scale and weight their coal, the weight to be the basis on which wages of "persons mining coal" were to be computed; *State v. Read*, 102 Iowa 572, 144 N.W. 310 (1913), where an automobile driver with two lamps on the dashboard of his automobile was held not to violate a statute requiring "two lamps on the front" of the vehicle; *State v. Prather*, 79 Kan. 513, 100 P. 57 (1909), where a Sunday baseball game was held not within a statute prohibiting "horse racing, cock fighting, or playing at cards or games of any kind" on Sunday; *State v. Hanchette*, 88 Kan. 864, 129 P. 1184 (1913), where the selling of hydrogen pyroxide in a 5 and 10¢ store was held not within a statute prohibiting the sale of "medicine" in a store which had no registered pharmacist; *Commonwealth v. Standard Oil Co.*, 129 Ky. 744, 112 S.W. 902 (1908), where filling customers' gasoline tanks weekly under standing orders was held not to be "peddling" under a statute requiring peddlers' licenses; *State v. Sloan*, 139 La. 881, 72 So. 428 (1916), where an additional flat service charge of 25¢ was held not within a statute imposing a penalty for charging "for more electricity" than the meter showed to have been used; *Libby v. New York, N. H. & H. Ry.*, 273 Mass. 522, 174 N.E. 171 (1930), where use of a gasoline car with an air whistle by a railroad corporation was held not within a statute requiring "a steam whistle to be placed on each locomotive engine passing upon its railroad"; *State v. Fisher*, 53 Or. 38, 98 P. 713 (1908), where possession, during the closed season, of a deer killed during the open season was held not within a statute prohibiting possession of a deer "during the season when it is unlawful to take or handle such deer"; *State v. Hoffman*, 110 Wash. 82, 188 P. 24 (1920), where an owner of a gill net not catching any salmon was held not liable to a statutory penalty for not filing a "report . . . stating the number of salmon . . . caught"; *State v. Herr*, 151 Wash. 623, 276 P. 870 (1929), where a hunter killing an elk on October 20 was held not liable under a statute prohibiting killing elk except "between the 20th day of October and the first day of November".

Effect of a Disproportionate Penalty. A statute imposing a penalty which the court regards as disproportionately heavy for the acts committed can hardly escape a strict construction. It was with such statutes, taking away benefit of clergy, that the doctrine arose, and the history of the past four hundred years has amply proved that under such circumstances courts, juries, and even prosecutors will cooperate to defeat a clearly avowed "legislative will" by any available means. But a strict construction for this reason is often the fault of the courts, and not of needlessly severe legislation.

Courts are not always fully aware of the social interests at stake, or may lack the necessary "judicial humility" to bow to what may seem undue harshness on the part of the legislature, but a power of judicial limitation in these cases does exist, and is exercised. It would serve only to perpetuate an unnecessary conflict between principle and decision to ignore this tendency; hence, a cautious modification of the rule of liberal construction here seems proper.

Such a relaxation does not often involve real judicial interference with legislative policy. An extension of a statute by construction to cover acts as to which the penalty may reasonably be believed disproportionate would usually do violence to the intent of the legislature.

A careful distinction is necessary, however. It is not whether the penalty is light or heavy which should control, but whether it is *disproportionately* light or heavy as compared with the culpability of the conduct which is sought to be penalized.⁷ As a practical matter, the minimum penalty rather than the maximum should be important, at least where there is some protection against arbitrary action on the part of the trial judge by appeal on the ground that the sentence is excessive, as there is in England and a few states. If such appeal becomes common, or if some sentencing tribunal is provided in which the upper court has confidence, the widespread availability of probation and suspended sentence, and the low minimum penalty for most crimes even where these are not available, will largely do away with the necessity of this type of strict construction.

Where the existing penal sanctions seem to the courts to be grossly inadequate, great ingenuity is sometimes displayed in bringing about a conviction for some greater crime which only by analogy could cover the case. Here all that is necessary is to give those

⁷This was the case in *Buzzard v. Commonwealth*, 134 Va. 641, 114 S.E. 664 (1922), where the statute punishing attempt to rape, liberally construed, would have inflicted a more severe penalty than that imposed by another statute for the completed act. The court construed the attempt statute strictly to avoid this result. The right result for the wrong reason was reached in *State v. Blaisdell*, 118 Me. 13, 14, 105 A. 359, 360 (1919), where the court quoted with approval the following rule: "The degree of strictness applied to the construction of a penal statute depends in great measure upon the severity of the statute." But the punishment (optional life imprisonment for "defiling a spring") was certainly disproportionate to the defendant's act, stirring up the mud in the bottom of a spring with a clean stick, and the conviction was reversed.

courts still controlled by the common-law rule the right to interpret the statutes liberally.

Effect of Honest Attempt at Compliance. Where an honest attempt is commonly made by those to whom the law applies to ascertain the precise limits of the legal sanction imposed, particularly in the regulation of business practices for the social welfare, indefiniteness is usually fatal to the enforcement of the law. It is unfair to those affected to inflict punishment, which is *ex post facto* by nature, for acts whose criminality was not readily apparent before the commission of the crime, where the honest motives of the defendant cannot be questioned, as is true in many crimes. And a mistake as to the proper interpretation of the statute itself is never a defense.⁸

Strict construction plays an important part in preventing this injustice. Grammar and deductive logic, narrowly applied, give a reasonably certain clue to the meaning of most statutes, but it is difficult to forecast with any approach to certainty the limits of liberal interpretation.

The New York Court of Appeals is almost the only court which has seen this problem and attempted to solve it. There have been two lines of decision: that ordinarily penal statutes are to be liberally construed, as required by the New York construction statute, and that certain statutes are to be strictly construed, since "The citizen is entitled to an unequivocal warning before conduct on his part, which is not *malum in se*, can be made the occasion of a deprivation of his liberty or property."⁹

The use of the phrase "*malum in se*" by the New York court is unfortunate; with so many different applications to different problems, it has long since lost any settled meaning, if indeed it ever had any. But the principle upon which the New York court is acting is clear. Where the conduct of the accused is not consciously directed against the interests of others, and is criminal only because deemed by the legislature to be contrary to general social policy, he should be given "fair warning" of the existence of those interests and the sanctions

⁸ *State v. Foster*, 22 R.I. 163, 46 A. 833 (1900); see Keedy, "Ignorance and Mistake in the Criminal Law" (1918) 22 *Harv.L.Rev.* 75.

⁹ *People v. Phylfe*, 136 N.Y. 554, 559, 32 N.E. 978, 979 (1893), quoted with approval in *People v. Shakun*, 251 N.Y. 107, 114, 167 N.E. 187, 189 (1929). Another statement of this distinction is found in *People v. Stoll*, 242 N.Y. 453, 152 N.E. 259 (1926): "It [the legislature] may impose penal liability upon a public officer who so conducts himself that the finger of suspicion, that his public acts are not governed exclusively by considerations of public benefit, may be pointed at him. The courts should give liberal construction to statutes which tend to accomplish that purpose but they may not give a strained construction to a statute which will result in the punishment of a public officer for acts performed in the public view without corrupt motive and which do not tend to introduce the influence of possible adverse private interest into the performance of acts which should be dictated only by considerations of public welfare." *Id.* at 466, 152 N.E. at 263-64. Cf. *Commonwealth v. Standard Oil Co.*, 129 Ky. 744, 112 S.W. 902 (1908), where the court said: "Criminal statutes should never be construed as to catch those who have honestly conformed to the law as it has been expounded by the proper authorities". *Id.* at 749, 112 S.W. at 903-04.

imposed to protect them. An analysis of the New York cases on this matter brings this out clearly.

It is difficult to lay down a practical guide defining this class of crime. Obviously, the construction of the statute cannot depend on whether the particular defendant has made a *bona fide* attempt to comply with its terms, and it is probably impossible to develop statistical data as to the habitual conduct in this respect of those affected by a particular statute. The gist of this exception is the tendency of a liberal construction to mislead persons acting in good faith and honestly attempting to comply with the law, and a general exception in these terms should prove sufficient.

Effect of Changed Conditions. The spasmodic attempt to enforce old legislation which is inapplicable to changed social or economic conditions presents another instance in which the doctrine of strict construction provides some measure of needed protection against administrative tyranny. The dead hand of the past, where it bars rather than leads social progress, must be narrowly limited in scope until outright repeal becomes possible.

Blue laws are but one example; they are commonly construed narrowly. The survival of private suits for penalties as a means of enforcing the criminal law is likewise an anachronism now that the enforcement of the law has been intrusted to public prosecutors, and here also strict construction is the rule. It is only in procedure that the courts often fail to take account of changed conditions.¹⁰

Strict construction of statutes inapplicable because of changed social or economic conditions does not do violence to the intent of the legislature in the true sense. Although usually perpetual in form, statutes are passed in the light of the conditions at the time, and there would seem no proper ground for inferring that the legislators of one generation ever intended to insist upon a broad interpretation of their statutes where they run clearly contrary to the social and economic policies of a subsequent generation.

ROSCOE POUND, COMMON LAW AND LEGISLATION

21 Harv.L.Rev. 383, 386-388 (1908).

We are told commonly that three classes of statutes are to be construed strictly: penal statutes; statutes in derogation of common right; and statutes in derogation of the common law. An eminent authority has objected to all of these categories and has pointed out that all classes of statutes ought to be construed with a sole view of ascertaining and giving effect to the will of the lawmaker.¹ But there

¹⁰ A refreshing exception is *People v. Lieber*, 357 Ill. 423, 192 N.E. 331 (1934), where the Supreme Court of Illinois granted a rehearing and reversed its first decision, which would have freed a large number of defendants simply because a grand jury panel of 60 instead of the statutory 23 was summoned, although the 23 grand jurors finally selected were all qualified.

¹ "The idea that an act may be strictly or liberally construed, without reference

is more justification for some of these categories than for others. For the rule that penal statutes are to be construed strictly something may be said. When acts are to be made penal and are to be visited with loss or impairment of life, liberty, or property, it may well be argued that political liberty requires clear and exact definition of the offense. So also the rule that statutes in derogation of common right are to be construed strictly has some excuse in England where there are no constitutional restrictions. There it is really another form of stating Blackstone's tenth rule, that interpretations which produce collaterally absurd or mischievous consequences are to be avoided.² In the United States it means that interpretations which would make an act unconstitutional are to be avoided, or else it is equivalent to Blackstone's tenth rule. Whenever it is applied beyond these limits, it is without excuse and is merely an incident of the general attitude of courts toward legislation. The proposition that statutes in derogation of the common law are to be construed strictly has no such justification. It assumes that legislation is something to be deprecated. As no statute of any consequence dealing with any relation of private law can be anything but in derogation of the common law, the social reformer and the legal reformer, under this doctrine, must always face the situation that the legislative act which represents the fruit of their labors will find no sympathy in those who apply it, will be construed strictly, and will be made to interfere with the *status quo* as little as possible. The New York Code of Civil Procedure of 1848 affords a conspicuous example of how completely this attitude on the part of courts may nullify legislative action.³ Some regard this attitude toward legislation as a basic principle of jurisprudence.⁴ Others are content to make of it an ancient and fundamental principle of the common law.⁵ In either event they agree in praising it as a wise and useful institution.⁶ It is not difficult to show, however, that it is not necessary to and in-

to the legislative intent, according as it is viewed either as a penal or a remedial statute, either as in derogation of the common law or as a beneficial innovation, is in its very nature delusive and fallacious." Sedgwick, Construction of Const. and Stat. Law, c. viii, fn.

² 1 Bl.Comm. 91.

³ "You have the State of New York before you as a terrible example. I believe our practice today is infinitely more technical than that in New Jersey. Even the attempt to abolish forms of action and especially the attempt to abolish the distinction between law and equity practice have been dismal failures. The distinction between *trover* and *assumpsit* is today more rigidly observed than under the common law practice. It is impossible to amend upon a trial from *trover* to *assumpsit* or *vice versa*." W. B. Hornblower, quoted in 2 Andrews, Am.Law, 2 ed., sec. 635, n. 29. But the impossibility of amendment spoken of and the rigid distinction were introduced into code practice by the judges in the teeth of express code provisions upon common law considerations. *De Graw v. Elmore*, 50 N.Y. 1. See N.Y.Code Civ.Proc.1848, secs. 69, 173, 176.

⁴ Robinson, Am.Jurisp., sec. 301.

⁵ E.g., Carter, Law, Its Origin, Growth and Function, 308.

⁶ Dr. Robinson says of the proposition that statutes in derogation of the common law are to be construed strictly that it is "a positive but reasonable rule." Am.Jurisp., sec. 301. Mr. Carter says that judges "displayed their wisdom by adopting it."

herent in a legal system; that it is not an ancient and fundamental doctrine of the common law; that it had its origin in archaic notions of interpretation generally, now obsolete, and survived in its present form because of judicial jealousy of the reform movement; and that it is wholly inapplicable to and out of place in American law of today.

NOTE

The following clause in the bill for the Minnesota Interpretation act (An Act Relating to Statutory Laws, now 1945 Minn.Stat. c. 645) as introduced was struck in the Judiciary Committee of the Senate:

"Strict and Liberal Construction. The rule that penal provisions, retroactive provisions, provisions imposing taxes, provisions conferring the power of eminent domain, provisions exempting persons and property from taxation, provisions exempting property from the power of eminent domain, and laws in abrogation of the common law are to be strictly construed shall have no application to the laws of this state, but every such provision shall be construed according to the fair import of its terms, to promote justice and effect the purpose of the law.

"All other provisions of any law shall be liberally construed to effect their objects and to promote justice."

There are similar provisions in the interpretation statutes of California, Idaho, Pennsylvania, South Carolina and South Dakota.

D. Concerning Remedies

WIGINGTON v. MID-CONTINENT ROYALTY CO.

Supreme Court of Kansas, 1930. 130 Kan. 785, 288 P. 749.

JOCHEMS, J. Plaintiff brought this action to cancel a certain oil and gas royalty conveyance on 80 acres of land and to quiet her title to the land. Judgment was rendered for plaintiff, and defendants appeal.

The case was submitted to the court upon the petition of the plaintiff and the exhibits attached thereto, the answer of the defendants, reply of plaintiff, the trust agreement under which the defendant company was organized, and a statement showing a list of the royalties owned by the defendant company which have been acquired by giving in exchange therefor units of ownership in the royalty company. No evidence other than the foregoing was introduced.

The petition of the plaintiff, after alleging that the defendant company was a common-law trust, that defendants Graham and Cline were the president and secretary thereof, respectively, and the address of the defendants at Newkirk, Okl., alleged further that the defendant company had ever since August 17, 1925, been exercising, or purporting to exercise, corporate powers in the state of Kansas, and selling and disposing of units or shares of the defendant company; that the company never at any time had any authority to exercise corporate powers, and never had any authority from the Kansas Blue Sky Board to sell or dispose of units, interests, or shares; that the

plaintiff is the owner of 80 acres of land (describing it), and that in February, 1926, the defendants Graham and Cline came to plaintiff's residence on the lands described in her petition, and proposed that she give to the company a royalty pooling agreement any royalty conveyance, conveying to the Mid-Continent Royalty Company, its successors and assigns, an undivided one-half interest in and to the oil and gas royalty, exclusive of oil and gas lease bonuses and rental moneys on the lands; that they represented to her that the contract and royalty conveyance would be for a term of 21 years and no longer; that the company owned other royalty contracts upon lands on which drilling operations were being conducted; and that within a few months she would be drawing large dividends from the units in the company. The plaintiff alleged that she was illiterate, and that defendants knew she could neither read nor write; that defendants further represented to her that the company was duly authorized to transact business in the state of Kansas, and that its method of doing business had been submitted to, and approved by, the Blue Sky Board of Kansas; that the company had been duly authorized to issue units or shares therein, and that in consideration of the foregoing the plaintiff entered into a royalty pooling agreement, and made a royalty conveyance in return for a certificate of 2,240 units in the defendant company; that thereafter, on about June 10, 1927, she learned that the royalty pooling agreement and conveyance covering her estate provided for a term of not only 21 years, but for as long as oil and gas were thereafter produced in paying quantities. She learned also that the company was not a corporation, and had no authority to do business in the state of Kansas; that the company is what is known as a common-law trust under which all unit holders are individually liable for the debts of the company, and learned further that the company had never obtained permission from the Blue Sky Board of Kansas to sell its units or interests.

She learned also that the company had no production on any acreage owned by it and no drilling wells on any of its acreage; that immediately upon learning such facts she demanded a reconveyance to her of the royalty and offered to return the units which she had received and in her petition tendered the units into court.

Does the Blue Sky Law of Kansas (Rev.St. 17—1201 to 17—1222, inclusive) apply to the transaction shown in this case?

Appellants urge that, inasmuch as they were engaged in forming a pool whereby they took the royalty conveyance from the plaintiff and gave her in exchange therefor the certificate for 2,240 units, this did not constitute a sale within the meaning of the Blue Sky Law. Appellants admit that the Blue Sky Law does apply to the sale of securities or shares of a common-law trust the same as to the stock of a corporation, and that this has been so decided by this court in *Home Lumber Co. v. State Charter Board*, 107 Kan. 153, 190 P. 601. The appellants, after setting forth the statute which relates to the sale of speculative securities in the state of Kansas (Rev.St. 17—1202), urge that the statute by its terms applies only to a "sale" or "offer for

sale." Appellants further contend that the statute is penal in its nature; that it must be strictly construed; that the Legislature has the power to enlarge the scope of the criminal statutes, but the court has no power to do so. The appellants then cite some authorities on the definition of the word "sale."

The law in question was adopted by the Kansas Legislature in 1915, and is chapter 164, Laws of 1915, as subsequently amended in 1919. The title of the act reads: "An act to prevent unfairness, imposition or fraud in the sale or disposition of certain 'securities' herein defined by requiring an inspection thereof, providing for such inspection, supervision and regulation of the business of any person, association, partnership, or corporation, engaged or intending to engage, whether as principal, broker or agent, in the sale of any such securities in the state of Kansas, as may be necessary to prevent unfairness, imposition or fraud in the sale or disposition of said securities, and prescribing penalties for the violation thereof. . . ."

The legislative purpose is made clear by the title of the act. The object which the Legislature had in mind was to prevent unfairness or fraud in the *sale or disposition* of securities. No contention is here made that the securities of the defendant were not within the definitions of the term "securities" as defined in the act.

In the case of *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 177 N.W. 937, 938, the court discusses the question of the construction of the Blue Sky Law. In that case it was said: "The purpose of the statute is to protect the public against imposition. It is a new form of regulatory law which, in the course of a few years, has swept over 33 states. It has been said that its popular name indicates the evil at which it is aimed, that is, speculative schemes having no more basis than so many feet of blue sky (*Hall v. Geiger-Jones Co.*, 242 U.S. 549, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas.1917C, 643; *State v. Agey*, 171 N.C. 831, 88 S.E. 726), and that it is intended to put a stop to the sale of shares in visionary oil wells, nonexistent gold mines, and other 'get-rich-quick' schemes calculated to despoil credulous individuals of their savings. It is a proper and needful exercise of the police power of the state and should not be given a narrow construction; for it was the evident purpose of the Legislature to bring within the statute the sale of all securities not specifically exempted To lay down a hard and fast rule by which to determine whether that which is offered to a prospective investor as such a security as may not be sold without a license would be to aid the unscrupulous in circumventing the law. It is better to determine in each instance whether a security is in fact of such a character as fairly to fall within the scope of the statute."

The action before us at the present time is civil and not criminal in its nature. It is one in which the operation of the statute applies to the offense and not to the offender. Since it is unnecessary to a decision of this case, we shall not at this time determine whether the statute shall be strictly or liberally construed in cases of criminal prosecution

for violation of the law, but will determine the construction to be given the statute in all cases where it operates on the offense.

Realizing the difficulty courts have had in attempting to establish an exact definition of fraud, and the fact that the Legislatures in enacting laws for the purpose of preventing fraud are confronted with this same difficulty, the rule of liberal construction of statutes designed to prevent fraud is unquestionably a proper one where the statute acts upon the offense. The general rule contended for by appellants is subject to an exception where the statute is one designed to prevent fraud when the application of the statute acts upon the offense and not the offender. It is our conclusion that in civil actions such as the case at bar, where the statute acts upon the offense committed, the Blue Sky Law is entitled to a liberal construction in order to accomplish the purpose which the Legislature had in mind when it enacted the law. In view of this liberal construction, does the transaction shown by this record constitute a sale of securities of the defendant company and come within the provisions of the Blue Sky Law?

It is to be noted that the title of the act embraces "sale or disposition." Numerous authorities are cited by both the appellants and the appellee upon the definition of "sale." . . .

Applying the definition laid down in the authorities cited, it is readily seen that the plaintiff parted with her interest in the oil and gas rights for a consideration; namely, the units of the defendant company.

The appellee has called our attention to the case of *Marney v. Home Royalty Ass'n*, recently decided by the Supreme Court of New Mexico and reported in 286 P. 979. This was an action involving the construction of the Blue Sky Law of that state. In that case it was held:

"The Blue Sky Law . . . is penal and to be strictly construed; but not to exclude the ordinary meaning of the term employed in denouncing the act, in favor of its narrower meaning, where the latter meaning would tend to defeat the salutary purposes of the legislation. [Syl. 2.]

"The consideration for the 'speculative security' being a conveyance of minerals and mineral rights, the transaction is a 'sale' within the prohibition of the Blue Sky Law. [Syl. 3.]"

The facts in that case were almost identical with the case at bar. The defendant in that case was a common-law trust operating under the same plan as the defendant in this case. The action was brought to set aside a royalty conveyance made to the plaintiff in exchange for a certificate of participation issued by the defendant. As here, the defendant contended that the transaction was a mere exchange or barter, and was not prohibited by the word "sale." In that case the court further said:

"We are satisfied that the strict construction, to which we are enjoined in the case of a penal statute, does not require that we close our eyes to a reasonable and ordinary meaning of the word 'sell' and

plant ourselves upon the narrowest meaning which it will bear; especially where such interpretation would in many cases defeat the salutary objects of the legislation and open the door to evasion. *Ex parte De Vore*, 18 N.M. 246, 136 P. 47. While the word 'sell' seems to be employed throughout in the body of the act, the title informs us of the purpose to prevent fraud in the 'sale or disposition' of securities. Every reason for prohibiting a sale of speculative securities exists for prohibiting a disposition of them by way of exchange. The narrow interpretation contended for, cannot, in our judgment, have been the intention of the Legislature."

The transaction involved in this case was a "sale of the securities of the defendant company within the meaning and intent of the Blue Sky Law."

Since such a transaction is prohibited by the statute, it is void. The statute being one clearly intended for the protection of plaintiff, she is entitled to a recovery of that which was illegally obtained from her.

. . . the judgment is affirmed.

NOTE

See note, "Blue Sky Legislation", 23 Iowa L.Rev. 102 (1937) esp. at pp. 109-111.

JACKSON v. NORTHWEST AIRLINES

District Court of the United States, 1047. 70 F.Supp. 501.

NORDBYE, DISTRICT JUDGE. Plaintiffs are seeking overtime pay allegedly due them as employers of defendant under the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 et seq., hereinafter also called the Wage and Hour Act. For convenience all plaintiffs will be referred to as "plaintiffs", and the defendants will be referred to collectively as "defendant". Defendant contends that Section 13(a) (4) of the Act exempts defendant and all its employees, including plaintiffs, from the Act's protection. Because a great number of plaintiffs seek recovery, the Court, after stipulation by the parties, has agreed to try initially the general issue, Does the exemption set forth in Section 13(a) (4) prevent each plaintiff from recovering? For the purposes of these proceedings, defendant concedes that, but for Section 13(a) (4), plaintiffs would be covered by the Act.

Defendant was incorporated in 1934 as an air carrier, and from that time until about January, 1942, it was exclusively engaged in operating a commercial airline from Chicago and the Twin Cities to the northwestern United States and to part of Canada. It maintained its own buildings, planes, and equipment, and employed many persons to care exclusively for its airline operations and property. But with the advent of war, defendant was requested by the United States Government to perform various projects necessary to the war effort. In January or early February, 1942, defendant was requested to, and did, establish and operate a military air transport route from the United

States to Alaska. During the war, defendant flew supplies, equipment, and personnel over this route for the Government and for the Military Department. The operation was known as the "Northern Region Operation".

In February, 1942, the defendant was requested to, and did, begin modifying in St. Paul, Minnesota, army planes which were manufactured on the production lines of various companies and which, together with military planes from storage and parking fields, or from combat zones, were flown to defendant for various structural or mechanical changes, alterations, or additions in the planes or the military equipment thereon. This project permitted changes which experience and added knowledge showed were desirable, but which could not be incorporated with maximum production efficiency into the quantity production line procedures. Defendant had modified some of its own commercial planes prior to the war, so it had some experience in this particular line of work.

In June, 1942, the defendant also was requested, and agreed to carry on modification work in connection with the installation of certain aircraft instruments which were made in Minneapolis, and in September, 1942, defendant also established, at the Government's request, an ice research project in connection with the de-icing of propellers and wings. The evidence indicates that the defendant had been experimenting privately upon this problem prior to the war. Defendant also performed other war services, including the operation of a training school and flying troops and supplies to foreign countries and between domestic airfields.

The plaintiffs in this proceeding were all employed upon the modification project. They were paid overtime under the Railway Labor Act, 45 U.S.C.A. § 151 et seq., at the rate of time and one-half for all hours worked in excess of 48 hours per week. In this proceeding, they are seeking overtime under the Wage and Hour Act for the eight hours worked over 40 hours per week and for which they were not paid under the Railway Labor Act. They also seek an equal amount in liquidated damages under Section 16(b) of the Wage and Hour Act, 29 U.S.C.A. § 216(b).

Section 13 of the Wage and Hour Act provides: "Section 13(a). The provisions of sections 6 and 7 . . . shall not apply with respect to . . . (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; . . ." 52 Stat. 1067, 29 U.S.C.A. § 213(a) (4).

Plaintiffs concede that this provision exempts defendant's commercial airline employees and activities from the Wage and Hour Act. But defendant argues (1) that Section 13(a) (4) exempts plaintiffs if defendant is subject to the Railway Labor Act with respect to any of its activities, including its airline activities, even if defendant is not subject to the Railway Act with respect to its modification activities, and (2) that the Railway Labor Act intends to subject a carrier to its jurisdiction for all purposes and all its activities if the carrier is

subject to that Act for any activity at all. Defendant lastly urges that, in any event, the modification project actually was a part of, and so connected with, the airline activities that in fact the project was a carrier activity and therefore was covered by the Railway Labor Act. These three alternative contentions, which plaintiffs dispute, create the issues. The burden of proof is upon defendant, who urges the exemption. *Walling v. De Soto Creamery & Produce Co.*, D.C.Minn.1943, 51 F.Supp. 938; *Fleming v. Hawkeye Pearl Button Co.*, 8 Cir., 113 F.2d 52.

Whether plaintiffs are exempt from the Wage and Hour Act upon the basis of defendant's first two contentions obviously depends upon the meaning of Section 13(a) (4) of the Wage and Hour Act and Sections 181-188 of 45 U.S.C.A., the latter sections being the Railway Labor Act applicable to air carriers.

Although defendant contends that the literal wording of Section 13(a) (4) supports its first contention, the section does not cover the problem specifically. That is, it states only that an employee of a carrier "subject" to the Railway Labor Act is exempt from the Wage and Hour Act. It does not state specifically if the exemption exists only when the Railway Labor Act supplies to the specific activity or work in litigation, or if the exemption exists even when the Railway Labor Act is applicable only to other work or activities in which the employer is engaged as a carrier. Broadly and literally construed, the provision may sustain the latter meaning, as defendant contends. But it is well settled that the exemption provisions of the Wage and Hour Act must be construed strictly, not broadly, and that its remedial provisions must be construed liberally, so that the Act's words will accomplish the purpose at which the Act is aimed. *Phillips Co. v. Walling*, 1945, 324 U.S. 490, 65 S.Ct. 807, 89 L.Ed. 1095, 157 A.L.R. 876; *Gemsco, Inc., v. Walling*, 1944, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921. See also *Walling v. Consumer Co.*, 7 Cir., 1945, 149 F.2d 626; *Fleming v. Hawkeye Pearl Button Co.*, 8 Cir., 1942, 113 F.2d 52.

The purpose of the Wage and Hour Act was to eliminate, not to perpetuate, substandard, undesirable labor conditions and their effect upon commerce. It sought to exclude from interstate commerce goods, produced for commerce under conditions detrimental to standards of living necessary to the health and general well-being, and to prevent the use of interstate commerce as the means of spreading and perpetuating substandard labor conditions among the workers of the several states. *United States v. Darby Lumber Co.*, 1941, 312 U.S. 100, 657, 61 S.Ct. 451, 85 L.Ed. 609, 132 A.L.R. 1430. This was conceived by Congress to be a basic need of commerce, and it is the public policy which must be considered when interpreting the meaning of the Act's provisions.

To accomplish this purpose, and to give heed to the public policy, Congress could not have intended that the exemption applied merely because the Railway Labor Act applied to another activity in which

the company was engaged. As hereinafter noted, the Railway Labor Act does not apply merely because the company's other activities are subject to the Railway Labor Act. The activity in litigation must be subject to that Act in order for it to apply. So if defendant's broad construction were adopted, many employees would be denied protection of the Wage and Hour Act as well as the Railway Labor Act, and the conditions which the Wage and Hour Act sought to prevent would flourish with its sanction. No reason why companies which perform air carrier activities which are subject to the Railway Labor Act should be favored with respect to their non-carrier activities has been pointed out or is apparent. The Railway Labor Act does not require it. Nor does the purpose of the Wage and Hour Act permit it. And no basis for assuming that this proposed favoritism was the purpose for including Section 13(a) (4) in the Wage and Hour Act is apparent. On the contrary, the opposite is the fact. . . .

Congress undoubtedly determined that public interest required that the benefits of the Railway Labor Act should be accorded the air transportation industry. The apparent success of the Act in bringing labor peace in rail transportation was at least one of the motivating reasons for the extension of the Act to the growing and vital national industry of air transportation. In passing Section 13(a) (4) of the Wage and Hour Act, Congress evidently intended to avoid any duplication or conflict of authority over the hours of employment of employees in the air transportation industry. For this reason, such employees were to be exempt from the Wage and Hour Act and jurisdiction over them was exclusively relegated to the Railway Labor Board. However, if any employee of an air carrier was not subject to the jurisdiction of the Railway Labor Act and its intent and purposes, then it must follow that there would be no conflict of Federal authority which Congress sought to avoid and the reasons for the exemption would be nonexistent. No cogent reason is advanced why the exemption could be extended beyond its aims and objects and beyond the apparent intent of Congress in its passage. . . .

Section 13(a) (4) does not prevent plaintiffs from recovering. Plaintiffs are entitled to the protection of the Wage and Hour Act in so far as this exemption is concerned.

E. Concerning Territorial Application

IN RE ROBINSON'S ESTATE

Supreme Court of Nebraska, 1940. 138 Neb. 101, 202 N.W. 48.

EBERLY, JUSTICE. In this case, Yale University, a Connecticut corporation, appeals from the decision of the district court for Scotts Bluff county, which denied the appellant's claim for exemption from the payment of inheritance taxes on its interests in certain Nebraska lands devised to it by the terms of the last will of Edward S. Robinson, deceased. These lands, by the terms of the will of the deceased, upon the termination of the life estate created thereby, were given, devised,

and bequeathed "to Yale University, of New Haven, Connecticut, to be its absolutely." The intestate died on February 27, 1937, and his will was duly admitted to probate on July 17, 1937. Upon the probate of the will an appraiser for inheritance tax purposes was appointed by the county judge of Scotts Bluff county, who determined that the share of the devised lands taxable to Yale University was \$73,786, and that the inheritance tax, if levied, would amount to \$7,154.32 with interest at 7 per cent. per annum from February 27, 1937. On February 6, 1939, the county court denied appellant's claim for exemption as an educational institution under section 77-2201, Comp.St.1929, as revised in 1931 (Laws 1931, ch. 132) and on that basis levied the inheritance tax complained of. On appeal to the district court, that court affirmed the levy of the inheritance tax against Yale University, and denied its claim of exemption as an educational institution under such section 77-2201, Comp.St.1929, as amended.

Appellant's appeal to this court challenges the correctness of the order thus made on the sole ground that it is a corporation organized and operated exclusively for educational purposes without pecuniary gain, and thus is within the protection of the proviso which was added as an amendment to section 77-2201, Comp.St.1929, by chapter 132 of the session laws of 1931. This proviso is in the following terms, viz.: "Provided further, that all bequests, legacies, devises, or gifts, to or for the use of any corporation, organization, association or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of which is owned or used for financial gain or profit to either the owner or user or inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable or educational purposes, shall not be subject to any duty or tax, and no such duty or tax shall be assessed or collected after the taking effect of this act irrespective of the time of the death of the decedent or the fact of the pendency of his or her estate."

Appellant insists on the general rule repeatedly announced by this court, that, where the words of a statute are plain, direct and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice. [Citing cases.]

And further insists that it is the duty of the court to discover, if possible, the legislative intent from the language of the act (State v. City of Lincoln, 101 Neb. 57, 162 N.W. 138); and that the statute under consideration is so clear and unambiguous on its face as to preclude any construction whatever by the trial court. [Citing cases.] As applied to the instant case, no account is taken of the inherent limitation to which legislative power is properly subjected.

There is, however, another principle by which general words of a statute are limited in order that the law may conform to legislative intent.

The underlying doctrine . . . was well expressed by the supreme court of Missouri in the case of *In re Estate of Quirk*, in the fol-

lowing language, viz. [257 Mo. 422, 165 S.W. 1065, 51 L.R.A.,N.S., 817]:

"The general doctrine seems to be that *prima facie* the law should be held to have reference to persons and things within the territorial jurisdiction of the body enacting it, unless it clearly appears that another and different purpose should be gathered from the act itself. Presumptively the lawmaking power is acting in the interest of persons and things within the state. Presumptively the lawmakers in this case were looking after the interests of Missouri, and not legislating for charities in other states, and especially is this so when they were unloosing our own purse strings by this exemption clause. It means, if given the construction urged by the respondent, that a Missouri lawmaking body was releasing its hold upon a source of revenue for charities outside of the state. To give it that construction would, in effect, be to say that the lawmaking body was taking Missouri money to support foreign charities."

It is the view of a majority of the adjudicated cases that the reason or basis for conferring exemption from taxation on educational corporations by legislative provision is the fact that such institutions render service to the state in consideration of which they are relieved of certain tax burdens. *Davis v. Treasurer & Receiver General*, 208 Mass. 343, 94 N.E. 556; . . .

It is quite obvious that this reason usually assigned as the basis for this legislation is, in Nebraska, wholly inapplicable to foreign corporations, not only because of their nonresidence in the state, but being incompatible with the clearly announced policy of this state. In principle, the question presented in the instant case is one of first impression. However, the conclusions announced by Good, J., in the case of *In re Estate of Rudge*, 114 Neb. 335, 207 N.W. 520, 521, seem to be applicable and controlling in the present controversy, viz.: "It is a familiar rule that statutes exempting property from taxation should be strictly construed, and one contending that his property is exempt from such tax must show clearly that he is within the exceptions provided by statute. [Citing cases.]

"The same rule should be applied to a statute exempting certain legacies from an inheritance tax. To be exempt from an inheritance tax, a legacy must come within the strict letter of the statute. A careful examination of the statute under consideration does not disclose that a legacy to a religious or charitable society is exempt from an inheritance tax." . . .

On this basis, we find that the tax exemption claimed is one to which appellant, as a nonresident corporation, is not entitled.

It follows that the judgment of the district court is correct, and it is affirmed.

NOTE

In Baker, "Judicial Interpretation of Tax Exemption Statutes," 7 Texas L.Rev. 385 at p. 395, the author states: "In spite of the use of the term 'strict construction' we find that the courts have a tendency to construe tax exemption statutes

in favor of the state only when a well founded doubt exists as to the meaning of the statute. 'The rule of strict construction does not relieve the court of the duty of interpreting the exemption by the ordinary rules of construction in order to carry out the intention of the legislature.' The statement often is made in the opinions that the purpose or intent of the legislature is to guide. After examining a large number of tax-exemption cases the impression is created that there is no such thing as a rule of 'strict construction' in many fields of tax exemption. In fact, there seems to be a liberal attitude on the part of the courts where religious, charitable, or educational property is sought to be taxed, where public property is in issue, where special taxes are involved, and where the statute itself seems to require liberal construction."

F. Concerning Taxing Statutes

STATE v. GLANDER

Court of Appeals of Ohio, 1946. 69 N.E.2d 226.

MILLER, JUDGE. This is an original action in mandamus brought by the State of Ohio on the relation of William A. Williams, a citizen, resident and taxpayer of the State of Ohio.

The respondent is C. Emory Glander, a duly appointed, qualified and acting tax commissioner of the State of Ohio.

The relator prays that a writ of mandamus be issued commanding the respondent to levy and assess personal property taxes on the inventory of merchandise and other personal property owned and held by the Department of Liquor Control of the State of Ohio, which personal property is within the State of Ohio, and for such other and further relief as the relator may be entitled to. . . .

The relator seeks to have the respondent compelled to make personal property tax assessment against the Department of Liquor Control of the State of Ohio. He is seeking to have the State tax itself.

Taxpayers are defined in Section 5366, G.C. They include, so far as might possibly be favorable to the relator, "every person . . . doing business in this state." The term "person" is defined in Section 5320, G.C., as follows:

"The word 'person' as used in this title, includes firms, companies, associations and corporations; words in the singular number include the plural number, and words in the plural number include the singular number; and words in the masculine gender include the feminine and neuter genders."

The State of Ohio is not a firm, a company, an association or a corporation. It is a sovereignty. The doctrine seems to be that a sovereign state, which can make and unmake laws, in prescribing general laws, generally intends thereby to regulate, not its own conduct, but that of its subjects.

In 37 O. Jur., Par. 479, we find the following:

"Accordingly, the state is not bound by the terms of a general statute unless it is so expressly enacted, particularly where it is at-

tempted to enforce a direct liability against the state, or where any of the prerogatives, rights, titles, or interests of the state are sought to be divested. This exemption, however, has been declared not to include municipal corporations or other parties of a public character other than the state. Moreover, the state may, by express provision, be brought within the terms of a statute."

The statute provides nowhere that the state of Ohio is expressly included as being subject to assessment. It is well settled that statutes imposing taxes are to be strictly construed in favor of the party upon whom the tax is sought to be imposed and are not to be extended by implication beyond their clear import. . . .

For the foregoing reasons we are of the opinion that the petition of the relator fails to state cause of action.

G. Concerning the Sovereign

UNITED STATES v. UNITED MINE WORKERS OF AMERICA

District Court of the United States for the District of Columbia, 1946.
70 F.Supp. 42.

Action by the United States of America against United Mine Workers of America and another for declaratory judgment as to rights under coal mine operating agreement, for temporary injunction and for other relief. A temporary restraining order was issued, restraining defendants from continuing in effect a notice terminating the agreement, and the court issued a rule to show cause why defendants should not be held in contempt for violation of such temporary restraining order, and defendants moved to discharge and vacate such rule to show cause.

The Court delivered the following opinion orally in overruling the motion of the defendants to discharge and vacate the Rule to Show Cause why the defendants should not be held in contempt:

The Court. Gentlemen, the Court is ready to rule.

It happens that the Court was a Member of Congress at the time the Norris-LaGuardia Act, 29 U.S.C.A. § 101 et seq., became law and during the debates in the consideration of it. Mr. LaGuardia and I were legislatively always very close. I think I am correct in saying that I supported every measure that he was interested in—I mean primarily interested in—and that he supported every measure that I was primarily interested in. He directed his activities principally toward the labor movement, in what he considered the public interest; and mine were directed toward the currency.

As I said before, I am sure he always supported me; and, as far as I remember, I always supported him. So I am sure I am thoroughly familiar with the Norris-LaGuardia Act and its purposes and the reasons for it.

It is notorious that around, I guess, from 1890 on, the Federal courts were used by powerful interests for the purpose of defeating attempts on the part of labor to improve their welfare, increase their wages, improve their living conditions, and to help themselves in various ways.

Now, it takes a long time to arouse the public, sometimes, but the Clayton Act, 15 U.S.C.A. § 12 et seq., was the first affirmative expression of their resentment of the action of the courts, and the Norris-LaGuardia Act was the culminating expression of their feeling that the courts were entirely in the wrong in the way they issued injunctions in labor disputes.

The Court remembers very distinctly the amendments that were offered by Mr. Beck, I think, of Pennsylvania—and I forget who offered the others—which endeavored expressly to exclude the United States in practically all cases, under all circumstances, from the operation of the Norris-LaGuardia Act. But those in favor of the Act felt that an inclusion—an express inclusion—might defeat the purposes of the Act in a great many cases, and that the Government was amply protected by the general principle where the Government was not specifically mentioned or included by necessary implication in a given case—that the language of the Act did not apply to the Government.

The leading case on that subject in this country—and it is still in force and effect—is the case of the Dollar Savings Bank v. United States, found in 19 Wall. 227, 22 L.Ed. 80. In that case the Federal Government brought an action of debt in Pennsylvania to collect a tax. The statutes provided that an ordinary common-law action of debt was not applicable in cases for the collection of taxes. There is a special statute that would ordinarily cover a case of that kind, a special statute for the collection of taxes.

The Federal Government brought an ordinary action for the collection of debt at common law, which the Savings Bank contended was not legal. Here is what the Court said. The Court did not take that view. The Court held that an ordinary action of debt if brought by the United States would lie. This is what the Court said:

“It is a familiar principle that the King is not bound by any Act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests.”

Certain cases are cited.

“He may even take the benefit of any particular Act, though not named. The rule thus settled respecting the British Crown is equally applicable to this Government, and it has been applied frequently in the different States and practically in the Federal courts. It may be considered as settled that so much of the royal prerogative as belonged to the King in his capacity of *parens patriae*, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution.”

As I said before, that is the leading case.

But the Court feels that the doctrine is stated with more and greater clearness than anywhere else that the Court has found it in Black on Interpretation of Laws, Second Edition. I am reading from pages 94 and 95:

"General words in a statute do not include nor bind the Government by whose authority the statute was enacted, where its sovereignty, rights, prerogatives, or interests are involved. It is bound only by being expressly named or by necessary implication from the terms and purposes of the Act.

"This is a very ancient rule of the English law and is equally applicable to the national and state governments in this country. It is said that laws are supposed to be made for the subjects or citizens of the State, not for the sovereign power. Hence, if the Government is not expressly referred to in a given statute, it is presumed that it was not intended to be affected thereby, and this presumption, in any case where the rights or interests of the State would be involved, can be overcome only by clear and irresistible implications from the statute itself. Generally speaking, therefore, the State is not bound by the provisions of any statute, however generally it may be expressed by which its sovereignty would be derogated from, or any of its prerogatives, rights, titles, or interests would be divested, save where the Act is specifically made to extend to the State or where the legislative intention in that regard is too plain to be mistaken."

In this case, what society, what the sovereign power, was endeavoring to do was to hold a matter involving the public interest, a matter involving a potential public calamity, by an entity which had been given power by the sovereignty itself, the labor union, from taking the contemplated action, which, as I said before, would amount to a public calamity, until there could be a judicial determination of whether it had the right to take such action.

The Court thinks that undoubtedly under the general rules which the Court has spoken of, the Norris-LaGuardia Act did not and does not apply; and following that opinion on the part of the Court, the Court had the same rights that the Court would have had prior to the passage of the Norris-LaGuardia Act and the Clayton Act.

So it is perfectly clear that prior to the Norris-LaGuardia Act and the Clayton Act, a court of equity had the right to enjoin a labor union which, in the opinion of the Court, was about to do something which was against the public interest, including the ultimate interest of the union itself.

The Court thinks that that opinion substantially disposes of this motion to discharge and vacate the rule to show cause, because under Section 385 of the United States Code Annotated, Vol. 15, the statement is made:

"The . . . courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to pun-

ish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts." . . .

NOTES

1. Cf. the technique of Chief Justice Hengham, *supra*, p. 980, and that used by Lord Nottingham in *Ash v. Abdy*, *supra*, p. 102, with that of the trial judge in the principal case.

2. If the trial judge had been a witness at the trial in the instant case would his statement of the purpose of the act, as set out in his opinion *supra*, have been admissible?

UNITED STATES v. UNITED MINE WORKERS OF
AMERICA

Supreme Court of the United States, 1947.
330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. —.

[On certiorari to the District Court, MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.]

I.

. . . Defendants' first and principal contention is that the restraining order and preliminary injunction were issued in violation of the Clayton and Norris-LaGuardia Acts. We have come to a contrary decision.

It is true that Congress decreed in § 20 of the Clayton Act that "no such restraining order or injunction shall prohibit any person or persons . . . from recommending, advising, or persuading others . . ." to strike. But by the Act itself this provision was made applicable only to cases "between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment . . ." For reasons which will be explained at greater length in discussing the applicability of the Norris-LaGuardia Act, we cannot construe the general term "employer" to include the United States, where there is no express reference to the United States and no evident affirmative grounds for believing that Congress intended to withhold an otherwise available remedy from the Government as well as from a specified class of private persons.

Moreover, it seems never to have been suggested that the proscription on injunctions found in the Clayton Act is in any respect broader than that in the Norris-LaGuardia Act. Defendants do not suggest in their argument that it is. This Court, on the contrary, has stated that

the Norris-LaGuardia Act "still further . . . [narrowed] the circumstances under which the federal courts could grant injunctions in labor disputes." Consequently, we would feel justified in this case to consider the application of the Norris-LaGuardia Act alone. If it does not apply, neither does the less comprehensive proscription of the Clayton Act; if it does, defendant's reliance on the Clayton Act is unnecessary.

By the Norris-LaGuardia Act, Congress divested the federal courts of jurisdiction to issue injunctions in a specified class of cases. It would probably be conceded that the characteristics of the present case would be such as to bring it within that class if the basic dispute had remained one between defendants and a private employer, and the latter had been the plaintiff below. So much seems to be found in the express terms of §§ 4 and 13 of the Act, set out in the margin.¹⁹ The

¹⁹ "Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act."

"Sec. 13. When used in this Act, and for the purposes of this Act—

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employees or associations of employees; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent

specifications in § 13 are in general terms and make no express exception for the United States. From these premises, defendants argue that the restraining order and injunction were forbidden by the Act and were wrongfully issued.

Even if our examination of the Act stopped here, we could hardly assent to this conclusion. There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect.²⁰ It has been stated, in cases in which there were extraneous and affirmative reasons for believing that the sovereign should also be deemed subject to a restrictive statute, that this rule was a rule of construction only.²¹ Though that may be true, the rule has been invoked successfully in cases so closely similar to the present one,²² and the statement of the rule in those cases has been so explicit,²³ that we are inclined to give it much weight here. Congress was not ignorant of the rule which those cases reiterated; and with knowledge of that rule, Congress would not, in writing the Norris-LaGuardia Act, omit to use "clear and specific [language] to that effect" if it actually intended to reach the Government in all cases.

But we need not place entire reliance in this exclusionary rule. Section 2,²⁴ which declared the public policy of the United States as a

of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

"(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

²⁰ *Lewis, Trustee v. United States*, 1875, 92 U.S. 618, 622, 23 L.Ed. 513; *United States v. Herron*, 1873, 20 Wall. 251, 263, 22 L.Ed. 275; see *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 1912, 224 U.S. 152, 155, 32 S.Ct. 457, 458, 56 L.Ed. 706.

²¹ *United States v. California*, 1936, 297 U.S. 175, 186, 56 S.Ct. 421, 425, 80 L.Ed. 567; *Green v. United States*, 1869, 9 Wall. 655, 658, 19 L.Ed. 806.

²² *United States v. Stevenson*, 1909, 215 U.S. 190, 197, 30 S.Ct. 35, 36, 54 L.Ed. 153; *United States v. American Bell Telephone Co.*, 1895, 159 U.S. 548, 553-555, 16 S.Ct. 69, 71, 72, 40 L.Ed. 255; *Dollar Savings Bank v. United States*, 1873, 19 Wall. 227, 238, 239, 22 L.Ed. 80.

²³ "The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him [the sovereign] in the least, if they may tend to restrain or diminish any of his rights or interests." *Dollar Savings Bank v. United States*, 1873, 19 Wall. 227, 239, 22 L.Ed. 80. "If such prohibition is intended to reach the government in the use of known rights and remedies, the language must be clear and specific to that effect." *United States v. Stevenson*, 1909, 215 U.S. 190, 197, 30 S.Ct. 35, 36, 54 L.Ed. 153.

In both these cases the question, as in the present case, was whether the United States was divested of a certain remedy by a statute or a rule of law which, without express reference to the United States, made that remedy generally unavailable.

²⁴ "Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

guide to the Act's interpretation, carries indications as to the scope of the Act. It predicates the purpose of the Act on the contrast between the position of the "individual unorganized worker" and that of the "owners of property" who have been permitted to "organize in the corporate and other forms of ownership association", and on the consequent helplessness of the worker "to exercise actual liberty of contract . . . and thereby to obtain acceptable terms and conditions of employment." The purpose of the Act is said to be to contribute to the worker's "full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives . . . for the purpose of collective bargaining . . ." These considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees. . . .

Affirmed in part and modified and affirmed in part.

MR. JUSTICE JACKSON joins in this opinion except as to the Norris-LaGuardia Act which he thinks relieved the courts of jurisdiction to issue injunctions in this class of case.

MR. JUSTICE FRANKFURTER, concurring in the judgment.

The historic phrase "a government of laws and not of men" epitomizes the distinguishment character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights, pt. 1, art. 30, he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. "A government of laws and not of men" was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court. Even this Court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law. The Court may be asked to reconsider its decisions, and this has been done successfully again and again throughout our history. Or, what this Court has deemed

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted."

its duty to decide may be changed by legislation, as it often has been, and, on occasion, by constitutional amendment.

But from their own experience and their deep reading in history, the Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. "Civilization involves subjection of force to reason, and the agency of this subjection is law."¹ The conception of a government by laws dominated the thoughts of those who founded this Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be "as free, impartial, and independent as the lot of humanity will admit". So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for. And no type of controversy is more peculiarly fit for judicial determination than a controversy that calls into question the power of a court to decide. Controversies over "jurisdiction" are apt to raise difficult technical problems. They usually involve judicial presuppositions, textual doubts, confused legislative history, and like factors hardly fit for final determination by the self-interest of a party. . . .

And so I join the opinion of the Court insofar as it sustains the judgment for criminal contempt upon the broad ground of vindicating the process of law.² The records of this Court are full of cases, both civil and criminal, involving life or land or small sums of money, in which the Court proceeded to consider a federal claim that was not obviously frivolous. It retained such cases under its power until final judgment, though the claim eventually turned out to be unfounded and the judgment was one denying the jurisdiction either of this Court or of the court from which the case came. In the case before us, the District Court had power "to preserve the existing conditions" in the discharge of "its duty to permit argument, and to take the time required for such consideration as it might need" to decide whether the controversy involved a labor dispute to which the Norris-LaGuardia Act applied. *United States v. Shipp*, 203 U.S. 563, 573, 27 S.Ct. 165, 166, 51 L.Ed. 319, 8 Ann.Cas. 265 and *Howat v. State of Kansas*, 258 U.S. 181, 42 S.Ct. 277, 66 L.Ed. 550.

In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no

¹ Pound, *The Future of Law* (1937) 47 Yale L.J. 1, 13.

² Since, in my view, this was not a conviction for contempt in a case "arising under this Act" the jury provisions of § 11 of the Norris-LaGuardia Act do not apply. For obvious reasons, the petitioners do not claim that the Constitution of the United States affords them a right to trial by jury.

free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. For legal process is subject to democratic control by defined, orderly ways which themselves are part of law. In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this Court be of defiance. As the Nation's ultimate judicial tribunal, this Court, beyond any other organ of society, is the trustee of law and charged with the duty of securing obedience to it.

It only remains to state the basis of my disagreement with the Court's views on the bearing of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101, 29 U.S.C.A. § 101, and the War Labor Disputes Act, 57 Stat. 163, 50 U.S.C.App. § 1501, 50 U.S.C.A. Appendix, § 1501. As to the former, the Court relies essentially on a general doctrine excluding the Government from the operation of a statute in which it is not named, and on the legislative history of the Act. I find the countervailing considerations weightier. The Norris-LaGuardia Act deprived the federal courts of jurisdiction to issue injunctions in labor disputes except under conditions not here relevant. The question before a court of equity therefore is whether a case presents a labor dispute as defined by the Act. Section 13(c) defines "labor disputes":

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee."

That the controversy before the district court comes within this definition does not need to be labored. The controversy arising under the Lewis-Krug contract concerned "terms or conditions of employment" and was therefore a "labor dispute", whatever further radiations the dispute may have had. The Court deems it appropriate to interpolate an exception regarding labor disputes to which the Government is a party. It invokes a canon of construction according to which the Government is excluded from the operation of general statutes unless it is included by explicit language.

The Norris-LaGuardia Act has specific origins and definite purposes and should not be confined by an artificial canon of construction. The title of the Act gives its scope and purpose, and the terms of the Act justify its title. It is an Act "to define and limit the jurisdiction of courts sitting in equity". It does not deal with the rights of parties but with the power of the courts. Again and again the statute says "no court . . . shall have jurisdiction", or an equivalent phrase. Congress was concerned with the withdrawal of power from the federal courts to issue injunctions in a defined class of cases. Nothing in the Act remotely hints that the withdrawal of this power turns on the character of the parties. The only reference to parties underscores their irrelevance to the issue of jurisdiction, for the power of the courts is withdrawn in a labor dispute "regardless of whether or not the disputants stand in the proximate relation of employer and employee".

READ & MACDONALD U.C.B.LEG.

The limitation on the jurisdiction of the court depends entirely on the subject matter of the controversy. Section 13(a) defines it:

"A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees;"

Neither the context nor the content of the Act qualifies the terms of that section. Did not the suit brought by the Government against Lewis and the United Mine Workers "grow out of a labor dispute" within the terms of § 13(a) ?

As already indicated, the Court now finds an exception to the limitation which the Norris-LaGuardia Act placed upon the equity jurisdiction of the district court, not in the Act but outside it. It invokes a canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it. At best, his canon, like other generalities about statutory construction, is not a rule of law. Whatever persuasiveness it may have in construing a particular statute derives from the subject matter and the terms of the enactment in its total environment. "This rule has its historical basis in the English Doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. . . . The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated." So wrote the late Chief Justice for the whole Court in *United States v. State of California*, 297 U.S. 175, 186, 56 S.Ct. 421, 425, 80 L.Ed. 567, and this point of view was very recently applied in *United States v. Rice*, 327 U.S. 742, 749, 66 S.Ct. 835, 837. It is one thing to read a statute so as not to bind the sovereign by restrictions, or to impose upon it duties which are applicable to ordinary citizens. It is quite another to interpolate into a statute limiting the jurisdiction of a court, the qualification that such limitation does not apply when the Government invokes the jurisdiction. No decision of this Court gives countenance to such a doctrine of interpolation. The text, context, content and historical setting of the Norris-LaGuardia Act all converge to indicate the unrestricted withdrawal by Congress from the federal district courts of the power to issue injunctions in labor disputes, excepting only under circumstances explicitly defined and not here present. The meaning which a reading of the text conveys and which is confirmed by the history which led Congress to free the federal courts from entanglements in these industrial controversies through use of the injunction, ought not to be subordinated to an abstract canon of construction that carries the residual flavor of the days when a personal sovereign was the law-maker.

Moreover, the rule proves too much. If the United States must explicitly be named to be affected, the limitations imposed by the Norris-LaGuardia Act upon the district court's jurisdiction could not deprive

the United States of the remedies it therefore had. Accordingly, the courts would not be limited in their jurisdiction when the United States is a party and the Act would not apply in any proceeding in which the United States is complainant. It would mean that, in order to protect the public interest, which may be jeopardized just as much whether an essential industry continued under private control or has been temporarily seized by the Government, a court could, at the behest of the Attorney General of the United States, issue an injunction as courts did when they issued the Debs, the Hayes and the Railway Shopmen's injunctions. But it was these very injunctions, secured by the Attorney General of the United States under claim of compelling public emergency, that gave the most powerful momentum to the enactment of the Norris-LaGuardia Act. This history is too familiar to be rehearsed. It is surely surprising to conclude that when a long and persistent effort to take the federal courts out of the industrial conflict, insofar as the labor injunction put them into it, found its way to the statute books, the Act failed to meet the grievances that were most dramatic and deepest in the memory of those most concerned with the legislation. . . .

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, concurring in part and dissenting in part.

For the reasons given in the Court's opinion, we agree that neither the Norris-LaGuardia Act nor the War Labor Disputes Act barred the Government from obtaining the injunction it sought in these proceedings. The "labor disputes" with which Congress was concerned in the Norris-LaGuardia Act were those between private employers and their employees. As to all such "labor disputes," the Act drastically limited the jurisdiction of federal courts; it barred relief by injunction except under very narrow circumstances, whether injunction be sought by private employers, the Government, or anyone else. But the attention of Congress was neither focused upon, nor did it purport to affect, "labor disputes", if such they can be called, between the Government and its own employees. . . .

NOTES

1 See *United States v. Keegan*, 71 F.Supp. 623 (D.C.N.Y.1947), and cf. *Kelfer & Kelfer v. R. F. C.*, *infra*, p. 1275.

2. See comment, "Labor Law—Injunction—*United States v. United Mine Workers of America*", 45 Mich.L.Rev. 469 (1947).

SECTION 3. COMMON LAW STATUTES

MOSS POINT LUMBER CO. v. BOARD OF SUPERVISORS

Supreme Court of Mississippi, 1906. 89 Miss. 448, 42 So. 290.

On Rehearing.

MAYES, J. This cause was decided at the least term of court by a majority court; WHITFIELD, C. J., dissenting. Subsequently a suggestion of error was filed, and the case is now before the court on this suggestion of error.

The board of supervisors of Harrison county filed a bill in the chancery court against the Moss Point Lumber Company, seeking to enjoin it from cutting down and using the timber on a sixteenth section of school land. The substantial allegations of the bill are that on the 7th day of August, 1882, the board of supervisors of Harrison county, acting on a petition of a majority of the inhabitants of township 2, range 12, of said county, wherein is located the particular section in controversy, leased the sixteenth section, for a period of 99 years, to one Margaret C. Thomas. The bill further alleges that appraisers were appointed, as was provided by law, to appraise and value the leasehold of the sixteenth section for the term. The appraisers, pursuant to their appointment as aforesaid, viewed and appraised the value of the term for said section, and fixed same at \$835, which said sum was paid or secured by the said Margaret C. Thomas in the manner required by law. The bill further alleges that the valuation made by the appraisers was based and calculated on the quantity and quality of the merchantable timber standing and growing on the section, and that the land leased, by reason of the character of its soil, is unfit for cultivation, and the only value it possesses is given it by the merchantable pine timber growing thereon. The bill further alleges that Mrs. Margaret C. Thomas has conveyed to some other person or persons, who have conveyed same to defendant company, so that, on and since the 1st day of April, 1905, the defendant has become, and is now, the owner of the unexpired term of whatever estate or interest was created thereby and vested in the original lessee. The bill then alleges that the Moss Point Lumber Company has, since the 1st day of April, 1905, entered on the said sixteenth section by virtue of this lease, and has cut down and carried away a large number of pine trees growing thereon, and is now engaged in illegally and wrongfully cutting and removing the merchantable pine timber therefrom, and, though notified by the complainant to desist, has declared it to be its purpose to cut and remove and manufacture into lumber all the merchantable pine timber on said section; that defendant is not cutting and removing the timber with the intent and purpose of *clearing* the land for cultivation, but the timber is being cut for *commercial purposes solely* and to be used in its lumber business, and that said cutting is waste, and injurious to the reversionary estate of the public therein; that, if the

defendant company is allowed to continue, the estate or interest of the trustees in the township, at the end of the term, will be of no value, and the injury and damage which will be done to the land by the removal of the timber is irreparable and impossible of ascertainment; that defendant company is of doubtful solvency, and a judgment at law would be valueless to the trustees as custodians of said land. The bill concludes with a prayer for an injunction to restrain the defendant company, or its agents or servants, from cutting and removing any of the pine timber from said section for commercial purposes, and for an accounting, under the direction of the court, of the timber and value of trees cut from the section, and for a decree in favor of the complainants against defendant for said sum and for perpetual injunction. . . . A demurrer was filed to the bill, stating the following grounds of demurrer: First, under the facts alleged, the right to cut and remove the timber from the land was contemplated by the lessors and lessee, and defendant, as lessee, was entitled to cut and remove the same; second, that the title to said timber was, under the lease, vested in the original lessee, and in the defendant, as holder and owner thereof; third, it appears from the bill that the unexpired term was of no value other than the timber thereon, and the appraisal of said leasehold interest was based upon the timber alone, and therefore the complainants were estopped to deny said lessee the right to cut and remove the same; fourth, there is no equity in the face of the bill as against the defendant.

In the consideration of this case, the first question to be settled is the classification of the estate conveyed to appellants; that is to say, is it a freehold, a leasehold, or a life estate? It would seem that the mere examination of the conveyance under which appellants claim would conclusively show that the class of their estate is a leasehold for the term of 99 years. . . .

We desire to call attention to the fact that the statutes of Marlbridge and Gloucester were passed nearly 600 years ago, for the purpose of relieving what was *then* considered a hardship on the lessors of land. It will also be observed that the statute of Marlbridge provided that a tenant should forfeit single damages for waste, and the statute of Gloucester, passed afterwards, provided that the tenant should forfeit treble damages and forfeit the estate. . . .

We now turn our attention to the question as to whether or not a tenant for years is liable for waste. Independently of the statutes of Marlbridge and Gloucester, and independently of whether or not they form a part of our common law, we think this question is as firmly settled and buried in our jurisprudence as any principle of natural right can sink itself in the jurisprudence of any state. Whenever this question has arisen in this state, it has been decided in the affirmative. . . .

Any tenant for years, it matters not how many years his tenancy may run, is liable for waste when he does those acts which are defined as waste, determined by the conditions and circumstances which exist at the time when the acts are committed. Any contrary hold-

ing would shock common understanding of the law. It may be stated that it is a universal rule in this country that, unless exempted by the terms of the lease from responsibility for waste, a tenant is responsible for voluntary waste, whenever committed. This statement of the law is laid down in *Ency. of Law*, vol. 30 (2d Ed.) p. 259, and it is there stated that such is the law in Georgia, Illinois, Indiana, Maryland, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, Virginia; and we might add that the result of our investigation shows many other states not named in the *Encyclopædia of Law*. *United States v. Bostwick*, 94 U.S. 53, 24 L.Ed. 65; *Bulitt v. Musgrave* (Md.) 3 Gill, 31; *Belt v. Simkins*, 113 Ga. 894, 39 S.E. 430. We do not hold that the statutes of Marlbridge and Gloucester have any intrinsic force as statutes in this state, but we do hold that the principle announced by them over 600 years ago, making a tenant for years liable for waste, is a part of our law at this time. . . . Over 600 years ago the rule exempting the tenant from waste was considered harsh and unjust towards the lessor, and the very purpose of these statutes was to relieve the law from this species of wrong. To say that this principle has not been adopted as a part of our jurisprudence would be to say that our courts and laws have not kept pace with the development of the law in extracting from it just rules of right. This principle of holding the tenant liable is not only one of natural right and justice, but it is thoroughly in keeping with our institutions, enlightenment, and circumstances, and has been held to be the law every time the courts have been called upon to pass on the subject.

It is held in many of our decisions that the common law is the law of this state, as far as it is adapted to our institutions and circumstances, when not repealed by statute, or varied by usage which long custom has superseded. *Vicksburg & Jackson R. R. Co. v. Patton*, 31 Miss. 156, 66 Am.Dec. 552; *Green v. Weller*, 32 Miss. 650. It is stated in the original opinion that "it is immovably fixed in the law of Mississippi that no statute ever enacted in Great Britain has any force here, unless re-enacted by our Legislature." In support of this proposition the court cites *Jordan v. Roach*, 32 Miss. 481; *Boarman v. Catlett*, 13 Smedes & M. 149; *Ingram et al. v. Regan*, 23 Miss. 213. We do not take issue with this announcement of the law as an abstract proposition, but we do say that a principle of law, passed by an English statute over 600 years ago, announcing a wise and just rule of conduct, is not to be renounced simply because it made its appearance first in an English statute, when it is suited to our circumstances and conditions, and adjustable to the policy of our law, and when it has been recognized as the common law by such universality of authority. . . .

Let the suggestion of error be sustained, and the former judgment of this court vacated, and the decree of the chancellor affirmed, and the cause remanded, with leave to answer in 60 days after mandate filed.

NOTES

1. In *Bogardus v. Trinity Church*, 4 Paige (N.Y.) 178, 198 (1833), the issue was whether an English Statute of limitations was applicable, and if it was, then whether it must be pleaded. The court said: "The common law of the mother country as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, becomes in fact the common law rather than the common and statute law of the colony. The statute law of the mother country, therefore, when introduced into the colony of New York, by common consent, because it was applicable to the colonists in their new situation, and not by legislative enactment, became a part of the common law of this province . . . It was sufficient, therefore, for the defendant to plead the facts which were necessary to bring their case within the common law of this state, without any reference to the statute. . . ."

2. In *Dutcher v. Culver*, 24 Minn. 584, 618-619 (1877), the court said: "At the time when the region of country, subsequently known as the Northwest territory, came into the possession and control of the United States, it was, in general, a vast wilderness, inhabited by savages, who had certain manners and customs, but no form of government nor any system of law. A like state of facts existed in almost all of the region known as the Louisiana purchase, and certainly in the whole northern portion of it. There was, in fact, no operative system of law there, since with exceptions too trifling to be entitled to any weight or consideration, there were no people there upon whom laws could operate. Nevertheless, there was a general law of the land, sometimes, and with great propriety, denominated the American common law. . . ."

"While colonization continued—that is to say, until the war of the revolution actually commenced, . . . the changes made in the common law were operative in America also, if suited to the condition of things here. . . . When, therefore, the colonists emerged from the colonial condition into that of independence, the laws which governed them consisted, *first*, of the common law of England, so far as they had tacitly adopted it as suited to their condition; *second*, of the statutes of England or of Great Britain, amendatory of the common law, which they had, in like manner, adopted; and *third*, the colonial statutes. The first and second constituted the American common law.' Cooley's Const.Lim. 22-25."

3. "The American doctrine of common-law statutes is in itself testimony to this concept of the statute as a nursing mother of the law." See Kent, Commentaries (Holmes' 12th ed. 1873) 473.

SECTION 4. USE OF COMMON LAW AS A MATERIAL OF INTERPRETATION

PERRY v. STRAWBRIDGE

Supreme Court of Missouri, 1908.

209 Mo. 621, 108 S.W. 641, 16 L.R.A.,N.S., 244, 123 Am.St.Rep. 510,
14 Ann.Cas. 92.[The case appears *supra*, p. 837.]

NOTES

1. See *Truelove v. Truelove*, 172 Ind. 441, 86 N.E. 1018 (1909) (decedent, who was illegitimate, was survived by the descendants of two other illegitimate sons of decedent's mother. In determining whether such descendants were the descendants of "brothers" within the meaning of the statutes on intestate succession, the court looked to the common law meaning of the words used in the statute, found that "brother" and "sister" meant legitimates only, and refused to draw any analogy from the statute which gave illegitimates the right to inherit from or through their mother); *Adamson v. City of New York*, 188 N.Y. 255, 80 N.E. 937 (1907) (the court said, "In interpreting this [riot] statute which defines an offense well known at common law, we are entitled to seek aid from common law definitions of such offenses. . . . Interpreting the statute . . . in the light of the provision quoted from the Penal Code and assisted as we may be by . . . common law definitions, we think that the evidence fails to disclose the existence of a mob or riot. . . ."); *United Copper Securities Co. v. Amalgamated Copper Co.*, 232 F. 574 (C.C.A.N.Y.1916) (in interpreting a federal statute the court said, "There being no federal common law distinct from the common law of the states, . . . a federal court, in construing a federal statute such as that before us, where there is no statutory provision to guide it, must refer to the common law existing at the time of the Declaration of Independence. . . .").

2. For a case which discusses the interpretation of the Negotiable Instruments Law with reference to the common law and the law merchant, see *Wettlaufer v. Baxter* (1910) 137 Ky. 362, 125 S.W. 741, discussed in footnote, *supra* p. 465, note 3.

3. In *McGinnis v. State*, 9 Humph.(Tenn.) 43 (1848), in a prosecution for assault in which the defendant set up as a bar a judgment and fine in justice court, the state asserted that the statute giving the justice court jurisdiction was unconstitutional on the ground that it violated the constitutional requirement that "no freeman shall be put to answer any criminal charge, but by presentment, indictment or impeachment," and "that the right of trial by jury shall remain inviolate." The court said: "Let us inquire how the law of England stood . . . at the time of the American Revolution in order to ascertain what law, in relation to the prosecution of offenses our ancestors brought with them to this country, as part of their 'birthright and inheritance.' For we apprehend, the rule, that statutes are to be construed in reference to the principles of the common law, is alike applicable to a provision of the constitution, or fundamental law, and for the same reason, that the framers of the law in either case, are not to be presumed to have intended to make any change, or innovation upon the common law further than is expressly declared. . . ." The court found that at common law indictment was not required in minor cases, and held the statute constitutional.

In *Waters & Co. v. Gerard*, 189 N.Y. 302, 82 N.E. 143, in upholding the constitutionality of a lien act on the ground that it did not go beyond the common law, the court said at p. 145:

"The principles and rules of organized society found in the English common law, so far as applicable to our conditions, became and continue in force, unless abrogated or modified by express constitutional or statutory enactments. Constitutions and statutes should be construed with reference to the doctrines of the common law. . . .

"In construing the constitutional and statutory provisions which provide that a person shall not be deprived of life, liberty, or property without due process of law, it should not be held that there was an intention by convention or Legislature to forbid or in any way affect the right to any lien upon property which had been recognized and sustained by the common law, and thus by the law of the land."

SECTION 5. STATUTE COVERING ENTIRE SUBJECT

COMMONWEALTH v. ALLEN

Supreme Judicial Court of Massachusetts, 1922. 240 Mass. 244, 133 N.E. 625.

RUGG, C. J. The defendant in these cases is in possession of the property and business of the several trust companies by virtue of the power exercised by him as Commissioner of Banks under St.1910, c. 399, § 2 (G.L. c. 167, § 22). The commonwealth, through the action of the Treasurer and Receiver General, was at the time such possession was taken a general depositor to large amounts in each of the trust companies. The object of these suits by the commonwealth is to secure for itself as a preferred claimant a priority over other general creditors in the payment of the amounts of its deposits.

It is not contended that any such preference is established by the express terms of any statute. The argument in behalf of the commonwealth rests upon two main propositions: First, that by the common law here prevailing the commonwealth is entitled to preference (*Giles v. Grover*, 1 Cl. & Fin. 72; *Central Bank v. State*, 139 Ga. 54, 76 S.E. 587; *Ætna Accident & Life Ins. Co. v. Miller*, 54 Mont. 377, 170 P. 760, L.R.A.1918C, 954; *Matter of Carnegie Trust Co.*, 206 N.Y. 390, 99 N.E. 1096; *Marshall v. New York*, 254 U.S. 380, 41 S.Ct. 143, 65 L.Ed. 315); and, second, that the court will adopt and follow in proceedings of this nature the preferences established for the benefit of the commonwealth in receivership proceedings by R.L. c. 150, § 29 (G.L. c. 216, § 118), under the doctrine declared and applied in *Jones v. Arena Publishing Co.*, 171 Mass. 22, 50 N.E. 15, and *Old Colony Trust Co. v. Medfield & Medway Street Railway*, 215 Mass. 156, 162, 102 N.E. 484, to the effect that equity will follow the law in respect of statutory preferences.

It is not necessary to examine critically these propositions, because, assuming, without deciding, that they are both sound and applicable in appropriate cases, they are not operative upon the facts and statutes here disclosed. The contention of the commonwealth cannot be sustained for other reasons.

The statute which establishes and regulates the powers of the Commissioner of Banks makes no provision for preference of debts or other obligations due to the commonwealth. The Commissioner is an executive or administrative officer. He exercises visitatorial powers, is charged with duties of rigid inspection, and, when circumstances exist enumerated in St.1910, c. 399, § 2 (G.L. c. 167, § 22), may take and retain possession of the property and business of the bank for the purpose of liquidation of its affairs in accordance with the statute. He acts in all these particulars as a public officer, and not as a receiver appointed by the court. While he possesses some powers commonly conferred upon a receiver, and in many respects is subject to the direction of the court, he nevertheless carries out directly and in his own official capacity a legislative policy. His chart is the legislative mandate as declared in the statute. *Greenfield Savings Bank v. Commonwealth*, 211 Mass. 207, 209, 97 N.E. 927.

The Supreme Judicial Court is given jurisdiction in equity "to enforce the provisions" of the statute and "to act upon all applications and in all proceedings thereunder." G.L. c. 167, § 36. Thus the power of the court, while not strictly circumscribed, is to a greater or less extent within limits which need not here be defined, bounded by the terms of the statute.

The statute by which the legislative policy is declared contains no preference for debts or obligations due to the commonwealth. Where it has been the purpose of the general court to give a preference to claims of the commonwealth, that commonly has been stated in express words. The earliest preference declared by statute since the Constitution related to insolvent estates of deceased persons. St.1784, c. 2. While in its original enactment preference was given to debts due to the commonwealth, as well as to taxes and excises, that was narrowed by the omission of debts in Rev.St. c. 68, § 1, and now by G.L. c. 198, § 1, preference is given only to "public rates, taxes and excise duties."

Under the insolvent laws of the commonwealth (of course, suspended in operation by the federal Bankruptcy Law [U.S.Comp.St. §§ 9585-9656]), "debts due to and taxes assessed by the commonwealth, or a county, city or town therein," are given a preference. G.L. c. 216, § 118. The same preferences are established as to settlements of estates by receivers. G.L. c. 206, § 31.

In view of these express preferences established by statute, which are not uniform or coextensive, but place estates of deceased persons upon a different footing from estates settled by receivers or under the insolvency laws, the omission of any such preference in the banking law is significant.

The insolvency law does not apply to banks. G.L. c. 216, § 143. It never has included them. They have been the subject of special statutes. A bank was closed under St.1838, c. 14, which, like G.L. c. 167, contained no preference for debts due to the commonwealth. When liquidation arose it was not suggested in argument by distinguished

counsel or in the opinion by Chief Justice Shaw that the debt due to the commonwealth from the bank was entitled to priority for full payment over other creditors. *Commonwealth v. Phoenix Bank*, 11 Metc. 129.

The powers of the trust companies here in liquidation are set forth in G.L. c. 172, § 31, embodying the substance of R.L. c. 116, § 12, as amended by St.1912, c. 54 (St.1914, c. 537, § 3), in these words:

"Such corporation may receive on deposit, storage or otherwise, money, government securities, stocks, bonds, coin, jewelry, plate, valuable papers and documents, evidences of debt, and other property of any kind, upon terms or conditions to be agreed upon, and at the request of the depositor may collect and disburse the interest or income, if any, upon said property received on deposit and collect and disburse the principal of such of said property as produces interest or income when it becomes due, upon terms to be prescribed by the corporation. Such deposits shall be general deposits, and may be made by corporations and persons acting individually or in any fiduciary capacity. Such corporation shall not give collateral or other security for a deposit of money received under this section, except that the corporation may make such a deposit of securities as may be required by the laws of the United States or the rules and regulations of the trustees of the postal savings system as security for deposits of postal savings funds made with such corporation and may give such collateral or other security for deposits of public or other funds as may be required by any public authority making such deposits or controlling the terms upon which they may be made."

The deposits of money which these trust companies were authorized to receive were "general deposits," with the exception that they might give collateral or other security for deposits required by a "public authority." Manifestly the Treasurer and Receiver General was a "public authority" within the meaning of those words in the statute. He might have insisted upon "collateral or other security" as a condition to making a deposit. If the commonwealth were entitled to an absolute preference in the payment of its deposits, it is unlikely that trust companies would be authorized to give him additional collateral or other security. The requirement of the statute that moneys received on deposit shall be "general deposits" (with the specified exceptions) implies that they shall all be commingled on the same footing of relation of debtor by the bank and creditor by the depositor without special preference of one creditor over another. See *National Mahaiwe Bank v. Peck*, 127 Mass. 298, 34 Am.Rep. 368.

The correlative to G.L. c. 172, § 31, is found in G.L. c. 167, § 32, whereby are defined the duties of the Commissioner in possession of the property and business of a bank. In said section 32 the rights of special depositors of jewelry, plate, money, and other valuables for safe-keeping with the bank are set forth in detail, and the method to be followed by the Commissioner in returning such special deposits to their owners is outlined. The distinction between general depositors and special depositors thus is emphasized. That no other

special preferences are established in the statute is an indication that none were intended by the general court.

An important part of the law concerning trust companies relates to savings departments. St.1908, c. 520, §§ 1 to 7; G.L. c. 172, §§ 60 to 72. It there is provided (section 4, c. 520; section 63, c. 172) that the depositors in the savings department shall have as security for payment of their claims the capital stock of the company and the liability of stockholders, but also that they shall have in addition to other security "an equal claim with other creditors upon the capital and other property of the corporation." This implies that "other creditors" includes depositors in the commercial department and imports that such other creditors are all on the same footing. If there were preferences or priorities among such "other creditors," it would be difficult to give to depositors in the savings department an "equal claim with other creditors." The main reason for this provision is that the security otherwise provided under the law may be insufficient to pay in full the claims of the depositors in the savings department. The terms of the statute and the general favor therein manifested for depositors in the savings department would seem to require that, if there are preferences, the savings department depositors ought to be equal to the most favored class. If they share equally with the most favored class, and the commonwealth is held entitled to an absolute preference for the full payment of its claims, grave difficulties in liquidation well might arise.

If it had been the design of the Legislature that the commonwealth as a depositor in a trust company in liquidation should be entitled to an absolute priority for the payment in full of its claims in preference to all other creditors, it is likely, in view of other provisions of the statute, that there would have been some expression to that effect in the words of the statute. An omission of all reference to the subject is significant of a purpose to place the commonwealth on the same basis as other general creditors.

These considerations lead to the conclusion that the general court has dealt comprehensively with the subject of liquidation of banks and trust companies and has established by its mandate all the preferences intended to exist. It is a general principle that, when legislation covers the entire field, previous provisions of either the common or statutory law in conflict therewith become no longer operative.

In each case the entity may be: Petition dismissed, with costs.

NOTE

See *State v. Wilson*, 43 N.H. 415 (1862), a case which raised the issue whether the common law of nuisance had been impliedly repealed. The court said, that "the whole of a former law is revised by a new statute, and the latter appears to be intended to prescribe the only rules which should govern that subject, the particulars of the old law in which they differ will be regarded as repealed by implication,"—that if a statute revises a whole subject which was formerly governed by the common law, that may effect a repeal of the common law. However the court

concluded that the common law of nuisance had not been repealed by the statute there in question. In *State v. Morgan*, 59 N.H. 322 (1879), however, statutes had been passed in affirmance and amendment of the common law rule of forcible entry and detainer, after which the whole chapter had been repealed, and another statute amended to include the offense of brawl and tumult. The court held that the common law rule of forcible entry and unlawful detainer, and the English statutes relating thereto which had formed a part of that common law were thereby repealed, and that thereafter there was no common law offense of forcible entry or unlawful detainer.

For other cases holding that where legislation covers an entire field it supercedes the common law wherever it is not declaratory of it, see *Penn Mutual Life Insurance Co. v. Hunt*, 237 Mass. 243, 129 N.E. 391 (1921); *Jurney Heater Mfg. Co. v. New York, N. H. and H. R. Co.*, 264 Mass. 427, 162 N.E. 897 (1928); *City of Boston v. Edison Electric Co.*, 242 Mass. 305, 136 N.E. 113 (1922).

REEVES & CO. v. RUSSELL

Supreme Court of North Dakota, 1914.

28 N.D. 265, 148 N.W. 654, L.R.A.1915D, 1149.

Goss, J. Plaintiff corporation brings this action to foreclose its chattel mortgage upon a threshing engine, and to determine priority of liens thereon, and particularly as against a blacksmith's lien filed against the engine by Boyle Bros., defendants. Plaintiff sold the engine to one Russell in 1906, taking a mortgage back, which was duly filed and has been renewed, and admittedly is, and always has been, a valid lien upon the property. On April 11, 1911, Russell wrote plaintiff for its written consent to a sale of the mortgaged engine, receiving a reply dated April 15, 1911, in effect withholding consent until it could investigate and until certain conditions were complied with. Russell, however, took no further steps to obtain such written consent, and sold it to Arbogast, for valuable consideration, who bought with notice of the incumbrance. Arbogast thereafter consulted Boyle Bros., machinists, at Jamestown, as to repairing the engine, and one of them went to Russell's place, where the machine still remained, and inspected the same as to the probable cost of overhauling, rebuilding, and putting it in suitable condition, and made an estimate that to do so would cost in the neighborhood of \$800. Defendants Boyle Bros., were then engaged by Arbogast, with the knowledge and acquiescence of Russell, to move the engine to the machine shop of Boyle Bros. for repairs and rebuilding the engine, which was thereafter completed at an expense for labor, material, and repairs and incidental expenses, totalling \$882.11, and incurred between April 27 and May 26, 1911, and for which amount a blacksmith's lien was soon filed by Boyle Bros. against Arbogast, Russell, and the Reeves Company, by the filing of an affidavit of lien, accompanied with an itemized and verified statement of all labor and items of material and charge entering into the account. Written notice of this was at once given. Plaintiff thereupon demanded possession from Boyle Bros., who had at all times since the completion of the work retained possession of the engine, and upon their refusal thereof the property was taken under

warrant of foreclosure. Boyle Bros., in defense pleaded their artisan's lien and possession for the purpose of foreclosure thereof, and asked that their lien, claimed both under section 6925, R.C.1905, and chapter 168, Laws of 1907, be adjudged to be a prior lien to the mortgage of the plaintiffs. With this question of priority of liens, plaintiff seeks to raise the following questions: (1) Whether an artisan's lien takes priority over a mortgage of record on the property liened; . . .

Section 6925, R.C.1905, which does not declare priority of an artisan's lien over recorded mortgages or incumbrances, was the only statute on the subject in 1906 at the time plaintiff's lien became effective. Chapter 168, Laws of 1907, became effective a year after this mortgage was given, and in express terms granted artisans' liens priority over mortgages. Whether this priority is granted as to mortgages taken and in force before its passage is one question arising, but for the purposes of this suit we shall assume the statute to be retrospective in this instance, and as in terms making the artisan's lien superior to the mortgage lien. Whether the statute is thus retrospective or not is immaterial, under the law controlling this decision. In construing statutes on liens, the first consideration is whether the lien is one given at common law, or is instead dependent for its existence solely upon the terms of the statute. Where the statute is merely declaratory of the common law, it is construed together with, and in the light of, the common law; the Legislature being presumed to know the common law on the subject and to enact the statute as merely declaratory thereof, and to be so interpreted in the light of its origin and common-law definition, where the statute does not depart from the governing common-law principles. And this here applies, as artisans' liens are a creation of the common law and not a special lien originating under, and dependent upon, statute for its creation and existence. So, without any reference to chapter 168, Laws of 1907, plaintiff's mortgage must be held to be subordinate to the lien of defendants, as such was the law at the time the mortgage was taken, where the party entitled to the lien has retained possession, as have defendants, at all times after the completion of the work. And this is decisive of the rights of appellant, as chapter 168 of the Laws of 1907, if applicable, is but declaratory of the equivalent of section 6925, R.C. 1905, as supplemented by the common law concerning priority, which by express terms it purports to amend. . . .

The judgment appealed from is affirmed.

On Petition for Rehearing.

Appellants filed a petition for rehearing, challenging, as judicial legislation, consideration by the court of the common-law priority of this common-law artisan's lien, and maintaining that because of section 6925, R.C.1905, in terms recognizing an artisan's lien but silent on its priority, the court must find that no priority of such lien can exist, and that any priority must be given by statute under section 6138, R.C.1905; the general statute concerning priority of liens providing that:

"Other things being equal, different liens upon the same property have priority according to the time of their creation except in cases of bottomry and respondentia."

In other words, appellant asserts that, in the determination of this question, we are limited to a construction of statutes, and cannot resort to the common-law rights of the parties to determine the question of priority, where the statute is silent thereon, and counsel cite in support of that contention section 4006, R.C.1905, a provision of the Civil Code, reading:

"In this state there is no common law in any case where the law is declared by the Codes."

And also cite section 10509, R.C.1905, next to the last provision of the Code of Criminal Procedure, providing that:

"The provisions of this Code so far as they are the same as existing statutes, must be construed as continuations thereof and not as new enactments."

From these statutes appellant reasons that there can be no common law on artisan's liens, the Code having spoken on the subject by the declaration therein providing for such a lien, and that, treating section 10509 as a general provision applicable to all the Codes and all Code provisions, the statutes are to be considered as continuations of statutes but not as continuations of the common law in all instances, civil and criminal. To emphasize this claim, appellant has cited section 5 of the Civil Code of California, reading:

"The provisions of this Code, so far as they are substantially the same as existing statutes of the common law, must be construed as continuations thereof and not as new enactments."

Under this California Code provision, and its construction by the courts of that state (*Quist v. Hill*, 154 Cal. 748, 99 P. 204, at pages 207, 208; *Michaelson v. Fish*, 1 Cal.App. 116, 81 P. 662; *Lux v. Haggin*, 69 Cal. 255, at page 384, 4 P. 919, 10 P. 674; and *Sharon v. Sharon*, 75 Cal. 1, at page 13, 16 P. 345), statutes are but continuations of the basic common law, a determination of rights under which necessitates consideration of both the common law and the statute where the statute is either silent or ambiguous. But appellant parallels this provision of the Civil Code of California with section 10509, R.C.1905, a portion of our Code of Criminal Procedure, nearly identical, but omitting the phrase of the California Civil Code provision of "or the common law," and therefore contends that in this state in no instance are the statutes to be considered as continuations of the common law. It is urged that the common law is excluded by our Code provision 4006, reading:

"In this state there is no common law in any case where the law is declared by the Codes."

This decision then narrows to the question of whether the common-law priority still exists, notwithstanding section 6925, declaring a lien in the possessor of the property with the right of possession until the charges for repairs are paid, but silent on the question of priority of

such lien, unless governed by section 6138, declaring priority of liens according to time of creation, "other things being equal," and section 6724, R.C.1905, that:

"The rule of common law that statutes in derogation thereof are to be strictly construed has no application to this Code. This Code establishes the law of the state respecting the subjects to which it relates; and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

In its last analysis the decision resolves to whether the provisions of our Civil Code are to be considered as continuations of the common law as well as continuations of statute, or whether, on the contrary, the fact that a common-law lien has been declared by statute makes all rights thereunder dependent solely on the statute, without regard to common-law incidents, or history, in which case a priority that would here exist under the same circumstances at common law as an incident to the same lien given by common law as here declared, also by statute, would be negatived and defeated by the mere silence of the statute on priority. If the statute is to be considered as but a continuation of the common-law lien without regard to common-law priority, the priority still exists; the statute then declaring the lien and the common law defining priority. If the statute is not a continuation of the common law but works an abolition of all common law on the subject, inclusive of the incident of priority, then some general statute must be found conferring priority, the particular statute giving none, otherwise there is no priority of artisan's liens over earlier liens.

The conclusions in the main opinion are sustained by all authority, and appellant's attack thereon loses all force in the face of the fact that common law is by statute (sections 4003, 4004, 4005, R.C.1905) declared to be the basic law, thereby requiring statutory enactment, to be considered as but a continuation of the common law as to civil rights and liabilities. Section 4003 reads:

"The will of the sovereign power is expressed: . . . (4) By the decisions of the tribunals enforcing those rules, which, though not enacted, form what is known as customary or common law."

And section 4005 declares what shall be evidence of such common law. By statute the provisions of the Civil Code are to be considered as but continuations of the common law, as well as other statutes, and no distinction exists in this respect between this state and California, notwithstanding section 10509, R.C.1905. Plainly this provision of the Code of Criminal Procedure can have no relation to or bearing upon the question of whether the provisions of the Civil Code and civil statutes are to be considered as continuations of the common law. Each of the seven Codes was passed as a separate bill in the Revision of 1895 and as an entirety. The term "Code," as used in many places in each of the seven Codes, must refer solely to the Code of which it was a part at the time of its enactment, and this provision has reference to Criminal Procedure and is not a general provision applicable to all of the seven Codes as separately enacted. The Code provisions relative to crimes and criminal procedure, as sections 8531-8538, and

10509, prescribe a different rule as to such than generally applies to civil rights and remedies. Our Penal Statutes undertake to and do define all our crimes, and our Code of Criminal Procedure in the main declares the process of administration of our Penal Statutes. But it is vastly different, as to civil rights and liabilities, to completely codify, which would be an absolute impossibility. Manifestly civil statutes must be regarded as they have always been construed to be, but continuations, affirmances, modifications, or repeals of basic common law governing principles, and to be interpreted in the light of the common law as has been done for generations. . . .

But counsel, in support of his contention, would emphasize the fact that the territorial statute declared no priority of this lien, and that by the Laws of 1890 priority was granted, which provision was repealed in the Revision of 1895, which priority provision has been again expressly re-enacted by chapter 168 of the Laws of 1907; and counsel inquires how the double repeal and enactment on priority can be considered other than as evidencing a successive legislative expression of denial and reaffirmance of priority, and that the lien by mortgage of the appellant having attached at a time when priority of artisan's liens was thus refused recognition and by inference denied, upon what basis can it be found that a lien at common law could exist during such interval? In territorial times, and until the enactment of the statute of 1890 granting it, priority existed at common law, as is held in *Garr, Scott & Co. v. Clements*, 4 N.D. 559, 62 N.W. 640. Upon repeal of the statute of 1890, no mention of priority being made in the repealing statute, and there being nothing to positively evidence a legislative intention to the contrary, the common-law rule as to priority was revived; "the repeal of the statute which abrogated a common-law rule revives that rule." *Beavan v. Went*, 155 Ill. 592, 41 N.E. 91, 31 L.R.A. 85; *Baum v. Thoms*, 150 Ind. 398, 50 N.E. 357, 65 Am.St.Rep. 368; *Burleigh County v. Rhud*, 23 N.D. 362, 136 N.W. 1082; *Lewis' Sutherland*, Stat.Const. § 294, quoting above rule and declaring same applicable, "even though there is a statute that a repeal of the repealing act shall not revive the act repealed," similar to section 6739, R.C. 1905, identical with section 20 of Civil Code of California, in force since 1872.

"Where a statute repeals the common law and is then itself repealed, the common law is revived, and the authorities say that, if a statute that is declaratory of the common law is repealed, the common law more clearly remains in force for the reason that the statute is an affirmance of it." *Harper v. Loan Co.*, 55 W.Va. 149, 46 S.E. 817, 2 Ann.Cas. 42, at page 45; *Endlich on Interpretation of Statutes*, § 475.

Under this rule and the presumption that the common law is abrogated by statute only so far as is necessary to give force to the statute and the legislative intent thereby and no farther. *State ex rel. v. Sullivan*, 81 Ohio, 79, 90 N.E. 146, 26 L.R.A., N.S., 514, 18 Ann.Cas. 139; *Chicago & E. Ry. Co. v. Luddington*, 175 Ind. 35, 93 N.E. 273, citing much authority, the territorial statute (subdivision 2, § 1814, of Civil Code of 1877) did not efface the common-law priority of artisans'

liens. Chapter 88, Laws of 1890, by declaring that priority was but declaratory of the prevailing common law and repeal of the Laws of 1890, instead of leaving no law on the subject, revived or made applicable the common law, and such was the situation when this appellant's mortgage was taken. That the Legislature has by chapter 168, Laws of 1907, again re-enacted the common-law provision of priority is of no consequence as a legislative construction on the question or otherwise. If it be assumed to be a legislative construction as contended, it is not binding on the courts, as it is beyond legislative power or province to interpret retrospectively by legislative act prior statute or common law. The duty and power of interpretation of past legislative enactment lies in the courts alone. But against revival of the common law it is contended that the Legislature cannot be presumed to have needlessly declared a statutory priority when a common-law priority existed, and on that assumption it is urged that no priority existed before 1890 or during the interval from January 1, 1896 to 1907. If appellant's basis of exclusion from common law by the statute of every subject touched upon by statute is accepted, this rule would be applicable. But, the civil statutes being but continuations of the prior common law to be construed therewith, the fact that a statute declares one incident of the common law on the subject does not of itself and alone signify an exclusion of all other common law touching rights on which the statute is silent. Nearly all the substantive law as contained in our Civil Code is but declaratory of established and prior existing common law, a fact which of itself establishes such legislation to be needless, except to render the same accessible and easy of reference, the principal benefit of our codification of a small portion of common-law principles. Appellant insists that the general statute as to priority of liens (section 6138, R.C.1905, first found as section 1711, Civil Code of 1877), declaring that, "other things being equal, different liens upon the same property have priority according to the time of their creation," here controls to exclude any common-law priority. This statute is but another principle of the common law codified. By its terms only when "other things being equal" is it applicable. The exception made is to exempt from its application instances, as here, where other things are not equal in that the lien recognized by statute has a common-law origin. . . .

The petition for rehearing is denied.

NOTE

"The repeal of an act repealing or modifying the common law rule revives the common law rule ab initio, and it exists the same as if it had never been repealed. The time during which statutes repealing the common law rule remain in force is regarded only as a suspension of such rule of the common law." *Baum v. Thoms*, 150 Ind. 378 (1898). Moreover, a statute which provides that no act repealed by the legislature shall be deemed to be revived by the repeal of the repealing act will not affect the rule that the repeal of a statute which supersedes a common law rule will have the effect of reviving the common law. *Beavan v. Went*, 155 Ill. 592 (1895). See also *Levy v. McCartee*, 6 Peters (U.S.) 102 (1832).

However, the repeal of a statute declaratory of the common law has no effect upon the common law rule other than to work a revival of it. In *re Sloan's Estate*, 7 Cal.App.2d 319, 46 P.2d (1935); *Gray v. Obear*, 54 Ga. 231 (1875); but cf. *Sedgwick v. Stanton*, 14 N.Y. 289 (1856), holding that the repeal of a statute declaratory of the common law of champerty and maintenance abolished the common law rule. (The court was somewhat influenced by the present low regard for the doctrine of maintenance in England, and by some indications in the code and the revisors' notes that they intended to abolish the whole concept.)

SECTION 6. UNIFORM LAWS

Review here attitude of courts toward uniform laws as reflected in material in Chapter 3, Section 7, *supra*, pp. 459-468.

SECTION 7. ANALOGICAL REASONING FROM LEGISLATION

JAMES M. LANDIS, STATUTES AND THE SOURCES OF LAW

Harvard Legal Essays, 213, 221: 1934, Harv.Univ.Press.

When the highest tribunal of England in 1868 decided that the landowner who artificially accumulates water upon his premises is absolutely liable for damage caused by its escape, that judgment had an enormous influence throughout Anglo-American law. True, the rule evolved was supposed to possess a rational basis in the earlier common-law treatment accorded wild animals. But we are sufficiently mature to recognize that there are differences between rattlesnakes and reservoirs, and to realize that the ultimate wisdom of such a judgment must rest upon the question of how well it distributes the unavoidable losses incident to the pursuit of a particular industrial occupation. Had Parliament in 1868 adopted a similar rule, no such permeating results to the general body of Anglo-American law would have ensued. And this would be true, though the act had been preceded by a thorough and patient inquiry by a Royal Commission into the business of storing large volumes of water, and its concomitant risks, and even though the same Lords who approved Mr. Fletcher's claim had in voting "aye" upon the measure given reasons identical with those contained in their judgments. Such a statute would have caused no ripple in the processes of adjudication either in England or on the other side of the Atlantic, and the judicial mind would have failed to discern the essential similarity between water stored in reservoirs, crude petroleum stored in tanks, and gas and electricity confined and maintained upon the premises—surely an easier leap than that from wild animals to reservoirs.

SCHUSTER, THE PRINCIPLES OF GERMAN CIVIL LAW,
10-11 (1906)

17. . . . A somewhat dangerous method of interpretation derived from Roman law, and not unfrequently carried out by the German Courts, is the interpretation by analogy. Where a gap has been left by any statutory rule it is filled up, according to this method, by reference to another rule contained in the same statute, in connexion with which a point corresponding to the point left open in the first-mentioned rule is expressly provided for, and the *ratio juris* of the last-mentioned expression is taken to be a general rule of law applicable to all cases. This method which assumes that the omission in the first case was accidental, while it may have been deliberate, and also that a judge may fill in a gap left by the legislator's want of care, is not in accordance with the English methods of interpretation.

NOTE

In Freund, "Interpretation of Statutes", 65 U.Pa.L.Rev. 207, 226, the author says: "The true problem of analogy may be stated this way: a statute has altered common law principles with reference to one relation; another relation not covered by the terms of the statute involves the same or similar principles: can the new relation be said to be within the spirit though not within the letter of the statute? The principle of liberalness stands in the way, or, to put it in another way, most statutes deal with principles only in the form of rules, and a principle is flexible while a rule is not. The law of prescription is in America common law and expresses a principle with regard to easements analogous to the principle involved in the statute of limitations which applies to corporeal hereditaments; the traditional period of the statute of limitations having been twenty years, such is also the common law period of prescription. If the period of limitation is by statute reduced to fifteen years, the courts correspondingly reduce the time for prescription. But if the period of prescription is fixed by statute, as it is in England (1832), it does not alter automatically by a reduction of the period of the statute of limitations from twenty to twelve.

"It would probably be accepted as an undisputed proposition of English and American law that statutes are not extended by analogy. . . ."

AMORY v. MEREDITH

Supreme Judicial Court of Massachusetts, 1863. 7 Allen 397.

HOAR, J. The testatrix, Miss Elizabeth Amory, being in feeble health, conveyed all her real and personal estate to trustees, upon the trust to manage the property and pay the income of it to her during her life; to reconvey the whole to her whenever she and the trustees should think it expedient to terminate the trust; or, upon her decease before its termination, to convey it to such persons as she should by her last will designate; or, upon her death intestate, to her heirs at law. She afterward inherited a small amount of real and personal estate which was not included in the trust, and the trust was not terminated during her life. By her last will she gave and devised one

half of all the estate, real, personal and mixed, of which she should die seised or possessed, to trustees, for the benefit of the family of a brother; one tenth in trust for a sister and her children; and the residue of her said estate to four brothers and sisters named in the will. This suit is brought by her executors and trustees to obtain the direction of the court in the execution of their trusts, on account of the conflicting claims of the heirs at law and the devisees under the will. And the question is, whether the real and personal estate embraced in the deed of trust will pass under the will?

The answer to this question is to be sought by ascertaining the intent of the testatrix as manifested by the will; and this intention being once ascertained, effect is to be given to it accordingly.

We are therefore to decide whether the language of Miss Amory's will, construed in reference to all the property in which she had a legal or equitable interest at the time it was made, and at the time of her death, shall be held to include in its disposition the property of which she had a power of appointment.

Without reviewing in detail the numerous English cases, it is perhaps sufficient to say that, according to the doctrine of the English courts of chancery, the will would certainly not be a good execution of the power. The cases are summed up and reviewed in *Doe v. Roake*, 2 Bing. 497, and in *Blagge v. Miles*, 1 Story R. 426. The distinction between "power" and "property" is carefully preserved through all of them; and the refinements and subtleties to which this distinction leads are great and perplexing. The general rule is thus stated by Chancellor Kent, in his Commentaries: "In the case of wills, it has been repeatedly declared, and is now the settled rule, that in respect to the execution of a power, there must be a reference to the subject of it, or to the power itself; unless it be in a case in which the will would be inoperative without the aid of the power, and the intention to execute the power became clear and manifest." "The intent must be so clear that no other reasonable intent can be imputed to the will; and if the will does not refer to a power, or the subject of it, and if the words of the will may be satisfied without supposing an intention to execute the power, then, unless the intent to execute the power be clearly expressed, it is no execution of it." 4 Kent. Com. (6th ed.) 335. . . .

. . . Lord St. Leonards, the highest authority on any question relating to this branch of the law, says that, "in reviewing the cases, it is impossible not to be struck with the number of instances where the intention has been defeated by the rule distinguishing power from property." Sugden on Powers, (8th ed.) 338.

It is not surprising that a course of decisions obnoxious to such criticisms should be at length controlled by legislation. By St. 7 Will. IV. and 1 Vict. c. 26, § 27, it was declared that a general devise of real or personal estate, in wills thereafter made, should operate as an execution of a power of the testator over the same, unless a contrary intention should appear on the will. Upon this English statute Judge Story

observes, in a note to *Blagge v. Miles*: "The doctrine, therefore, has at last settled down in that country to what would seem to be the dictate of common sense, unaffected by technical niceties." 1 Story R. 458, note.

We are aware of no decisions in this commonwealth, binding on us as an authority, which should compel us to adopt a rule of construction likely, in a majority of cases, to defeat the intention it is designed to ascertain and effectuate. Seeking for the intention of the testator, the rule of the English statute appears to us the wiser and safer rule; certainly when applied to cases like the one now under consideration, where the testatrix is dealing with property which had been her own, and of which she had the beneficial use, as well as the power of disposal.

The point to be determined is simply this: Did Miss Amory mean to dispose of the property held under the deed of trust, by the terms of her will, in devising all the estate of which she should be possessed at her death? We can have no doubt that she did. It was originally her property by inheritance. She received the income of it during her life. She had the complete power of disposal over it by will; and it constituted the great bulk of the property over which she had testamentary control. If she died intestate, like the rest of her property, it was to go to her heirs. The trust had been created merely with a view to relieve her, when in feeble health, from the trouble of managing and investing her estate, and with a provision that the trust should be terminated whenever, in her opinion and that of the trustees, it might be expedient. The rest of her property had been transferred, though not to the legal ownership, yet to the care and custody of the same trustees; had been treated in precisely the same manner with that included in the trust; and we can see no reason to believe that it was regarded by her in any different light.

The decree will therefore direct the trustees to convey the property held by them in accordance with the devises and bequests of the will. . . .

NOTE

See also *McGibbon v. Abbot* (1885) 10 App.Cas. 653, where English legislation concerning the law of wills was used as a precedent for the Canadian common law rule. The court said that it was "not bound by a course of English decisions which have been swept away by the legislature as fraught with inconvenience and mischief".

EBERS v. MacEACHERN

Supreme Court of Prince Edward Island, 1932 4 M.P.R. 333.

SAUNDERS, J.: This action was brought to recover the value of a silver black fox shot and killed by the defendant on his farm premises. The plaintiff owned a pair of silver black foxes and had them ranched with one Frank McKay of East Royalty. Frank McKay, like many other farmers in this Province, was engaged in the breeding and raising of silver black foxes for nine years in his ranch. The fox in ques-

tion was a ranch-bred fox. I have no doubt that this fox was the progeny of foxes bred in captivity for a great many years. It escaped from its pen and was at large for several days. The defendant about this time had lost some of his poultry. He saw every evidence of these having been killed by some animal as feathers and blood were strewn over the snow. He believed it was the plaintiff's fox that did the killing, although as a fact he did not see the fox kill any. The fox came to the defendant's a little after dark and went right straight for the hen-house and the defendant shot him. The plaintiff claims the value of the fox as a live animal.

The action was tried at the last January sitting of this Court before the learned Chief Justice and he charged the jury as follows:

"The whole question for you to decide is narrowed down to one. You are to fix the value of the fox. The rest of the questions involved in determining whether it will have to be ultimately paid or not are questions of law which will be considered later.

It is only in the event of the decision of the Court being that according to law the defendant is bound to pay a price for this fox that your verdict will come into effect."

The jury returned a verdict of no value for the fox.

The plaintiff on the 26th day of January, 1932, gave the defendant a notice of motion to have the verdict given herein set aside and a new trial had between the parties. . . .

In Kent's Commentaries on American Law, Blackstone series, vol. 2, p. 348, it is said:

"Animals *feræ naturæ*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when they return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases. . . . If an animal belongs to the class of tame animals, . . . he is then clearly a subject of absolute property; but if he belongs to the class of animals which are wild by nature and owe all their temporary docility to the discipline of man, such as deer and several kinds of fowl, then the animal is a subject of qualified property, and which continues so long as the tameness and dominion remain."

And he sums up by saying (p. 349):

"The common law has wisely avoided all perplexing questions and refinements . . . and has adopted the test laid down by Pufendorf, by referring the question, whether the animal be wild or tame, to our knowledge of his habits, derived from fact and experience." . . .

The question now is, are foxes domestic or tame animals?

I am convinced beyond doubt that foxes in this Province owing to the fact that they have been bred in captivity for many years and have received exceptional care and attention, have greatly changed in their habits and disposition. I am far from saying that when released they have the *animus revertendi* or that they would have no disposition to

escape the owner's dominion. I am equally convinced however that the legislators of our Province believed their habits and disposition have so completely changed and altered as to be now regarded as domestic or tame animals.

We have in this Province an Act known as "The Domestic Animals Act" passed in the year 1888. This Act is intended to regulate the running at large of tame animals within the Province. It has no relation whatever to wild animals or what are generally known and described as animals *feræ naturæ*; it might very well have been called "The Tame Animals Act."

When this Act was passed no such industry was known in this Province as the fox industry. It is true that a few pioneer fox men were then engaged in raising and breeding foxes. The year 1910 was the beginning of the breeding and raising of foxes in captivity on a large scale. . . .

After many years of confinement and breeding their habits and disposition became so completely changed that in the year 1919 they were regarded by the fox breeders as tame or domestic animals and the legislators of our Province in 1919 included them in "The Domestic Animals Act." The Act of 1888 is as follows:

"1. This Act may be cited as 'The Domestic Animals Act.'

"2. In this Act unless the context otherwise requires: (a) The expression 'animal,' except in the second part of this Act, means and includes horses, neat cattle, sheep, swine, turkeys, geese and all other domestic fowl. (b) The expression 'animal' in the second part of this Act means and includes a stallion, bull, ram or boar pig."

In the year 1919 the Act of 1888 was amended so as to include foxes. The Act now reads as follows:

"2. In this Act, unless the context otherwise requires, (as amended by 9 Geo. V, ch. 6, sec. 4): (a) The expression 'animal,' except in the second part of this Act, means and includes horses, neat cattle, sheep, silver black foxes and cross or patch foxes, but not including those named in sub-section (b) turkeys, geese and all other domestic fowl. (3 Edward VII, ch. 2.) (b) The expression 'animal' in the second part of this Act means and includes a stallion, bull, ram or boar pig. (3 Edward VII, ch. 2.)"

As already stated, at the time of passing the 1888 Act foxes were not regarded as tame or domestic animals and the provisions of the Act were framed to meet only such animals as were then regarded as tame or domestic. The provisions of the Act have been changed only in minor detail, and are certainly not as applicable to foxes as to the other tame or domestic animals; yet I see no great difficulty in bringing foxes within the provisions of Part V of the Act. Certain it is that the legislators intended that foxes should be regarded as tame or domestic animals as they were specifically included in the 1919 amendment in "The Domestic Animals Act." I would hesitate to nullify the clear and unequivocal intention of the legislators.

I know of no other province or place where foxes have been declared by statute to be tame or domestic animals and, as I see it, all the cases cited by counsel for the defendant have no application in this case. I think it goes without saying that no person would be justified in shooting his neighbour's horse or cow should it stray on his premises and now, since a fox is placed in the same category as a horse or cow and regarded as a tame or domestic animal, the same principle applies.

The evidence discloses the fox in question was an animal of some value and was the property of the plaintiff.

I am of opinion that the verdict of the jury was wrong and should be set aside.

NOTE

In numerous other cases courts have reasoned by analogy from statutes which were not necessarily determinative of their decisions. In *Johnson v. United States*, 163 F. 30 (1908), where a bankrupt was being prosecuted for concealing assets from the trustee in bankruptcy, the issue was whether a schedule of assets and liabilities filed by the bankrupt in district court in an involuntary bankruptcy proceeding was entitled to the immunity accorded pleadings under a statute which provided that "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding . . . shall be given in evidence, or in any manner used against him . . . in any criminal proceeding. . . ." The court, speaking through Mr. Justice Holmes, held that the schedules were protected, saying: "We quite agree that vague arguments as to the spirit of a constitution or statute have little worth. We recognize that courts have been disinclined to extend statutes modifying the common law beyond the direct operation of the words used, and that at times this disinclination has been carried very far. But it seems to us that there may be statutes that need a different treatment. A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however, indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

In *Queen v. Jackson*, [1891] 1 Q.B. 671, defendant, in order to compel restitution of his conjugal rights, seized his wife and detained her in his house, leaving her free to move about the house but not to leave. He claimed that under the English law he had the right to act as he did. The court held that no such right existed under the English law. In an opinion which typified the attitude of the other members of the court, Lord Esher said: "I think that the passing of the Act of Parliament which took away the power of attachment in such cases [power of the court to enforce a decree for restitution of conjugal rights by attachment] is the strongest possible evidence to show that the legislature had no idea that a power would remain in the husband to imprison the wife for himself; and this tends to show that it is not and never was the law of England that the husband has such a right of seizing and imprisoning the wife as contended for in this case. . . ."

KEIFER & KEIFER v. RECONSTRUCTION FINANCE CORP.

Supreme Court of the United States, 1939.
306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Court took this case for review because an important question of federal law called for settlement, particularly in view of a conflict between the court below and the Supreme Court of Minnesota. *Casper v. Regional Agricultural Credit Corporation*, 202 Minn. 433, 278 N.W. 896. The question is whether a Regional Agricultural Credit Corporation, in the circumstances presently to be stated, is immune from suit.

On July 21, 1932, Congress enlarged the powers of the Reconstruction Finance Corporation (hereafter called "Reconstruction") established early that year, Act of January 22, 1932, c. 8, 47 Stat. 5, 15 U.S.C.A. § 601 et seq., by authorizing it, among other things, to create regional agricultural credit corporations "in any of the twelve Federal land-bank districts." Emergency Relief and Construction Act of 1932, § 201(e), c. 520, 47 Stat. 709, 713, 12 U.S.C.A. § 1148. Each corporation was to have a paid-up capital of not less than \$3,000,000 to be subscribed for by Reconstruction, was to be managed by appointees of Reconstruction, and was empowered to make loans to farmers and stockmen for agricultural purposes or for raising and marketing livestock. Accordingly, on September 10, 1932, Reconstruction chartered the Regional Agricultural Credit Corporation of Sioux City, Iowa (hereafter called "Regional"). Regional, in due exercise of its powers, entered into so-called cattle-feeding contracts, whereby it undertook to provide sufficient feed and water for livestock with appropriate security for rendering these services. Failure through negligence to provide proper care for cattle delivered under this arrangement, with resulting damage to the livestock, is the basis of this suit brought by petitioner, plaintiff below, against Reconstruction and Regional. Both defendants demurred on several grounds, of which challenge to the jurisdiction of the court is alone pertinent here. The District Court sustained the demurrers and dismissed the suit. 22 F.Supp. 918. The Circuit Court of Appeals affirmed, holding for Reconstruction because its control of Regional had been transferred by Executive Order (No. 6084, dated March 27, 1933, effective May 27, 1933, 12 U.S.C.A. c. 7 note) to the Farm Credit Administration prior to the alleged cause of action, and for Regional because it was found immune from suit. 8 Cir., 97 F.2d 812. Certiorari was granted, directed solely to the latter issue. 305 U.S. 588, 59 S.Ct. 106, 83 L.Ed. 372.

The starting point of inquiry is the immunity from unconsented suit of the government itself. As to the states, legal irresponsibility was written into the Eleventh Amendment, Const.U.S.C.A.; as to the United States, it is derived by implication. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321, 54 S.Ct. 745, 747, 78 L.Ed. 1282.

For present purposes it is academic to consider whether this exceptional freedom from legal responsibility rests on the theory that the United States is deemed the institutional descendant of the Crown, enjoying its immunity but not its historic prerogatives, cf. *Langford v. United States*, 101 U.S. 341, 343, 25 L.Ed. 1010, or on a metaphysical doctrine "that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353, 27 S.Ct. 526, 527, 51 L.Ed. 834. But because the doctrine gives the government a privileged position, it has been appropriately confined.

Therefore, the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. *United States v. Lee*, 106 U.S. 196, 213, 221, 1 S.Ct. 240, 254, 261, 27 L.Ed. 171; *Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567, 42 S.Ct. 386, 388, 66 L.Ed. 762. For more than a hundred years corporations have been used as agencies for doing work of the government. Congress may create them "as appropriate means of executing the powers of government, as, for instance, . . . a railroad corporation for the purpose of promoting commerce among the states." *Luxton v. North River Bridge Co.*, 153 U.S. 525, 529, 14 S.Ct. 891, 892, 38 L.Ed. 808. But this would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted. In the context of modern thought and practice regarding the use of corporate facilities, such a clause is not a ritualistic formula which alone can engender liability like unto indispensable words of early common law, such as "warrantizo" or "to A and his heirs", for which there were no substitutes and without which desired legal consequences could not be wrought. *Littleton, Tenures* (Wambaugh ed.) §§ 1, 733.

Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so? *Federal Land Bank v. Priddy*, 295 U.S. 229, 231, 55 S.Ct. 705, 706, 79 L.Ed. 1408. Cf. *Helvering v. Gerhardt*, 304 U.S. 405, 411, 412, notes, 58 S.Ct. 969, 971, 972, 82 L.Ed. 1427. This is our present problem. Has Congress endowed Regional with immunity in the circumstances which enveloped its creation? It is not a textual problem; for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes utilizing corporations for governmental purposes and drawing significance from dominant contemporaneous opinion regarding the immunity of governmental agencies from suit.

Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of government in economic affairs have greatly extended the use of independent corporate facilities for governmental

ends. In spawning these corporations during the past two decades, Congress has uniformly included amenability to law. Congress has provided for not less than forty of such corporations discharging governmental functions, and without exception the authority to-sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope. It is noteworthy that the oldest surviving government corporation—the Smithsonian Institution—has several times been in the law courts, even in the absence of explicit authority and although the general feeling regarding governmental immunity was very different in 1846 from what it has become in our own day. 9 Stat. 102, 20 U.S.C.A. § 41 et seq. *Smithsonian Institution v. Meech*, 169 U.S. 398, 18 S. Ct. 396, 42 L.Ed. 793; *Smithsonian Institution v. St. John*, 214 U.S. 19, 29 S.Ct. 601, 53 L.Ed. 892.

Only two instances have been brought to the Court's attention in which Congress has not explicitly rendered its recent corporate creations amenable to suit. These are the Regionals and the Federal Savings and Loan Associations. 48 Stat. 128, 132-134, 12 U.S.C.A. § 1464. It is significant that neither of these classes of corporations was the direct emanation of Congress or the offspring of a general incorporation law under Congressional authority. *Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp.*, *supra*. Each was to come into being through an organ that had theretofore been created by Congress. We put the Federal Savings and Loan Associations to one side, because they are not now before the Court. But the circumstances attending the origination of Regional make it manifest that it was within the considerations that have uniformly led Congress to make its immediate corporate creatures subject to suit. The genesis, functions, and affiliations of Regional all negative the assumption that in its operations it was to be without the law.

Reconstruction is the parent of Regional. When creating it, Congress gave Reconstruction various general corporate powers including authority "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal." 47 Stat. 5, 6, 15 U.S.C.A. § 604. When later Congress authorized Reconstruction to create these Regional Agricultural Credit Corporations, it did so by outlining in a single section of a comprehensive statute the broad scope of this added power for Reconstruction. 47 Stat. 709, 713. Congress naturally assumed that the general corporate powers to which it had given particularity in the original statute establishing Reconstruction would flow automatically to the Regionals from the source of their being. Such, certainly, has been the practical construction of the Regional Agricultural Credit Corporations in the instinctive pursuit of their enterprise. See, e. g., *Hallenbeck v. Regional Agricultural Credit Corporation*, 47 Ariz. 477, 56 P.2d 1041; *Regional Agricultural Credit Corporation v. Elston, Prince & McDade*, La.App., 183 So. 91. Cf. *Lewis v. Regional Agricultural Credit Corporation* 10

Cir., 92 F.2d 1008. To imply for Regionals a unique legal position compared with those corporations to whose purposes Regional is so closely allied, is to infer Congressional idiosyncrasy. There is a much more sensible explanation for the failure of Congress to bring Regional by express terms within its emphatic practice not to confer sovereign immunity upon these government corporations. Congress had a right to assume that the characteristic energies for corporate enterprise with which a few months previously it had endowed Reconstruction would now radiate through Reconstruction to Regional.

To give Regional an immunity denied to more than two score corporations, each designed for a purpose of government not relevantly different from that which occasioned the creation of Regional, is to impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies none. A fair judgment of the statute in its entire setting relieves us from making such an imputation of caprice.

The legal position of Regional is, therefore, the same as though Congress had expressly empowered it "to sue and be sued." . . .

Reversed.

NOTES

1. None of the law review commentaries on the principal case is particularly helpful concerning its legislation aspects.

2. In *Taff Vale Ry. v. Amalgamated Society of Ry. Servants*, [1909] A.C. 426, the issue was whether a union is suable in its group name. Farwell, J., said: "The questions that I have to consider are what, according to the true construction of the Trade Union Acts, has the Legislature enabled the trade unions to do, and what, if any, liability does a trade union incur for wrongs done to others in the exercise of its authorized powers?" He discussed at length the statutory recognition that has been accorded unions and their activities, and concluded: "The proper rule of construction of statutes such as these is that in the absence of express contrary intention the legislature intends that the creature of the statute shall have the same duties, and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing. . . . If, therefore, I am right in concluding that the society are liable in tort, the action must be against them in their registered name. . . ."

See also *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975 (1922), which was a suit against the union under the anti-trust laws. In holding that the unincorporated association was suable in the group name, the court described in detail the organization of the union, its purposes, and the great powers and funds given over to the central organization for the purpose of carrying out those ends, saying, "No organized corporation has greater unity of action, and in none is more power centered in the governing executive bodies. Undoubtedly at common law, an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member. . . . But the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary. . . ."

"It would be unfortunate if an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of four hundred thousand members in carrying on, in a wide territory, industrial controversies and strikes, out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in course of such strikes. To remand persons injured to a suit against each of the 400,000 members to recover damages and to levy on his share of the strike fund, would be to leave them remediless."

Some state courts have refused to follow the *Taff Vale Ry. and Coronado Coal Co. Cases*, relying at least in part upon differences in their own legislative background. For example see *District No. 21, U. M. W. A. v. Bourland*, (Ark.) 277 S.W. 547 (1925); *Tucker v. Eatough*, 186 N.C. 505, 120 S.E. 57 (1923).

SECTION 8. VIOLATION OF STATUTES AS NEGLIGENCE PER SE

JAMES M. LANDIS, STATUTES AND THE SOURCES OF LAW

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One well recognized field exists where statutes have been commonly relied upon by courts to determine whether certain types of conduct are to be regarded as tortious. Legislatures in striking at action deemed by them to be undesirable often fail to think beyond the imposition of a criminal penalty for pursuing forbidden acts. The very prohibition, however, carries with it a judgment of culpability. Courts have generally recognized this fact, and have enlarged the area of tort liability by giving the statute the effect of attaching culpability to action in disregard of the statute.

EVERS v. DAVIS

Court of Errors and Appeals of New Jersey, 1914.
86 N.J.L. 196, 90 A. 677.

GARRISON, J. Upon the trial of this cause, which was an action of negligence brought by an administrator to recover damages for a death that was attributable to the absence of fire escapes upon a tenement house owned by the defendant, the trial court conceived the idea that the proper action was not an action of negligence, but "an action based on a violation of the statute," the statute in question being the Tenement House Act of 1904 (P.L. 1904, c. 61). Under this conception of the plaintiff's statutory rights the trial court permitted an amendment of the complaint by which its allegations of negligence were stricken out, and in their place the nonperformance of a statutory duty was charged. The effect of this amendment and of the trial theory that induced it was the overruling of a line of testimony offered by the defendant and the denial of requests to charge, which rulings were admittedly erroneous if the action of negligence originally brought by the plaintiff was the proper remedy.

A little more in detail the facts of the case were as follows: On November 11, 1912, the defendant became the owner of "a three-story and basement tenement," which was unprovided with fire escapes. On December 28, 1912, the building took fire, and plaintiff's intestate died of injuries attributable to the absence of fire escapes. The Tenement House Act of 1904, by its thirty-sixth section, provides that every nonfireproof tenement house "more than three stories in height" shall be provided with fire escapes from each apartment. By the 189th section it is provided that every person who shall violate any provision of the act shall be subject to certain penalties, to be recovered by the State Board of Tenement House Supervision under a proceeding prescribed by the 193d section. No other remedy or right of action is given by the statute. . . .

At the close of the testimony the court granted a motion to amend the complaint so that it should not charge any element of negligence nor be susceptible to any defense based upon that style of action.

The defendant's motion for a direction was met by the declaration that:

"With respect to the point that there is no negligence established the answer to that is this: That the action is not for negligence now."

Finally the court refused to charge the following request:

"If you find that the building was of such character as, under the law, required fire escapes, you must further find that the negligence of the defendant in failing to provide fire escapes was the cause of the death of the decedent, or the plaintiff cannot recover."

And in connection therewith made this statement for the record:

"My conception of an action of this kind is—I want to get it on the record—my conception is the conception that is voiced by the dictum of the Court of Errors and Appeals in *Fielders v. North Jersey Street Railway Co.*, to the effect that, assuming the party injured in a given case to be one of a class for whose benefit a duty has been by statute or ordinance imposed upon the opposite party, and assuming that the evidence shows an actual breach of that duty, it would seem the sole remaining inquiries should be whether the violation of the imposed duty was the proximate cause of the injury, and, if so, whether any faulty conduct of the injured party was the contributing cause."

"That is my conception of the action, and that is the conception upon which the plaintiff in the case proceeds, upon which his complaint rests, and if I am wrong about that, why there is nothing for the court to do but to reverse me; that is all; and I want to have it squarely brought up, and I therefore write it right in the record in response to your request."

These quotations from the printed case leave no room for doubt that an admitted defense to the action of negligence was shut out by the trial court: First, because that was not the proper form of action; and, second, because the proper action was one based directly upon a violation of the Tenement House Act.

In each of these respects we think that the trial court was in error, and that, to the contrary, no civil action could be brought directly upon the statute, and that whatever benefit the plaintiff in a civil action derives from the statute must be through the common-law action of negligence.

1. The reason why no civil action can be based upon the statute is because no such action or right of action is given by the statute. The language of the statute is entirely free from ambiguity; it seeks to eliminate a source of danger by the imposition of a penalty. The Legislature could, if such were its intention, have provided also that any one injured by a breach of the statute should have a remedy by civil action. It has not seen fit to do so, and the court has no right to supply such omission, especially when, as in the present case, it is a deliberate omission. For the Tenement House Act of 1904 is an evolution from the act of March 24, 1899 (P.L. p. 359), the first section of which provides, *inter alia*, that tenements shall be furnished with fire escapes, and by the third of which a penalty for the breach of the statute is provided—

“and, in case of fire occurring in any of said buildings, the owners thereof shall *also* be liable in an action for damages in case of death or personal injury sustained in consequence of such fire breaking out in said buildings in the absence of such fire escapes.”

The retention in the later act of the remedy by penalty contained in the earlier one, while omitting its companion remedy by civil action, is, as a matter of construction, conclusive of the legislative intent, for what circumstance could more strongly evince a deliberate intention to omit the civil remedy short of a superfluous declaration by the Legislature that what it omitted from a statute was not intended to be included in it? The mere application of the ordinary rules of construction to the act of 1904, therefore, so completely demonstrates the fundamental character of the error into which the court below fell that the matter might well be allowed to rest here, were it not for the danger of a misconception that would be equally erroneous, *viz.*, that the omission to give a private action evinced a legislative intention that the statute should be without effect upon private rights. That this is not the case, and the reason why it is not is so well stated in a recent article by Ezra Ripley Thayer in the *Harvard Law Review* for February, 1914, that I cannot do better than quote what he says:

“The Legislature must be assumed to know the law, and if upon common-law principles such a statute would affect private rights, it must have been passed in anticipation of that result. The Legislature is to be credited with meaning just what it said—that the conduct forbidden is an offense against the public, and that the offender shall suffer certain specified penalties for his offense. Whether his offense shall have any other legal consequence has not been passed on one way or the other as a question of legislative intent, but is left to be determined by the rules of law. If the effect of such a statute is to change the relations of individuals to one another, this must come

about, not through the intent of those who enacted the statute, but by the operation of common-law principles. It thus becomes a question of applying to the situation the principles of the law of negligence, in the light of which the statute was passed."

The question then is, What is, upon common-law principles, the effect of statutes such as the one we are considering upon the action of negligence? The familiar expressions that the breach of such a statute is "negligence per se," or is "prima facie evidence of negligence," seem to me to postpone elucidation rather than to contribute to it, while the implication that proof of a breach of a public statute will support a private recovery is positively misleading.

A fact constantly to be borne in mind in tracing the legal effect of such statutes is that the negligence that is essential to the action of negligence is not solely in the overt act that produced the injury complained of, but may lie in the failure to foresee the danger likely to result from the doing of such act. . . .

Now, it is precisely upon this element of discoverable danger that public statutes or ordinances act, and they do this, not by giving to the plaintiff a right of action he did not have before, but by their operation upon what we may call the common-law conscience of the defendant, better known to us in its personified form of "the ordinary prudent man," the familiar fiction designed by the common law to aid juries, when deciding what was the proper thing for a man to do, to lose sight of the personal point of view of that particular man and to base their judgment upon a general standard which in the final assize is what the jury itself thinks was the proper thing to do.

Now this ordinary prudent man of common-law creation must, in the nature of things, be regarded as a law-abiding citizen to whom, as is pointed out in Dean Thayer in the article referred to, it would be an unjust reproach to suppose that, knowing the statute—for upon familiar principles he can claim no benefit from his ignorance of it—he would break it *reasonably* believing that it was a prudent thing for him to do, and that in all probabilities no harm would come of it.

In other words, it is inconsistent with ordinary prudence for an individual to set up his private judgment against that of the lawfully constituted public authority. We must assume, therefore, that the ordinary prudent man would not do such a thing, since to do so would be to change his entire nature and to forego the very traits that brought him into existence. He would, in fine, cease to be the pattern man he must continue to be in order to be at all.

Upon common-law principles, therefore, when the Legislature has by public statute established a certain standard of conduct in order to prevent a danger that it foresaw, it has in this regard forewarned the "ordinary prudent man," and through him the defendant in a civil action, whose conduct must always coincide with this common-law criterion. . . . The point to be observed, and it is the only matter with which we are now concerned, is that whatever benefit the plaintiff in a civil action derives from such penal statutes is

through the medium of the action of negligence, from which it follows that if such action be abandoned, as was done in the present case, the plaintiff thereby cuts himself off from the very benefits of the statute that he is seeking to derive from it.

It is the necessary corollary of these views that the defendant in such action of negligence retains all of the defenses appropriate to such action that are not affected by such penal statute, which, as we have seen, operates conclusively upon the basis of the defendant's liability, but not at all upon the factum of such liability. The operation of such a statute, in fine, is that the defendant's duty toward the plaintiff as affected by such statute takes the place of what would have been his common-law duty if such statute had not been enacted, leaving the action of negligence in other respects unaffected by such statute. Thus a defendant, although he cannot be heard to say that it was not his duty to obey the statute, may show what he did in his effort to obey it, leaving it to the jury to say whether such effort was what a reasonably prudent person would have done in view of the statute.

Reversed.

NOTES

1. See also *Osborne v. McMasters*, 40 Minn. 103 (1889), where a druggist was held liable for selling a deadly poison to plaintiff's intestate without labelling it "poison" as required by the statute. The court said, "Negligence is the breach of legal duty. It is immaterial whether the duty is one imposed by the rule of common law . . . or is imposed by a statute designed for the protection of others. In either case the failure to perform the duty constitutes negligence. . . . The only difference is that in the one case the measure of legal duty is to be determined upon common law principles, while in the other the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence, or, in other words, negligence per se. . . . All that the statute does is to establish a fixed standard by which the fact of negligence may be determined."

2. See *Restatement of Torts*, American Law Inst. Vol. 2, Secs. 285-288; and "The Effect of Penal Statutes on Civil Liability", 32 Colum.L.Rev. 712 (1932).

CHARLES L. B. LOWNDES, CIVIL LIABILITY CREATED BY CRIMINAL LEGISLATION

16 Minn.L.Rev. 361 (1932).

Professional pride, coupled with an instinctive antagonism toward legislation, leads the common law lawyer to visualize a tort as the special creation of the common law. But a tort may originate in an act of the legislature or subordinate legislative body.¹ If the statute or ordinance is explicit about civil liability, there is no great difficulty apart from the ever-present problem in its application to a border-line

¹ Familiar examples are statutes providing for workmen's compensation, also at a ing the fellow servant rule, recognizing a right of privacy, creating various torts, and imposing extraordinary liabilities upon the owners of automobiles, nothing

case.² But a perplexing situation is created by those enactments which, while expressly providing only for a criminal action, are found to entail certain civil consequences as well. Specifically, there is great confusion in connection with penal statutes or ordinances whose violation is held to create a civil liability directly, or to do so indirectly on the subtler theory that their violation is negligence per se or evidence of negligence.³

There are two problems which are not always clearly distinguished: the statute must be construed; and the construed statute must be fitted into the framework of the common law. . . .

The court which holds that a criminal statute creates a civil liability does not, of course, come out flatly and say that the legislature has been silent upon the subject and therefore it will decide the matter as it sees fit. This may be what the court does, but it is not what it says. Verbally, the court justifies its action by "finding" that the legislature intended to create a civil duty although it did not explicitly state this intention. Such an intention is usually imputed to the legislature where the court decides that the statute was passed for the protection of a class of which the plaintiff is a member. The obvious difficulty with this theory, however, is that even conceding a legislative intention to protect this class it has not evidenced any intention of achieving this protection by the imposition of a civil liability, since the only remedy provided by the statute is a criminal or penal proceeding. A right is simply the ex post facto aspect of a remedy, and it savors of absurdity to impute to the legislature an intention to create a civil liability, where it has manifested no intention of creating a civil remedy.

A pious cant which adds little to clear thinking about the law of torts is the trite jingle that the law will suffer no wrong without a remedy. If this means that the law will suffer no moral wrong without giving a remedy, it is obviously untrue. If it means that the law will suffer no legal wrong without a remedy this is mere tautology, since the existence of a legal wrong presupposes a legal remedy. In these cases the court is verbally carrying out the repressed desires of the legislature, but actually giving vent to its own inhibitions. Under the pretense of construing the act of the legisla-

² An interesting illustration of the difficulty inherent in applying a statute to a close case is *Katz v. Wolff & Reinheimer, Inc.*, (1927) 129 Misc. 384, 221 N.Y.S. 476. A New York statute provided that the owner of an automobile should be liable for negligent injuries resulting from the operation of his car, if it was driven with his "consent." The driver of one of the defendant's taxicabs became ill and without the defendant's knowledge procured X to drive the cab for him. X negligently ran into the plaintiff. The court held that X's driving the cab was not unauthorized, and that the owner of the cab was, therefore, liable under the statute.

³ See Thayer, *Public Wrong and Private Action*, (1914) 27 *Harv.L.Rev.* 317, *Selected Essays on the Law of Torts* 276; Davis, *The Plaintiff's Illegal Action as Defense*, (1905) 18 *Harv.L.Rev.* 505; Schneider, *Negligence by Violation of Law*, 11 *Boston Univ.L.Rev.* 217; Notes and Comments: (1918) 18 *Col.L.Rev.* 603; *mat.* 28 *Col.L.Rev.* 984; (1902) 15 *Harv.L.Rev.* 225; (1915) 28 *Harv.L.Rev.* 111; (1911) *Harv.L.Rev.* 541; (1928) 27 *Mich.L.Rev.* 116; (1924) 72 *U.Pa.L.Rev.* 187; the *P.* *Tex.L.Rev.* 398; (1918) 5 *Va.L.Rev.* 145; (1928) 14 *Va.L.Rev.* 582.

ture, the court is writing the statute which it thinks the legislature should have enacted.

But even though a court refuses to construe a statute to create a civil liability, this does not preclude the possibility of the statute having an important bearing upon the liability of a defendant in a civil suit. The court may reach this result in a perfectly legitimate fashion by holding that the violation of the statute is an element of a tort resting upon negligence. The difference between these approaches in a given case may be one of technique rather than result, but there is a good deal to be said in favor of using the proper means to reach a given end.⁸

Here we are faced with the common law creation of negligence. The liability of the defendant is based on common law principles, and the statute has only an indirect bearing. The proposition is that the defendant is liable for his negligent torts, and the violation of the statute becomes an element of negligence. . . .

SECTION 9. JUDICIAL ADAPTATION OF COMMON LAW TO BASIC LEGISLATIVE CHANGES

MATHEWSON v. MATHEWSON

Supreme Court of Errors of Connecticut, 1906.

79 Conn. 23, 63 A. 285, 5 L.R.A.,N.S., 611, 6 Ann.Cas. 1027.

HAMERSLEY, J. The plaintiff alleges that the defendant, for a valuable consideration, promised to pay her upon her demand a certain sum of money. The defendant, by his demurrer to the plaintiff's answer to the defendant's plea in abatement, in effect admits, for the purpose of determining the question of law in issue, that he did promise as alleged in the complaint, and claims that the plaintiff cannot maintain this action against him for the enforcement of that promise. It goes without saying that, if the parties had the right to make this contract, the plaintiff can sue the defendant for its breach, unless

[Footnotes 4 to 7 are omitted. Ed.]

⁸ Compare the reasoning in these cases: In *Evers v. Davis*, . . . [and] in *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832, *Atkin, L. J.* said: "I imagine that the rule is this, that where a statute imposes a duty upon an individual the question whether a duty is owed to a person aggrieved by a breach of the statute depends on the intention of the statute as to whether it is intended that a duty shall be owed to the individual as well as the state, or that the duty shall be owed to the state only. That will depend on the construction of the statute as a whole, and the circumstances in which it is made, and one of the circumstances to be taken into consideration is this: Does the statute on the face of it contain a reference to the remedy for the breach of its provisions? If it does, this is *prima facie* the only remedy. That, however, is not conclusive; one must still look at the intention of the Legislature to be ascertained from the words used and one may come to the conclusion that, although the statute enacts a duty and imposes a penalty for the breach of that duty, the statute may still intend that a duty shall be owed to the person aggrieved." To find from the "words used" an intention to create a civil liability, when the statute *ex hypothesi* says nothing about a civil liability would seem to be quite a feat.

such suit is clearly forbidden by some positive statute. "Wherever there is a valuable right and injury to it with consequent damage, the obligation is upon the law to devise and enforce such form and mode of redress as will make the most complete reparation." *Foot v. Card*, 58 Conn. 1, 9, 18 A. 1027, 6 L.R.A. 829, 18 Am.St.Rep. 258. The right to contract involves the right to sue for breach of contract, and, when the law creates a new right to contract, the mere creation of the right includes an appropriate remedy by suit for its violation. The defendant's claim, therefore, is manifestly wrong, unless he can maintain the proposition upon which he founds it, namely, the parties had no power to make the contract alleged. It is not claimed that any disability attaches to the person of either of the parties. Each is of age and of sound mind. Each is capable of acquiring, owning, and managing property. Each is capable of making lawful contracts with all persons and with each other, unless there is some law which prohibits any contract, or at least the contract alleged in the complaint, between this plaintiff and defendant. It is admitted that the parties intermarried since April 20, 1877, and the defendant contends that a law prohibiting any contract between the plaintiff and defendant is to be found in the law (including the married woman's act of April 20, 1877) defining the civil status of husband and wife. For the purpose of avoiding confusion, we will first consider our law as it affects the status of married persons, without reference to the exceptions to the rule which have obtained in courts of equity in respect to those wives who have a separate estate.

The relation of husband and wife, although necessarily regulated by positive law, is not, like the relation of guardian and ward, created by that law. Like the relation of parent and child, it is the offspring of the law of nature, and these two relations constitute the family. The family and the obligations and privileges pertaining to it reach back of all state regulations. *Payne's Appeal*, 65 Conn. 402, 32 A. 948, 33 L.R.A. 418, 48 Am.St.Rep. 215. The essential character of the relation of husband and wife, as determined by the law of nature and the correlative rights and duties pertaining to it, may be developed, perverted, or confused, but cannot be destroyed, by the positive law which defines their legal status. The prevalent conception of the true nature of this relation may be affected by, and may affect, the changing conditions of society, and may be affected by, and may affect, legislation defining the legal status. While legislation is ordinarily in accord with the notion of the true relation presumed to prevail at the time, it does not purport to create that relation. The rights and duties growing out of the natural relation are of a kind that must vary with changing circumstances, and of a nature in the main impracticable of enforcement through legislation. In defining the legal status of married persons, the law determines the change in the civil rights of each wrought by the fact of marriage. The legal status thus established necessarily involves certain incidental rights which may or may not be expressed, and which may be established or altered by law without necessarily altering the status resulting

from marriage. The primary and controlling change in legal status wrought by force of the marriage relates to the freedom of the person, but mainly to the capacity of owning property, and the incidents of the latter are the power of making contracts and of suing and being sued. In most English speaking communities, by the law as first established, the wife by force of the marriage lost her legal identity and the capacity of owning property, and as incident to this she lost the power of making contracts and of suing and being sued. But, by the law as now generally established, she does not by force of the marriage lose her legal identity, nor the capacity of owning property, and does not lose the civil rights incident to this capacity. This change in status has been accomplished in different ways and more or less gradually. In Connecticut, perhaps more fully than elsewhere, it has been accomplished by a single radical act of legislation, directly reversing the former primary and controlling change in legal status, affected by force of the marriage, and such radical change more clearly involves a consequent change in the civil rights purely incidental to the status. This consequent effect upon incidental rights plainly comes within the rule that, where the reason of the law fails, the law ceases to operate.

By our first legislation it was enacted that justice should be administered according to the laws of this jurisdiction, "and for want thereof according to the rule of the Word of God." 1 Col.Rec. pp. 21, 509; Revision 1672, Preface; *Fitch v. Brainerd*, 2 Day, 163, 190, 193, 194. By this law, first enacted in 1637-38, the wife's legal identity by force of the marriage became merged in that of her husband, and her legal capacity to own or acquire property, real as well as personal, was lost. By force of the marriage her personal freedom was subjected to the will or control of the husband. Until the reign of Charles II, the right of a husband to correct his wife was recognized (1 Bl.Comm. 444), and until comparatively recent times the right of the husband to restrain the person of his wife by confinement for the purpose of securing her obedience was recognized. The law which attached such subjection to the legal status of a married woman has been abolished, but not by direct legislation. It has disappeared under the continuous pressure of judicial interpretation or indirect legislation. The law, however, which attached to the status of a married woman an incapacity to own property, with the consequent inability to make contracts and to sue or be sued, remained unchanged in theory until 1877.

The foundation of the legal status, namely, the unity in the husband of his own and his wife's legal identity and capacity to own property, was removed, and a new foundation, namely, equality of husband and wife in legal identity and capacity of owning property, was laid by the act which took effect April 20, 1877 (Pub. Acts 1877, p. 211, c. 114; Revision 1902, §§ 4545, 4546, 391, 392). This legislation is remedial, not as ameliorating an existing evil, but as eradicating that evil. It is in the nature of fundamental legislation involving all the results necessarily flowing from the principle established. . . .

The completeness of this change cannot be questioned. The act, in the clearest terms, declares that equality in personal identity and in the ownership of property shall replace the unity of all rights in the husband as the legal status effected by intermarriage.

We think that in enacting this law the state adopted a fundamental change of public policy; that the new legal status established for married persons by the act was based upon, and must be administered in accordance with, this policy; that in every marriage contracted since April 20, 1877, husband and wife alike retain the capacity of owning, acquiring and disposing of property belonging to unmarried persons; that the power of contracting incident to such capacity necessarily follows; and that the legal status of husband and wife involves the capacity to contract with each other and with others. . . .

It is doubtless true that, by reason of the marriage relation, some events which, as between unmarried persons, would give rise to a cause of action, would not, as between man and wife, have the same effect. The nature of such events, should the question arise, must be determined in view of the public policy upon which our legislation of 1877 was based, and not in view of the policy recognized in our legislation of nearly three centuries ago. It is sufficient, for the disposition of this case, to say that such possible events do not include a contract upon valuable consideration to pay a certain sum of money and a breach of that contract. It may be that the action of the trial court, in overruling the plaintiff's demurrer to the defendant's plea alleging a marriage, is sustainable under existing rules of practice in pleading, but that question is now immaterial. The plaintiff has answered alleging that the marriage mentioned in the plea took place since April 20, 1877, and this allegation, if true, is a sufficient answer to the plea. The defendant's demurrer to the answer should therefore have been overruled.

Reversed.

SCHULER v. HENRY

Supreme Court of Colorado, 1908. 42 Colo. 367, 94 P. 360.

. STEELE, C. J. The record presented requires us to determine this question: Is a husband liable for the tort of his wife, committed during coverture, and without his presence, and in which he in no manner participated? The rule of the common law which makes the husband liable for the torts of his wife has not been expressly repealed, and unless it has been repealed by implication the question must be answered in the affirmative. In determining whether the rule of the common law has been abrogated by the enactments concerning married women or is still in force, it will be necessary to briefly consider the status of a married woman at common law and her status under the statutes of this state. At common law the husband and wife were considered as one person, as having but one will between them—that seated in the husband, as the head and governor of the family. . . .

As compensation for depriving her of a legal existence, and depriving her of the enjoyment of her property, and of being under the dominion of her husband, the wife had the benefit of her legal nonentity, and she was presumed to have acted under the direction of her husband, . . .

. . . The wife in Colorado has been wholly emancipated "from the condition of thralldom in which she was placed at common law." And, as stated by Chief Justice Thatcher in *Wells v. Caywood*, 3 Colo. 494: "The wife in Colorado is the wife under our statute and not the wife at common law, and by our statutes must her rights be determined; the common law affecting her rights, as we shall presently see, having been swept away."

. . . We can find no just reason for holding the husband liable for the torts committed by his wife unless committed by his direction. He cannot be held upon the common-law theory of unity of husband and wife. The unity has been severed, and we have grafted into our system of jurisprudence the benign principle of the civil law, whereunder "husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries." *Wells v. Caywood*, 3 Colo. 487. He cannot be held upon the ground that she cannot be held without him, for she can be sued in all matters as if she were sole. He cannot be held upon the ground that he has control of her property and should respond in damages with it, because he has no control of her property, and she may do with it as she pleases. He cannot be held upon the theory that he has the power to restrain her, because he has no such legal power. As he has no legal control over her person or her property, he should not be held for her wrongs. In fact, not one of the reasons assigned by courts and text writers for holding the husband liable exists in this state; and as the reason for holding the husband no longer prevails, he should not be required to respond in damages for the torts of his wife. . . .

Reversed, action dismissed.

MAXWELL, J. (dissenting). . . . It has been repeatedly held by this court that statutes in derogation of the common law shall be strictly construed, and in considering repeals of the common law by implication the same rules should be applied as are applied to statutes, for the reason that the common law is made a part of our jurisprudence by statutory enactment. We believe that many if not all of the arguments of the learned Chief Justice are subject to the criticism contained in the following excerpt from the dissenting opinion of Mr. Justice Campbell in *Insurance Co. v. Ross-Lewin*, 24 Colo. 43, 56, 51 P. 488, 493, 65 Am.St.Rep. 215: "But these and similar arguments are more properly addressed to the legislative department as reasons for changing a long recognized common-law rule, and should not be potential with courts as a reason why they should encroach upon legislative functions." . . .

NOTE

In *Clow v. Chapman*, 125 Mo. 101, 28 S.W. 328, 26 L.R.A. 412, 46 Am.St.Rep. 408 (1894), the court, pointing out that under the statutes the status of married women is entirely different from what it was at common law, held that a married woman can maintain an action against a third person for alienation of her husband's affections.

OPPENHEIM v. KRIDEL

Court of Appeals of New York, 1923. 236 N.Y. 156, 140 N.E. 227.

[The case appears *supra*, p. 86.]

NOTE

Of. Edwards v. Porter, [1925] A.C. 1, discussed in 38 Harv.L.Rev. 1114 (1925), where the court took the position that, notwithstanding the Married Women's Property Acts, a husband is still liable for his wife's torts.

JOHNSON v. UNITED STATES

United States Court of Appeals for the District of Columbia, 1946.
157 F.2d 209.

EDGERTON, ASSOCIATE JUSTICE. Appellant was convicted of forgery, under D.C.Code 1940, § 22—1401, and also of conspiracy under 18 U.S.C.A. § 88. His co-conspirator was his wife, who was convicted but is not a party to this appeal.

Appellant urges that it is legally impossible for a husband and wife to conspire with each other. The old common-law rule to that effect has been followed in *Dawson v. United States*, 9 Cir., 10 F.2d 106, 107, *Gros v. United States*, 9 Cir., 138 F.2d 261 (one judge dissenting), *United States v. Shaddix*, D.C., S.D.Miss. 43 F.Supp. 330, and a number of State cases. There are some State cases to the contrary. *Dalton v. People*, 68 Colo. 44, 189 P. 37; *Marks v. State*, 144 Tex.Cr.R. 509, 164 S.W.2d 690. The old rule was based on the common-law fiction that husband and wife were one person. Acts of Congress have established the separation of husband and wife as to property, contracts, and torts in the District of Columbia. We agree with the District Court of the United States for the District of Columbia, which ruled upon the question in denying the motion of the present appellant's wife for a new trial, that this legislation has made the fiction obsolete. No reason remains why the law should not recognize the obvious fact that the relation of husband and wife does not prevent two persons from conspiring to commit an offense. The interest of society in repressing crime requires that the fact be recognized, and our common-law system does not require that its recognition await express legislative action. . . .

Affirmed.

NOTES

1. In *State v. Herndon*, Fla., 27 So.2d 833 (1946), in the course of his majority opinion holding that a man can steal from his wife, Terrell, J., remarked: "A court can no longer interpret the law from the back of an ass; the process is so slow that it overlooks factors that require a different interpretation to day from what might have been required yesterday. Before the turn of the century the question in this case might have required a different answer".

2. See *Rees v. Hughes*, (1946) 2 Alleng.Rep. 47, noted in 62 L.Q.Rev. 319.

THOMPSON v. DELAWARE, LACKAWANNA &
WESTERN RAILROAD CO.

Superior Court of Pennsylvania, 1910. 41 Pa.Super. 617.

Opinion by ORLADY, J.

The plaintiff recovered a verdict of \$779, as damages for the alleged negligent killing of her son, aged seven years. The questions involved are first, the right of a mother of an illegitimate child to recover for injuries sustained by the child resulting in his death, and, second, the question of contributory negligence, which may be first considered and dismissed as without having any merit. . . .

The other question is of a more serious character and we are without direct authority in this state in regard to it. Prior to the act of July 10, 1901, the mother of an illegitimate child could not recover in such a case.

The Act of April 26, 1855, P.L. 309, provides that the persons entitled to recover damages for any injury causing death, shall be the husband, widow, child or parent of the deceased and no other relative. By the Act of May 14, 1857, P.L. 507, it is provided that in any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of lawful wedlock, and cohabit, such child or children shall thereby become legitimated and enjoy all the rights and privileges as if they had been born during the wedlock of their parents. The next step in this remedial legislation is in the Act of April 6, 1868, P.L. 67, which provides, that all marriages theretofore contracted between parties within the degree of affinity as prescribed by act of 1860, of which issue is born, are thereby legalized, and the child or children of such marriages shall have all the rights and privileges of children born in lawful wedlock. This was followed by the Act of June 5, 1883, P.L. 88, which declares that illegitimate children born of the same mother, and leaving as survivors neither mother nor issue capable of inheriting, shall have capacity to take and inherit from each other personal property as next of kin and real estate as heirs in fee simple, in the same manner as children born in lawful wedlock. This was evidently enacted to remedy the effect of *Woltemate's App.*, 86 Pa. 219, in which it was held that the act of 1855 did not enable illegitimate children to inherit from each other. The act of June 14, 1897, amending the third section of the act of 1855, provides, that

illegitimate children shall take and be known by the name of their mother, and they and their issue and their mother and grandmother shall respectively have capacity to take or inherit from each other personal estate as next of kin, and real estate as heirs in fee simple; and as respects said real or personal estate, so taken or inherited, to transmit the same according to the intestate laws of this state.

Prior to 1874, a great number of private or special acts of assembly were passed, providing that certain named illegitimate children of certain named parties, "shall be legitimated, and shall have and enjoy all the rights and privileges of children born in lawful wedlock, with the right to inherit and transmit any estate whatsoever."

The next act on the subject is the one which is vital to this case, that of July 10, 1901. It is entitled an act, "to regulate and define the legal relation of an illegitimate child or children, its or their heirs, with each other, and the mother and her heirs." The first section is as follows: "That illegitimate children shall take and be known by the name of their mother, and the common-law doctrine of nullius filius, shall not apply as between the mother and her illegitimate child or children, but the mother and her heirs and her illegitimate child and its heirs, shall be mutually liable one to the other, and shall enjoy all the rights and privileges one to the other, in the same manner, and to the same extent, as if the said child or children had been born in lawful wedlock." The second section provides, "The mother of an illegitimate child, her heirs and legal representatives, and said illegitimate child or children, its or their heirs and legal representatives, shall have capacity to take or inherit from or through each other, personal estate, as next of kin, and real estate as heirs in fee simple or otherwise, under the intestate laws of this commonwealth, in the same manner and to the same extent, subject to the distinction of half-bloods, as if said child or children had been born in lawful wedlock." Section 4 is as follows: "The intent of this act is to legitimate an illegitimate child and its heirs, as to its mother and her heirs; but it is not intended to change the existing laws with regard to the father of such children, or their respective heirs or legal representatives."

The plaintiff was originally married to a man named Ward, who died more than a year prior to the birth of her son, Willie, and after his birth she was married to her present husband. While the action was originally brought in the name of George Thompson and Mary Thompson, the record was subsequently amended by striking therefrom the name of George Thompson, it being conceded that he was improperly joined with the mother as a plaintiff.

In construing the act of 1901 we are aided by many decisions in arriving at a proper interpretation of the legislative will; all of its parts are to be taken together, and the legislative intention so ascertained will prevail over its literal import, or its strict letter; the title may be considered, and the construction most agreeable to reason and justice shall be adopted as embodying the intention of the lawmakers, for it will not be presumed that the legislature contemplated unreason or

injustice. While this is a statute in derogation of the common law, and as such it is to be strictly construed, yet it is not to be extended by implication beyond the legal import of the words used, so as to embrace cases or acts not clearly described by such words, or to bring them within a prohibition or penalty of such a statute. A strict construction does not mean that words will be so restricted as not to have their full meaning, and that the rule of strict construction will not be applied with such technicality as to defeat the purpose and the true intent or meaning of the statute. Statutes which give a right to the personal representative of a deceased for tortious acts, should be construed strictly, but on the other hand, it is just as positively held, that such statutes are remedial inasmuch as they provide a remedy for an obvious wrong, and that in this sense they should be construed liberally. They are made to supply defects or abridge superfluities in the law, and in construing any statute we are to keep in mind the old law, the mischief and the remedy intended; that which is within the mischief intended to be remedied is considered within the statute although not within the letter, and that which is not within the mischief is not within the statute, though within the letter.

In *Moritz v. Garnhart*, 7 Watts, 302, the Supreme Court held that the grandfather of an illegitimate child might maintain an action on the case for the abduction of the illegitimate child of his daughter, Judge Gibson saying, "Though a bastard be not looked upon as a child for any civil purpose, the ties of nature are respected in regard to its maintenance, and can it be said, having bestowed his affection on this child and reared it by his bounty, he shall not be permitted to exercise the rights of a father to it, as against an intermeddler. It would be a reproach to the law if he should not. The stern simplicity of feudal principles is gradually bending to the more complicated relations of a milder civilization." Prior to 1901, the rights even of the mother of an illegitimate child were very circumscribed. . . .

In interpreting this statute, the question is not, Could the right of the mother of an illegitimate child to maintain the action have been more clearly expressed? but, Do the words used clearly convey the legislative intention of her right to maintain such an action? There is no ambiguity in its provisions, it is the last step taken in a long series of enactments and adjudications, involving the same subject-matter, and each enactment is a step forward in the direction of relief and protection for the unfortunate mother of an illegitimate child, and of an increase of the rights of her offspring. By its very terms the old common-law doctrine of *nullius filius* no longer applies; the mother and her heirs, and the child and its heirs shall be mutually liable one to the other, and shall enjoy all the rights and privileges one to the other, in the same manner, and to the same extent as if the child had been born in lawful wedlock, and the special declaration of intent is stated in unequivocal words to be, to legitimate an illegitimate child as to its mother. With this declaration of intention, can it be questioned that the object and effect of this statute was to change the status and capacity of an illegitimate child to the status and capacity of a legitimate

child, and create the relation of parent and child for all purposes as if the latter had been born in lawful wedlock. These are the words used, and to our mind they can be interpreted in but one way. We held in *Com. v. Gilkeson*, 18 Pa. Superior Ct. 516, that children born prior to marriage, who have been legitimated by the subsequent marriage of their parents, are not liable to pay a collateral inheritance tax upon the estate passing from their father to them.

The last consideration of the question by the Supreme Court is in *Com. v. Mackey*, 222 Pa. 613, 72 A. 250, 128 Am.St.Rep. 825, and it is there held in referring to this act of 1901, by Judge Brown that, not only are all the rights and privileges of a child born in lawful wedlock conferred upon any illegitimate child, as between it and its mother, but these rights and privileges are to be enjoyed in the same manner and to the same extent as if the child had been born in lawful wedlock . . . the expressed purpose of the act is to legitimate an illegitimate child as to its mother, and, as a proper, logical and humane incident to such legitimation to confer upon such child every right and privilege enjoyed by a child born to wedded parents. This act was intended to apply alike to the unfortunate mother and the helpless child and to remove all legal obstructions, as between them, that had theretofore existed by reason of the illegitimacy of the child.

As said by Judge Woodward in *Killam v. Killam*, 39 Pa. 120, the words used by the legislature were large enough to confer all the civil rights of legitimacy, and as it was a remedial and humane law, it ought not to be cramped in the construction.

The opinion of the learned trial judge in denying the motion for judgment for the defendant, fully justifies his disposition of all the matters raised by the questions involved.

The assignments of error are overruled and the judgment is affirmed.

NOTES

1. See *Rhode Island Hospital Trust Co. v. Hodgkin*, 48 R.I. 459, 137 A. 381 (1927), holding that where a testator devised property "to the children or other descendants" of testator's daughter, an illegitimate child of the daughter was entitled to receive the property. The court said, "It is plain . . . that under the Rhode Island statute a child born out of wedlock is the legal child of its mother and is to be so regarded with reference to the provisions of other statutes dealing generally with the legal rights of 'children or descendants'. . . . The legitimating or enabling act by making the illegitimate child the legal child and heir of his mother has also without specific legislative declaration given him that standing with reference to other statutory provisions. . . . At the time the testator made his will the remedial statute (permitting inheritance) and the construction placed on it by this court had been the settled law of this State for many years. The court had held that the legislative intent which would ordinarily attach to other statutes was modified by the provisions of the remedial statute. We are of the opinion that it should be said, with equal reason, that the ordinary testamentary intent would be modified by the statute as construed by the Supreme Court. The testator made his will in that state of the law and in the absence of provision to the contrary, the terms 'children or other descendants' as used by him

would include illegitimate as well as legitimate children or descendants of his daughter. . . ."

See also *Hadley v. City of Tallahassee*, 67 Fla. 436, 65 So. 545 (1914); *Security Title & Trust Co. v. West Chicago St. R. R.*, 91 Ill.App. 332 (1900); *Bennett v. Toler*, 15 Gratt (Va.) 588 (1860); *Estate of Wardell*, 57 Cal. 484 (1881); but cf. *Will of Scholl*, 100 Wis. 650, 76 N.W. 616 (1898).

2. In *Brown v. Scherrer*, 5 Colo.App. 255 (aff'd 21 Colo. 481) (1894), the issue was whether marriage, without birth of issue, operates to revoke a husband's will by operation of law. The common law required both marriage and the birth of an heir. Reason was that neither wives nor daughters could inherit lands. But modern statutes make surviving spouse an heir. "In accordance with what we believe to be the spirit and the reason of the doctrine, and in accordance with what we believe to be the purpose and spirit of our legislation, we hold that the marriage of a testator, whether or not it be followed by the birth of an heir, is operative to revoke any will which he had antecedently made."

See *Karr v. Robinson*, 107 Md. 375, 173 A. 584 (1934), where the court held that a will, executed after the testator's second marriage but before the birth of issue by that marriage, was impliedly revoked by the subsequent birth of a child for whom no provision was made in his will. The court said, "The facts of marriage, subsequent to the execution of a will, and the subsequent birth of a child, are now generally held to be sufficient to revoke a will by implication, subject to certain exceptions to the rule. The authorities, however, are not in accord upon the question whether or not the concurrence of such facts is essential to an implied revocation of the will. Some have held concurrence not essential, while others have taken a contrary view. In most of the states, statutes have been passed relative thereto. In this state no such statute has been passed, nor has there been any case before this court where this question has been raised upon facts similar to those in this case. . . . The court, so far as we are able to ascertain, has never passed upon the question here involved, and hence we are at liberty to follow either line of decisions, and, as those cases holding that the concurrence of the facts named are not essential appear to us to be most logical, we will hold that the will, in this case, was impliedly revoked."

Of this Maryland case it has been said, "The approach of the instant court, in determining that the common law of Maryland relating to implied revocation of wills shall be guided by this trend of legislative opinion in other jurisdictions, assumes a significance out of proportion to the holding." 35 Col.L.Rev. 787 (1935).

See also *Colcord v. Conroy*, 40 Fla. 97, (1898), and *Teopfer v. Kaeufer*, 12 N.M. 372 (1904), in both of which the court held that where a woman executed a will, then married, and thereafter died leaving only her husband surviving, the will was impliedly revoked by the marriage. In the latter case the court said, "By the marriage not only a husband or wife, but a new heir capable of inheriting all of the property comes into existence, and in accordance with what we think is the spirit and reasoning of the doctrine and the purpose and meaning of our laws, we hold that the marriage of a testator, whether or not it be followed by the birth of an heir, is operative to revoke any antenuptial will."

JUNG v. ST. PAUL FIRE DEPT. RELIEF ASS'N

Supreme Court of Minnesota, 1947. — Minn. —, 27 N.W.2d 151.

MATSON, JUSTICE. Plaintiff, by his mother as guardian ad litem, appeals from a judgment entered for defendant in an action for the recovery of certain pension benefits alleged to be due him upon the death of his illegitimate father.

Plaintiff is a minor child and was born out of wedlock on December 19, 1938, to Dorothy Jung. Prior thereto, on November 1, 1938, Thomas James Kell, in writing and before a competent attesting witness, declared himself to be the father of plaintiff, who was then unborn, as part of a written stipulation for settlement entered into by the mother, the state board of control, and said Thomas J. Kell, whereby the latter agreed to pay and did pay \$1,000 for and in consideration of being relieved from all further liability on account of plaintiff, pursuant to Minn.St.1945 and M.S.A. § 257.28. This stipulation was approved by the Ramsey county district court.

Thomas J. Kell, who during his lifetime was a member of the St. Paul fire department and also an active member in good standing of defendant association, was killed in the line of duty on January 9, 1942. According to the by-laws of defendant, if an active member dies leaving a widow who was his legally married wife or leaves a *child or children*, such widow and said *child or children* shall be entitled to a pension out of the association's benefit fund. In the case of a child, such pension would amount to \$11.66 per month and would continue until the age of 16 years is attained. Defendant is organized under and subject to Minn.St.1945 and M.S.A. § 69.48, which provides:

"When . . . an active member of a relief association, dies, leaving

"(1) A widow . . . ; or

"(2) A child or children . . . [such] widow and the child or children shall be entitled to a pension . . . :"

Subject to certain limitations, which are not here material, such statute further provides that the pension shall be granted "in conformity with the by-laws" of the association.

After plaintiff's application for a pension had been rejected by defendant, the present suit was instituted on his behalf by his mother as guardian ad litem to compel defendant to pay plaintiff the aforesaid monthly pension. The trial court found specifically that plaintiff was not a child of Thomas James Kell within the meaning of the foregoing statute and within the meaning of defendant's by-laws. The only issue we need consider is whether plaintiff, born out of wedlock and whose parentage has been acknowledged by the father in writing and before a competent witness, is a *child* of the said father within the meaning of that term as used in § 69.48 and in defendant's by-laws.

1. At common law, a child born out of wedlock is said to be *filius nullius*, the child of nobody, or *filius populi*, the child of the people. The common law is in force in this state except as it has been abrogated by statute or is not adapted to our conditions. 1 Dunnell, Dig. & Supp. § 1503, and cases cited. Most states, including Minnesota, have enacted statutes mitigating to a greater or less degree the rigors of the common law and have conferred upon illegitimates certain limited rights. See, Minn.St.1945 and M.S.A. §§ 525.172 and 176.01, subd. 3; *In re Snethun's Estate*, 180 Minn. 202, 230 N.W. 483; *Reilly v. Shapiro*, 196 Minn. 376, 265 N.W. 284. In numerous cases, the question has arisen whether illegitimates are included within such terms as "child" or "children" as used in statutes, wills, deeds, and other instruments. By the weight of authority, when the word "child" or "children" is used in a statute it means a legitimate child or children, unless the statutory language reflects an intent to the contrary. A similar interpretation has been adopted with respect to deeds, wills, and similar instruments, unless the context requires, or the circumstances surrounding the execution import, a meaning inclusive of illegitimates.

2, 3. We come to a consideration of the extent to which the harshness of the common-law rule has been mitigated in this state with respect to the rights and status of children born out of wedlock.

"While the common law is flexible and adaptive, and may be applied to new conditions, the courts cannot abrogate its established rules any more than they can abrogate a statute." 1 Dunnell, Dig. § 1504.

It is the province of the legislature, not the courts, to modify the rules of the common law. *Congdon v. Congdon*, 160 Minn. 343, 200 N.W. 76; 1 Dunnell, Dig. § 1503. We must therefore turn to an examination of pertinent legislative enactments to determine the degree of modification. One line of authority holds that statutes in derogation of the common law are to be strictly construed; but the more modern view is that when legislation, even though in derogation of the common law, is remedial in character, a liberal construction should be adopted. . . . A statute conferring upon illegitimates rights which the common law denied them is remedial. *Goodell v. Yezerski*, 170 Mich. 578, 136 N.W. 451, 40 L.R.A., N.S., 516; *Burris v. Burgett*, 16 Del.Ch. 10, 139 A. 454; *Crawford v. Masters*, 98 S. C. 458, 82 S.E. 793; *Edwards v. Beard*, 77 Ind.App. 478, 134 N.E. 203; *Wasmund v. Wasmund*, 90 Wash. 274, 156 P. 3. The remedial nature of such legislation does not, however, justify a construction which gives to the statutory language an application and meaning not intended by the legislature. *Gollnik v. Mengel*, 112 Minn. 349, 128 N.W. 292; Minn.St.1945 and M.S.A. § 645.08. A legislative modification of the common law is limited in its application and by its necessary implication to the removal of the mischief against which the statute is directed. In determining the extent to which the common law has been abrogated, we are not at liberty, even though the

purpose be worthy, to substitute the horizon of judicial imagination for that of legislative intent. See, *Wasmund v. Wasmund*, 90 Wash. 274, 156 P. 3.

4. Section 69.48 (quoted above), under which defendant is organized, in its use of the term "child" or "children," obviously does not by and of itself involve or effect any change in the common law so as to include illegitimates. *Murrell v. Industrial Commission*, 291 Ill. 334, 126 N.E. 189; see, Annotation, 30 A.L.R. 1075. Its reference to defendant's by-laws adds nothing. *This court* (following the rule of *State v. McCurdy*, 116 Me. 359, 102 A. 72), in construing the meaning of the term "child" in G.S.1923, § 10136, [now Minn.St.1945 and M.S.A. § 617.56.] has already determined that such term, without any qualifying language to the contrary, does not embrace illegitimate children. *State v. Lindskog*, 175 Minn. 533, 221 N.W. 911, 912. Although the meaning of the term "child" has thus already been determined, plaintiff, nevertheless, contends that the legislature, by reason of having enacted certain statutes extending to illegitimates certain specific rights denied to them at common law, has in reality determined that the term "child" includes an illegitimate child. The contention seems wholly untenable. Plaintiff first refers to § 525.172, which provides:

"An illegitimate child shall inherit from his mother the same as if born in lawful wedlock, and also from the person who in writing and before a competent attesting witness shall have declared himself to be his father; but such child shall not inherit from the kindred of either parent by right of representation."

Obviously, the foregoing statute pertains to, and confers only, the right of inheritance. It is not in pari materia with § 69.48 so as to provide any basis whatever for construing the two statutes with reference to each other. It is also clear that the legislature did not intend thereby to abrogate the common-law rule generally, but only with respect to the right of inheritance, and then in a limited degree. No recognized rule of construction permits this court to invade the province of the legislature by a process of destroying or distorting express statutory provisions intended to limit the application of a statute. Not only must this section be confined to the field of inheritance, but also to a restricted portion of that field. This court in *Reilly v. Shapiro*, 196 Minn. 376, 265 N.W. 284, denied an illegitimate the right to inherit under the foregoing statute from a father who in bastardy proceedings, in open court, in the presence of the prosecuting attorney, the judge, the reporter, and the complainant, pleaded guilty in writing and thereby admitted that he was the father. Although he had been duly adjudicated to be the father, his written plea of guilty had not been signed by any witness as expressly required in the foregoing statute, and therefore this court, speaking through Mr. Justice Julius J. Olson, denied his illegitimate child the right of inheritance, and in so doing said (196 Minn. at page 379, 265 N.W. at page 286):

"Nor can it be denied that a child born out of wedlock is as much in need of parental aid and the natural rights that go with the relationship of parent and child as those pertaining to a child born in wedlock. Every human instinct is moved toward extending a helping hand to such child, already laboring under a handicap impossible of removal. That is why the old and harsh rules of the common law have been modified and in many instances removed by statutory enactments. *Our own statute is proof that we have made some progress in that direction.* However, rights of inheritance are purely statutory. We as judges cannot make law. No matter what the individual judgment of a judge may be, his desire to aid in extending human rights cannot be employed to the extent of making law. Obviously, this matter is wholly one for the Legislature to regulate and define." (Italics supplied.)

We have made nothing more than "some progress" in ameliorating the harsh rule of the common law. See, *In re Snethun's Estate*, 180 Minn. 202, 230 N.W. 483. The cautious and specific manner in which the legislature granted to illegitimates a limited right of inheritance indicates that it intended thereby to establish, not a repeal of, but only an exception to, the general rule.

Plaintiff also cites § 176.01, subd. 3, whereby it is provided that the term "child" or "children" as used in the workmen's compensation act shall include all children who are entitled by law to inherit from the deceased. Again we have an express exception which only serves to illustrate the restricted manner in which the legislature has accorded rights to children born out of wedlock. If the legislature had intended to make anything more than exceptions to the general rule, it would have used a few simple words to accord to illegitimates all the rights enjoyed by children born of legitimate parents.

With respect to the issues herein discussed, we find it unnecessary to express any opinion as to the effect of the putative father's act in making a cash settlement pursuant to § 257.28, whereby he was relieved of all further liability for the care, maintenance, and education of his illegitimate child.

In a society which has barbarically handicapped and burdened children of illegitimate parents for sins in the commission of which they had no part, much remains to be done to humanize existing rules of law. As a court, however, we must take legislative enactments as we find them and not invade the legislative field.

The judgment of the lower court must be and is affirmed.

Affirmed.

NOTE

See "Effect of Statutes Altering the Position of Illegitimate Children on Judicial Construction of Wills", 45 *HARV. L. REV.* 890 (1932).

SECTION 10. THE PROBLEM OF CODIFICATION AND RESTATEMENT

REPORT OF THE COMMITTEE ON THE ESTABLISHMENT OF A PERMANENT ORGANIZATION FOR IMPROVEMENT OF THE LAW PROPOSING THE ESTABLISHMENT OF AN AMERICAN LAW INSTITUTE.

Submitted to a meeting of representative judges, lawyers and law teachers,
held February 23, 1923, in Washington, D.C. American Law Institute
Proceedings Vol. 1, 6-11 (1923).

(C) Two Chief Defects in American Law.

Two chief defects in American law are its uncertainty and its complexity. These defects cause useless litigation, prevent resort to the courts to enforce just rights, make it often impossible to advise persons of their rights, and when litigation is begun, create delay and expense.

When the law is doubtful most persons are inclined to adopt the view most favorable to their own interests; and many are willing if necessary to test the matter in court while those willing to overreach their neighbors are encouraged to delay performing their obligations until some court has passed on all the novel legal theories which skilled ingenuity can invent to show that they need not be performed. In either case litigation is carried on, which but for the law's uncertainty would be avoided. Again, the present degree of uncertainty in many parts of the law tends to create the feeling that the outcome of all court proceedings is uncertain no matter how just the claim, the result being that many whose legal rights are clear indirectly encourage a failure of justice by compromising with opponents who are conscious of the lack of merit of their own contentions.

Furthermore, injuries caused by uncertainty in the law are not confined to situations in which controversies have arisen so that rights claimed must be either compromised or referred to the courts for their decision. Though one function of law is to provide rules by which disputes may be settled, its other equally important function is to provide rules of action. Because of the existing uncertainty in the law those who turn to it for guidance in conduct often find that it speaks with a doubtful voice. For example, the lawyer who assists in the combination of commercial enterprises, or the lawyer who draws a will with provisions suggestive of the rule against perpetuities, will often find that he cannot positively inform his clients of the legal consequences of their acts.

The same bad effects, though in a less degree, result from the law's complexity. Besides which, complex law tends to make the administration of justice a game in which knowledge and skill are more important for obtaining victory than a just cause.

The time consumed by the courts in disposing of cases is an obvious fact which all persons may note and criticise. Furthermore, everyone realizes that long-drawn-out litigation is, on account of the expense, a greater hardship on those of relatively small means than on the litigant with a long purse. It is therefore natural that the delays of the law rather than its uncertainties or complexities is the defect on which those who criticise the administration of justice usually lay stress; and yet, the most of these delays are due to uncertainties and complexities.

Perhaps, however, the most serious result of these defects is that they create a lack of respect for law. . . .

At the outset we realized that it was useless to attempt to come to any final conclusion in regard to the right way to reduce the present uncertainty and complexity of our law until we had made a thorough analysis of the principal forces now operating to make our law more or less certain or more or less complex. . . .

Our investigation shows that among the causes of the law's uncertainty are: lack of agreement among the members of the legal profession on the fundamental principles of the common law, lack of precision in the use of legal terms, conflicting and badly drawn statutory provisions, attempts to distinguish between two cases where the facts present no distinction in the legal principle applicable, the great volume of recorded decisions, the ignorance of judges and lawyers and the number and nature of novel legal cases. We also find that among the causes of complexity are, the complexity of the conditions of life, the lack of systematic development of the law, and the unnecessary multiplication of administrative provisions.

All these causes of the law's uncertainty would continue to exist were the Federal Constitution repealed and the United States made one state. The fact, however, that the nation is composed of forty-eight states, each of which as well as the Federal Government is an independent source of law, means that the law on any subject in any one jurisdiction may differ from the law of one or more or all of the other jurisdictions. These variations in law are themselves a potent cause of uncertainty and complexity, and because of this and for other reasons do much injury, not only where transactions are carried on in two or more states, but also where transactions are carried on wholly within one state.

Any practical plan devised and carried out by lawyers to promote certainty and simplicity in the law must meet those conditions causing uncertainty and complexity which it is possible for the profession to modify or eliminate. It is manifest that some of the causes are beyond the power of the bar to remedy. The number and nature of novel legal questions, and those differences in the law of different states due to differences in economic or social conditions, are entirely outside the control of the bar. Furthermore, the great volume of the annual increase to the already overwhelming mass of reported cases, which is another cause of the law's uncertainty, cannot be di-

rectly checked by any action which may be taken by the profession. . . .

On the other hand, many causes of the existing uncertainty and complexity are more or less within the power of the legal profession to control by intelligent united action. Bar associations have done and are now doing much to improve legal education and thereby create conditions which will tend to reduce one cause of the law's uncertainty—the ignorance of judges and lawyers.

Badly drawn statutory provisions and the unnecessary multiplication of administrative provisions set forth in statutes are, as stated, causes of uncertainty and complexity. The wisdom of the purpose which the substantive provisions of the statute law are intended to effect is beyond the province or the power of the profession. So, too, the means adopted to attain an end is also often largely a question of public policy. On the other hand, not only the principles of legislative draftsmanship but also the administrative details of many statutes, especially the provisions for the enforcement of regulatory statutes, are matters concerning which the public have a right to secure from the bar an informed opinion. Again, the procedural law is in great part expressed in statutes and rules of court, and this field of law, in so far as it applies to methods for the determination of rights and duties, is a subject on which the people have a right to expect from the profession more than an informed opinion; they have a right to efficient direction.

Finally, the more detailed study of the subject in Part II shows that lack of agreement among lawyers concerning the fundamental principles of the common law is the most potent cause of uncertainty. The bad effect of this lack of agreement is not confined to creating uncertainty in the law of each state. To it is due much of the unnecessary and harmful variation in the law of the different states. Closely interwoven with this cause is the lack of precision in the use of legal terms. Fortunately these two causes of uncertainty and complexity are precisely those over which the legal profession has the greatest control. The people through the legislatures are theoretically responsible for the uncertainties and complications of statutory enactments. The common law and its terminology, however, have been developed solely by lawyers. To say that the system of developing and applying law is primarily responsible for the lack of agreement on legal principles and the lack of precision in the use of legal terms does not excuse the profession which through the centuries of English history has evolved the system with all its great merits and also with all its defects. As the common law has been developed under the guidance of the legal profession, that profession has the power and the duty to reduce its principal defects. At present chief among them is this lack of agreement among lawyers concerning the principles of the law and lack of precision in the use of legal terms. The fact that lawyers have so far failed to appreciate the extent of the resulting evil or to recognize the responsibility

of the profession to try to improve conditions is the sole reason that today these defects loom so large.

ROSCOE POUND, SOURCES AND FORMS OF LAW

22 Notre Dame Lawyer 1, 71-79 (1946).

Possibilities and Advisability of a Civil Code. 1. *Purposes of codification.* Three different ideas of a code have been urged. The first, which may be called the Benthamite idea, is really the idea of the eighteenth-century law of nature school. It regards a code as a complete legislative statement of the whole body of the law so as to put it authoritatively in one self-sufficing form.

A second view, at the other extreme, is that which was adopted by a number of the commissioners under Lord Westbury's plan and has been urged particularly by Holland and by Sir James Stephen. According to this idea, orderly arrangement, convenience of ascertainment, and publicity are the chief objects; so that preparation of a code involves (a) republication in systematic form of the whole mass of existing law of every kind, and (b) separate codification of statute and common law, adhering as closely as possible to the language, conceptions, and methods of the old law.

A third view, which was the one taken, on the whole, by the framers of the French Civil Code and by those who framed the German code, is that the purpose must be primarily to provide so far as possible a complete legislative statement of principles so as to furnish a legislative basis for juristic and judicial development along modern lines; laying down rules sparingly and for the analogies they furnish, except in the law of property and of inheritance where precise rules are called for.

Bentham and Austin following him conceived that it would be possible not only to make the law certain and accessible but to remove all ground for dispute as to the meaning of terms or interpretation of the code provisions. In other words, they conceived that the function of the judge could be limited to the application to concrete cases of rules so clearly formulated that nothing more than genuine interpretation would be necessary except for new and unforeseeable situations of fact. The notion that something of this sort can be done has been widespread but is refuted by all juristic and judicial experience. In Frederick the Great's Code the lawmaker's intention was to formulate with such careful minuteness that no possible doubt could arise in the future. Hence it was provided that the judges were not to have any discretion as to interpretation but were to consult a royal commission on any points they found doubtful and were to be absolutely bound by the answer of this commission. This stereotyping of the law was in accordance with the doctrine of the law of nature school which believed that a perfect and complete system could be worked out for which no changes would ever become necessary. Thus rational propositions could be laid down once for all so as to be avail-

able for every possible combination of circumstances. Perhaps it need not be said that the attempt to realize such an ideal proved impossible. After a time the royal commission was abolished and the right and duty of judges to interpret and develop by analogy had to be recognized.

Conceding that the first idea is impracticable, the second plan seems not worth while. Sir James Stephen's idea was that it would furnish a prelude to an eventual code in which the results of the development of the imperative element and of the traditional element were to be combined as was proposed by Lord Westbury. Justinian's codification shows us that a parallel compilation of the legislative-made and digest of judge-made law are likely to come into conflict not merely by overlapping of precepts but because the presupposition of a precept in the one way may not be that of a precept on the same point in the other. In this respect the codifier of Anglo-American law will encounter a difficulty in the distinction of our substantive law into law and equity. It would be much greater if he started with a compilation of statutes and a digest of decided cases. He would have much more to do than be sure to choose between all conflicting precepts. He would need to be sure that precepts presupposing divergent starting points for reasoning were not in his code side by side.

Those who drew up the French civil code made the first attempt to put the third idea into operation. In that code, on the whole, the attempt was made not to lay down minute rules on every conceivable point but to formulate broad principles. Of course this may be carried too far. On certain points and in certain fields of the law definite rules are expedient or even necessary. But in general, as has been seen in other connections, the lawmaker, whether legislative or judicial, must not be over-ambitious to lay down universal rules. . . .

2. *Objections to codification.* Many Anglo-American lawyers have insisted that codification of the common law would be, if not impossible, at least highly unfortunate. Almost everything which has been written in English in opposition to codification has its basis directly or indirectly in Savigny's tract on the Vocation of our Age for Legislation and Jurisprudence. Savigny's objections to codification were answered by Austin. But the weight of Austin's arguments is somewhat impaired by his acceptance of Bentham's idea of a code.

Savigny's objections resolve themselves to three. First, he argues that the growth of the law is likely to be impeded or diverted into unnatural directions. Experience, however, shows that this is not necessarily true. It can hardly be doubted that, on the whole, the French code brought about a juristic new start which has favored the development of the law in France. No doubt an ill drawn or too hastily drawn code might afford so poor a basis for further juristic or judicial development as to impede the progress of a system of law. There is no reason to suppose, however, that the carefully drawn codes of the present century have had any such effect.

Savigny's second objection is that a code made by one generation is likely to project directly or indirectly the intellectual and moral notions which existed at that time into days when such notions have become anachronisms. There is undoubted truth in this and it might well result from a code made on the basis of such a digest as was contemplated by Holland and by Sir James Stephen. But it must be observed that development of the law through juristic working over of the traditional element is open to the same objection. Our common law today can show more than one example of projection into the present of the ideas and modes of thought of the past. The law of the last part of the nineteenth century was full of such cases.

Savigny's third objection is based upon defects in the codes of the past. They may be summed up in two. (a) The codifiers but too often had only superficial knowledge of the law they tried to codify. Partly this was due to the eighteenth-century notion of natural law which made men think they could make a wholly new system by pure reason without regard to the juristic or judicial experience of the past. Partly it has been due to the attempt of one person or of a small number of persons to codify the whole law. The law of a modern state is too complex to be so thoroughly mastered in all its parts by one man or a few men as to enable that man or those few men to draw up a code. (b) In most cases codes in the past have been drawn too hurriedly. Justinian's commissioners set a bad precedent in that matter which was followed unhappily by those who drew the French civil code. The French code, the Georgia code, and the Negotiable Instruments Law in the United States are examples of the defects which necessarily result from undue haste. Field's civil code is an example of the defects which are sure to result from the attempt of one man to cover the whole field. The German code shows what may be accomplished by a sufficiently large commission taking sufficient time for its work and utilizing full criticism from every side.

To the points which Savigny made against the codes of the past, Austin added two others which are noteworthy. (1) He objected to them because they made no adequate provision for the incorporation from time to time of judicial interpretation. He insisted that there should be some provision whereby periodically the results of judicial application or interpretation of the code should be incorporated therein and in that way the traditional element which grows up around a code be made part of it. (2) He objected especially to the French code because it was not complete and was intended to be eked out by the pre-existing law. This is based largely on his idea that a code can be made substantially self-sufficing. It is probably impossible to draw up a code in such a way that all reference to the pre-existing law to throw light upon it will be obviated. It is true that so far as possible this necessity of looking into the law before the code should be done away with since otherwise a tendency will arise to treat the code sections as only declaratory. Herein is one of the chief defects of Field's civil code. It assumed at every point a pretty

thorough knowledge of the common law, and was not in itself so clear and sound as to be any real help toward ascertaining the pre-existing law. On the other hand, the attempt to foreclose all judicial or juristic working over of the material of the code must in view of the experience of the past be pronounced futile. The most serious objection to a code in a common-law jurisdiction is that we have no well developed common-law technique of developing legislative texts. Our technique of statutory interpretation is not adequate to the application of a code.

3. *Advisability of codifying Anglo-American law.* If we apply to common-law jurisdictions what experience has shown as to the conditions which lead to codes, it must be evident that, especially in America, we are rapidly approaching a condition in which codification is likely to be resorted to.

(1) It can hardly be questioned that our case law is by no means able to rise to new situations as it could do in the past. Practically it broke down on the important subject of employer's liability and workmen's compensation. There was clear failure in holding promoters to their duties. Development was too slow in the law of public service agencies and conspicuously too slow in labor law. In these fields legislation and administrative commissions and boards have replaced common law and adjudication. Even in legal procedure it took legislation in England, Canada, and Australia to provide a modern system, although judicial rule-making has done the most for that subject in the present century. It must be admitted that the traditional element has shown signs for a time of having exhausted its possibilities.

(2) The defects of form in Anglo-American law of today are obvious. They may be summed up as five. (a) Want of certainty. . . .

(b) Waste of labor entailed by the unwieldy form of the law. As Chief Justice Sharswood put the matter, the difficulty is not so much to know the law as to know where to find it. . . . From personal experience I can testify that the labor is very heavy. The judges in important appellate courts today must have law secretaries to enable them to reduce this task to reasonable proportions.

(c) Lack of knowledge of the law on the part of those who amend it. It must be admitted that the fault in our sometimes crude legislation on matters of private law is not all with the legislators. It is sometimes an almost impossible task in jurisdictions where many controverted questions, often fundamental, are still open, to ascertain with assurance what the law is which is to be changed or amended or abrogated.

(d) Irrationality, due to partial survival of obsolete precepts. In Illinois in 1910, the Supreme Court had to decide that contingent remainders could still be barred by merger. After that, real property lawyers in Chicago trembled for a decade. What other sup-

posedly obsolete common-law rules must they reckon with? No one knew. . . .

(e) Confusion. Courts are frequently led into mistakes between the two parallel lines of case law and statute law, dealing with the same subjects, the one potentially with the whole, the other unsystematically with parts here and there. No court has authority and no legislature, as a rule, undertakes to reduce any subject to systematic and complete orderly statement.

(3) Passing to the third point . . . in connection with the enactment of codes, we come to a matter which is likely longest to retard effective codification in the United States. Where significant codes have been enacted the growing point of the legal system had shifted to legislation and an efficient organ of legislation on matters of law had developed. Undoubtedly with us the growing point has largely shifted to legislation. But we have not developed an efficient organ of lawmaking for the ordinary civil side of the law. In England, if the government takes up a proposal for legislation it has the machinery for pushing it through Parliament. Also through the institution of parliamentary counsel England has got rid of some of the causes of crudity in legislation as to private law. But as has been said, Parliament is not interested in "lawyer's law." In the United States, both houses of Congress now have competent legislative counsel and this is true in some states. This, however, does not suffice to do more than insure the form of statutes. It seldom involves grasp of the legal difficulties at the root of a question. Moreover, there is nothing with us comparable to the taking up of a measure of detailed law reform by the cabinet in England and thus giving it the right of way in a crowded session. .

(4) On the other hand, the fourth point, the need of one law, is of more importance with us today than any of the others. It is suggestive that with the economic unification of the country conflict of laws is becoming one of the most important everyday subjects in the average American practice. The demand for one law was behind the growth of the common law. Prior to the Conquest there was no one law of England. Local customary law differed greatly. As one of the demands in Magna Carta was for one measure of corn and one measure of ale for all England, so another demand of the time was for one measure of law. Such a demand may some day lead to codification of the common law in the United States.

Our condition is much worse than that of England in respect of uncertainty, unwieldy bulk, and need of unification.

Attempt to reshape the law by judicial overruling of leading cases is no substitute for well drawn, comprehensive legislation. The English have an advantage in that down to the nineteenth century, and indeed till the second half of that century, relatively few cases were decided by the House of Lords. Hence old cases decided by tribunals not of ultimate authority may be questioned, whereas with us the ultimate reviewing court is likely to have fixed a century ago or more

the law we should like to see changed or given up. Patchwork overruling along with patchwork legislative tinkering often does at least as much harm to the legal system as it does good. Our situation calls for a ministry of justice or a code; and a code will need a ministry of justice also.

NOTES

1. See arguments for and against complete codification in Salmond, "Jurisprudence" (7th ed. 1924) sec. 52; Carter, "Law, Its Origin, Growth and Function", (1901), p. 312 et seq.; Hart, "The Way of Justice," ch. IV (1941).

2. For a sketch of the history of codification, beginning with Roman Law, see Pound, "Sources and Forms of Law", 22 Notre Dame Lawyer, 1, 46 et seq. (1946).

ERNST FREUND, LEGISLATIVE REGULATION

New York: 1932. The Commonwealth Fund, pp. 5-10.

In comparing code law with unwritten common law, we have to consider the relation of code law to interpretation, to law reform, and to regulative legislation.

1. *The interpretative elaboration of code provisions.* The outstanding difference between a civil code and the Anglo-American system of case law is that code provisions are limited in number while the number of cases is unlimited. The accumulation of case law shows that the process of elaborating principles and rules can be extended almost indefinitely, stopping only at the point, often arbitrarily assumed, where subdifferentiation of type situations yields to individuation in the form of what is called a question of fact. . . . It is interesting, . . . to compare statements of the law of torts—a branch of the law which necessarily operates with abstractions (such as negligence or proximate cause) which at the core are matters of common sense, but have an extremely wide margin of uncertainty. The French Code has only five sections, as against thirty-one sections of the German Code, while the Swiss Code, with twenty-one sections, stands between them. On the other hand, the more didactically worded Code of Georgia has one hundred and nineteen sections; and unofficial statements are even more elaborate: Jenks' Digest of English Civil Law has three hundred and fifteen sections on torts, and the Restatement of the American Law Institute (not claiming to be intended for legislative enactment) gives in one of the tentative drafts two hundred and forty-nine sections to only a fragment of the subject. . . .

If legislation cannot rival the unwritten law in the mass production of declaratory rules, what is the object of codification? Of the three impelling reasons that historically have made for codification: unification, law reform, and clarification, it is the latter which is most likely to be drawn in question. Opponents of codification may contend that rules which must avoid the detail of case law make a pretense at clarification which must be illusory, and that the pretended benefit is paid for by the loss of flexibility which is the great merit of unwritten law. The lack of certainty may well be conceded, and **no**

lawyer will be misled by the apparently categorical form of the rule; but the layman's purpose will often be served by intelligible explicitness falling short of absolute certainty; and this gives the written rule a political and educational value which nations living under codes fully appreciate.

On the other hand, the difference in flexibility between the written and unwritten law is apt to be greatly overestimated: so far as the argumentative form of a judicial conclusion implies elasticity, it must be remembered that judicial decisions generally turn on points which codes leave to interpretation, likewise expressed in inconclusive and therefore elastic form, whether through judicial decisions or through the writing of jurists. And in so far as the imperative form of a legislative conclusion may seem to imply inelasticity, it seems relevant to make two observations: first, that rules of unwritten law which correspond to code provisions are often accepted as settled with a rigidity hardly inferior to that of an imperative statement; and, second, that the legislative statement is flexible at least within the limits of inevitable expressional ambiguity and implication, and that the codifier has it within his power to choose latitudinarian terms to suit his purpose. The value of the provisions of the German Code concerning malice (§ 226), good faith (§ 157), and acts *contro bonos mores* (§ 826) lies in their intentional generality. . . .

2. *Codification and law reform.* One of the incidental benefits of codification is that it affords opportunities of correcting sporadic forms of anomaly or injustice which make no appeal to class interest or to popular imagination, and which are therefore likely to remain unremedied in the ordinary course of legislation. . . . Where law reform has strong social implications, the practical tendency, whatever the possibilities of unwritten law, will be to transfer the scene of the change from the relative obscurity of the court room to the political atmosphere of the halls of the legislature, although it is also true that occasionally the relative obscurity of the court room will serve the purposes of law reform better than an open legislative struggle.

3. *Regulative rules in private law.* In order to assign to legislation its proper place in private law, it must be realized, that, normally speaking, the judicial process cannot produce the rule that is regulative in character. . . . As the law becomes more socialized, the demand for qualified, in preference to absolute, rights increases; and in satisfying this demand, the uncompromising logic of the courts has proved inferior to legislation.

In any of the European civil codes it is possible to distinguish the relatively permanent stock of abstract and conceptual doctrines, largely the inheritance from Roman jurisprudence, from the innovations which involve administrative arrangements. The progress of the law lies largely in the latter, and a considerable part of this more modern law (title registry, corporation law, etc.) has been built up outside of the codes. Accident liability is transformed into schemes of compensation and of social insurance, the labor law becomes a system of

administration, and many commercial transactions are placed under some form of official supervision. The declaratory part of the private law retains its absolute importance, but, in comparison with the regulative part, its relative importance is constantly diminishing.

NOTE

In Stone, "Some Aspects of the Problem of Law Simplification", 23 *Colum.L.Rev.* 319, 320-321 (1923), the author states:

"But the problem of simplifying our law in its statement and in its mechanism is due not alone or principally to the volume and character of its literature. It is one which is inherent in the nature of the common law and the method of its creation. The common law doctrine of precedent, whereby the judicial decision not only determines the rights of litigants who invoke it, but becomes the authoritative source of legal precepts to govern future cases, is at once the secret of its strength and the source of some of its weaknesses.

"Its rules and doctrines, unlike those of other systems, are forged between the hammer and anvil of opposing counsel in the judicial settlement of actual controversies. They are wrought to fit the very facts which call for the application of legal rules and inspire that creative spirit which more than in any other system has dominated the common law. Hence it is that in the course of its long history and experience the common law has developed, by its method and in the substance of its precepts and doctrines, a technical excellence and a capacity to adapt itself to new situations which have given to it an extraordinary vitality—a vitality which has enabled it to spread its influence over a large part of the civilized globe and is enabling it today to supplant other systems of law whenever it comes into conflict with them."

A. L. GOODHART, PRECEDENT IN ENGLISH AND CONTINENTAL LAW

50 *Law Q.Rev.* 40, 42, 61-63 (1934).

W. M. Best, the author of the well-known work on "Evidence" . . . says [The Juridical Society's Papers 213-215 (1856)]:

"Every system of law, whether in the shape of a code or not, contains some provisions for its own interpretation, and if a code for this country were resolved upon, one of the first questions its framers would have to settle would be, whether the decisions of judges on the meaning of expressions in it should have the force which judicial decisions have at present; or whether, as in France, the judges should be forbidden to lay down general principles. I cannot help thinking that the balance of advantage is on our side." . . .

I believe that the development of the common law doctrine is not due merely to the existence of convenient judicial machinery, but primarily to the fact that it satisfied a need which existed, and which still exists, in English law to a degree unknown on the Continent.

This need is the need for certainty—the need for definite fixed rules which shall bind the judges. On the Continent, even before the establishment of the Codes, there was a background of Roman law which furnished a legal system of developed doctrines and principles. With the codes we get an even stronger framework into which cases

could be fitted by the judges, although, of course, creative interpretation, as it has been called, remained part of the judicial function. But in England, the judges had to create this structure almost entirely for themselves, and English justice if it were not to remain fluid and unstable, required a strong cement. This was found in the common law doctrine of precedent with its essential and peculiar emphasis on rigidity and certainty. It is here that we find both the cause and the justification for the English system, and an explanation, which is more than merely historical, of the fundamental difference between it and Continental *jurisprudence*.

This may also explain why the English system is less satisfactory when applied to statute law than it is in the case of judge-made law. Some years ago Sir Frederick Pollock wrote:

"The best and most rational portion of English law is in the main judge-made law. Our judges have always shown, and still show, a really marvellous capacity for developing the principles of the unwritten law, and applying them to the solution of questions raised by novel circumstances. Unfortunately they have, for reasons which it is not perhaps very easy to define, been far less successful in their interpretation of the written law, or in other words, of statutes." [(1893) 9 L.Q.R. 106.]

Perhaps one reason that may be suggested is that the rigidity of strict precedent, when superimposed on the rigidity of a statute, is unnecessary and inconvenient. The history of the Workmen's Compensation Acts, which by their nature demand simple interpretation but have, instead, become encrusted by a thick layer of binding cases, is hardly an illustration in favour of the English system. As Professor Allen has said:

"When the English judge has to apply a statute—and this nowadays is a great part of his task—he is, it would seem, in exactly the same position as the Continental judge who has to apply a code. But here too—so deeply rooted is our principle of judicial analogy—our judges are governed by precedents of interpretation. An English statute is not very old before it ceases to be a dry generalization and is seen through the medium of a number of concrete examples. The result is often startlingly different from what the enactment would seem to have intended." [Law in the Making (2nd ed.) 1930, at p. 110.]

In France, on the other hand, it has been possible to adapt the Code Napoleon to changing conditions by a gradual variation in the interpretation of the different sections—a variation which would have been far more difficult, if not impossible, if precedent cases had been absolutely binding.

I, therefore, disagree with Best's view, with which I began this paper, that if the English law were codified, the common law doctrine of precedent would still be the best method of interpretation, for this rigid, unyielding system is unnecessary when a statute or a code supplies in itself an adequate and definite framework. It has, however, in the past proved itself an admirable and essential material in the building up of the English law, supplying, as I have said, that cement

of certainty which was required by the otherwise fluid judge-made law. Whether it is as useful at the present time, especially in the extreme form it has assumed since the beginning of the nineteenth century, is open to some doubt, for English law, in most of its branches, is no longer in the formative period but has become a mature and fully developed system.

ROSCOE POUND, SOURCES AND FORMS OF LAW

22 Notre Dame Lawyer 1, 63-66 (1946).

The New York Code. Agitation for codification in New York was in part a phase of the legislative reform movement of the fore part of the nineteenth century and influenced by the wide attention given to the writings of Bentham. In part it grew out of the hostility toward English institutions and English law in the period after the Revolution and favor toward things French which went along with Jeffersonian democracy. Both were well marked in New York. The French civil code had fascinated many, as it had almost every one abroad. Lay discussions of American law in the first quarter of the nineteenth century abound in demands for an American code. Very likely the connection of Livingston with the code in Louisiana was an influence also. But the prime mover was David Dudley Field. Before the New York Constitutional Convention in 1846, he had urged a general code. Largely as a result of his agitation, the constitution in 1847 provided for commissioners to reform procedure and codify the law. The commission to reform procedure was appointed in 1847 and in 1848 reported the first installment of the code of civil procedure, which was enacted in April of that year and put in effect in July. The rest of the code was reported from time to time in four different reports until in 1850 complete codes of civil and criminal procedure were submitted to the legislature. The history of the code of civil procedure is well known. Either substantially as reported by Field's commission or in the form of codes based upon his draft, it came to be in force in about thirty jurisdictions. After the adoption of the code of civil procedure the enthusiasm for law reform in New York waned, and in 1850 the legislature repealed the act appointing a commission to reform procedure and codify the law. One reason seems to have been that the commission on codifying the substantive law, which was headed by Chancellor Walworth, had proceeded with a deliberation which was not satisfactory to the public.

Upon this Field renewed his agitation for codification of the common law, and in 1857 the legislature provided for a new commission "to reduce into a written and systematic code the whole body of the law of this state or so much and such parts thereof as shall seem to them practical and expedient." The commissioners were David Dudley Field, William Curtis Noyes, and Alexander W. Bradford; obviously too small a commission for such a purpose. Noyes undertook the penal code and Field the political and civil codes. In preparing the civil code Field was assisted by Thomas G. Shearman and Austin

Abbott, both well known as text writers. This commission put forth the first draft of a civil code in 1862. The draft of the penal code, which had been assigned to Noyes, was presented in 1864. The political code was reported by Field in 1860.

In 1865, after Field had been at work upon these codes for eighteen years, the full text of the five codes, namely, the code of civil procedure, the code of criminal procedure, the penal code, the civil code, and the political code, were submitted in the ninth and last report of the commission. Of the eighteen years in which Field devoted a large part of his time to these codes, he received no compensation except for the first two years.

The original code of civil procedure adopted in New York was Field's first draft. His final draft was not adopted, but a different one, prepared on a different plan, although founded on Field's code, was adopted between 1876 and 1880. This code, which was prepared by Throop, went into great detail. Whereas there were 392 sections in Field's original code, in Throop's version this was extended to 3356, and further additions in 1890 and 1897 made the whole number of sections 3441. A great deal of the deservedly severe criticism which has been directed against the New York Code of Civil Procedure applies rather to this attempt to regulate by precise rule every action of the judge from the time he enters the court room than to the original Field draft. The Civil Practice Act of 1920 reduced this to 1540 sections (still too much detail) and further simplification has been going on.

In 1881, the code of criminal procedure was enacted, but the other codes failed of adoption in New York. As has been said above, some thirty jurisdictions adopted the code of civil procedure. Sixteen jurisdictions adopted the penal code and the code of criminal procedure. California, Montana, and North and South Dakota adopted all five of Field's codes. California, North Dakota and South Dakota have in addition a code of probate law. But it should be said in this connection that the civil code has accomplished little in the four jurisdictions which adopted it. The courts, especially in California, frequently ignored the civil code, deciding questions as matters of common law, seldom referring to the code or, if they did, assuming that it was merely declaratory. This attitude of the courts, however, was not the sole cause of the comparative failure of Field's civil code. It must be admitted that the code was by no means well drawn. The work was too much for one man, even though as good a lawyer and tireless a worker as David Dudley Field. It was fortunate both for the substantive law of New York and for the cause of codification that that state did not adopt his draft.

NOTE

Laws of New York, 1848, ch. 379, Part II, Title I, § 62; Laws of New York, 1849, ch. 438, Part II, § 69: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and, there shall be in this state, hereafter, but one form of action, for the enforcement or

protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action."

See also in 1848 Act, sec. 145, 146, 147, and in 1849 Act, sec. 169, 170, 171. Cf. *Reubens v. Joel*, 13 N.Y. 488 (1856); *Voorhis v. Childs' Ex'r*, 17 N.Y. 354 (1858); *Stevens v. The Mayor*, 84 N.Y. 296 (1881); *Gould v. Cayuga County National Bank*, 86 N.Y. 75 (1881). "It is idle to say that the distinction between legal and equitable actions has been wiped out by the modern practice. . . . But the distinction between legal and equitable actions is as fundamental as that between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out".

See W. B. Hornblower, quoted in 2 *Andrews, American Law* (2nd ed.) § 635, n. 29 "You have the State of New York before you as a terrible example. I believe our practice today is infinitely more technical than that in New Jersey. Even the attempt to abolish forms of action and especially the attempt to abolish the distinction between law and equity practice have been dismal failures. . . ." (Cited in Pound, "Common Law and Legislation" (1908) 21 *Harv.L.Rev.* 383, 387.) See also Winslow, C. J., in *McArthur v. Moffet*, 143 Wis. 564, 567, 128 N.W. 445 (1910) "The cold, not to say inhuman, treatment which the infant Code received from the New York judges is matter of history". For a summary of modern developments see MacDonald, "Introduction, A Survey of the Administration of Justice in New York," (1941) 26 *Corn.L.Q.* 648.

FINAL REPORT OF THE NEW YORK CODE COMMISSION, FEBRUARY 13, 1865.

The Commissioners of the Code, appointed by the Act of April 6, 1857, having completed their labors, beg leave to make this their ninth and final report:

They have already reported, from time to time, the various steps taken by them in the progress of their work. Their duty, it will be remembered, as expressed in the act by which they were appointed, was "to reduce into a written and systematic code the whole body of the law of this State, or so much and such parts thereof as shall seem to them practicable and expedient, excepting always such portions of the law as have been already reported upon by the Commissioners of Practice and Pleadings, or are embraced within the scope of their reports." This work was to be divided into three portions; one containing the Political Code, another the Civil Code, and a third the Penal Code.

The Codes of Civil and Criminal Procedure, as reported complete by the Commissioners on Practice and Pleadings, were designed to embrace all the law of this State, respecting remedies in the judicial tribunals, civil and criminal, including the law of evidence. There then remained the vast body of substantive law; that is to say, the law of civil rights and obligations affecting all the transactions of men with each other and the law of government, including every branch of administrative and political action. This body of substantive law, the Legislature, by the Act of 1857, declared should be contained in the three codes—Political, Civil, and Penal—and to them the Commissioners of the Code have ever since devoted themselves.

READ & MACDONALD U.C.B.LEG.

Their first act was to prepare and report to the Legislature a general analysis of the codes projected by them. After this their efforts were next directed to the preparation of the Political Code. This was next divided into four parts: The first declared what persons composed the people of the State, and the political rights and duties of all persons subject to its jurisdiction; the second defined the territory of the State and its civil divisions; the third related to the general government of the State, the functions of its public officers, its general police, and civil polity; and the fourth related to the local government of counties, cities, towns, and villages. The draft having been made, was distributed among the Judges and other competent persons for examination; and after that the Commissioners reexamined their work and considered such suggestions as had been made to them; and the whole, as finally agreed upon by them, was reprinted and distributed to the Judges and other officers before being presented to the Legislature. The Political Code, thus drawn and revised, was presented to the Legislature on the 10th of April, 1860.

A few days afterward, by an act passed on the 16th of April, 1860, they were requested to prepare a Book of Forms adapted to the Code of Civil Procedure. This duty was performed by them, and the required forms were submitted to the Legislature on the 30th of March, 1861.

On the 5th of April, 1862, the Commissioners having prepared the draft of the Civil Code, distributed it to the Judges and others for examination, and, on the 2d of April, 1864, they in like manner distributed the drafts of the Penal Code.

Having reexamined these two codes, and considered such suggestions as had been made, they have finally revised and agreed upon them.

The Penal Code is herewith laid upon the tables of the members of the Senate and Assembly. The Civil Code is in the hands of the printer, and will shortly be completed, and in like manner furnished to the members of the two Houses. But, as the term of office of the Commissioners will expire before the close of the present session of the Legislature, it is not possible to make the required distribution among the Judge, surrogates, and county clerks, in time for the more formal presentation of the Civil and Penal Codes to the Legislature for adoption.

The Penal Code, thus prepared, defines all the crimes for which, according to the law of this State, persons can be punished, and the punishment for the same. In preparing it, the Commissioners kept the following objects in view: first, to bring within the compass of a single volume the whole body of the law of crimes and punishments; second, to supply deficiencies and correct errors in the present definitions of crimes; third, to make the relative degrees of punishment more nearly equal to the relative degrees of crime; and, fourth, to define and punish acts deserving of punishment, but not punishable by the existing law.

The Civil Code was required to embrace the laws of personal rights and relations, or property and of obligations.

It has four general divisions; the first relating to persons, the second to property, the third to obligations, and the fourth containing general provisions relating to these different subjects. In the execution of this vast undertaking, the Commissioners have endeavored to bring together and arrange in order all the general rules known to our law upon the subjects contained within the scope of such a code, rejecting those which are obsolete or unsuitable to our present condition, and adding such others as appeared necessary or desirable.

The first division, it will be seen, defines the civil condition of different persons in the State, adults, minors, persons of unsound mind, and Indians; enumerates their personal rights; declares their personal relations, under the various topics of marriage, divorce, husband, wife, parent, child, guardian, ward, master, and servant.

The second division contains the laws respecting property, real and personal, the various interests or estates therein, the modes of acquisition by occupancy, accession, transfer, will, or succession; the restrictions on alienation and accumulation, the conditions and qualifications of ownership uses and powers; the making, interpretation, and execution of wills, and various special provisions relating to corporations, copyright, shipping, and the rules of navigation. The third division embraces the whole subject of obligations, whether arising from contract or the operation of law, their definition, interpretation, transfer, and extinction, whether by performance, offer of performance, prevention of performance, or otherwise; the object and consideration of contracts, the parties thereto and their consent, whether freely given or obtained by duress, menace, fraud, undue influence, or mistake; and, after these general subjects, the particular subjects are considered of sale, exchange, deposit, loan, hiring, employment, service, carriage, trust, agency, partnership, insurance, indemnity, suretyship, pledge, mortgage, lien, and commercial paper. The fourth division specifies the different kinds of relief afforded for the violation of private rights, and the means of securing their observance, whether compensatory, specific, or preventive, and the measure of damages when compensation is the rule. This division contains, also, provisions concerning the special relations of debtor and creditor, and concerning nuisances, and enumerates and explains various maxims of jurisprudence.

In all this immense range of subjects, while it has been the general purpose of the Commissioners to give the law as it now exists, they have kept in mind the injunction of the Constitution to "specify such alterations and amendments therein as they shall deem proper." In obedience to this command of the organic law, they have specified various alterations and amendments which they consider proper to be adopted. These are mentioned in the notes to the different sections, where the reasons for recommending them are generally given. . . .

The Commissioners will not presume to think that in the preparation of the codes they have foreseen all the cases which can arise in the multifarious affairs of men, or that they have even collected all the general rules which have been announced from the bench in the his-

tory of our law. Some may have been overlooked, some may have been omitted from a mistaken belief that they were obsolete or inapplicable to our present condition, or were contrary to other rules of greater importance that ought to be retained.

All that the Commissioners profess is, that they have endeavored to collect those general rules known to our law which are applicable to our present circumstances, and ought to be continued. They trust that they have arranged these rules in a manner which will be approved by the scientific student, while it will help the lawyer and the citizen to an easier if not a better knowledge of the law. And they flatter themselves that, for the unforeseen cases which are certain to arise, there are general principles, rules of interpretation, and analogies, which will serve as guides for judicial decision.

The question whether a code is desirable is simply a question between written and unwritten law.

That this was ever debatable is one of the most remarkable facts in the history of jurisprudence. If the law is a thing to be obeyed, it is a thing to be known; and, if it is to be known, there can be no better, not to say no other, method of making it known than of writing and publishing it. If a written constitution is desirable, so are written laws.

. . .

There are those who argue that an unwritten law is more favorable to liberty than a written one. The contrary should seem to be more consonant with reason. It can scarcely be thought favorable to the liberty of the citizen that he should be governed by laws of which he is ignorant, and it can as little be thought that his knowledge of the laws is promoted by their being kept from print or from authentic statement in a written form.

Whatever is known to the Judge or to the lawyer can be written, and whatever has been written in the treatises of lawyers or the opinions of Judges can be written in a systematic code.

It is no answer to say that nothing can be written which will not be susceptible of different interpretations. That may be true. But it is no more susceptible of different interpretations when written in a code than when written in the reports. On the contrary, when expressed with care, for the very purpose of stating a rule which is to govern all cases alike, there is more likelihood of precision in language than when expressed with reference to a particular case.

For these eight years the Commissioners have been engaged in the preparation of the codes with which they were charged by the Legislature of 1857. The task which they undertook was untried and difficult. No code of the common law of America or of England had ever before been attempted. How they have acquitted themselves it is not for them to say. Their work is before the Legislature and the people. If it shall effect half the good which the Commissioners have ventured to hope from it, and the thought of which has cheered them through their long task, they will be rewarded. . . .

NOTES

1. David Dudley Field, *The Codes of New York and Codification in General* (An Address to the law students of Buffalo, N. Y., February 6, 1879). *Speeches, Arguments and Miscellaneous Papers of David Dudley Field* (1884) p. 374. ". . . I am to speak of the Codes of New York and codification in general. By the Codes of New York I mean not the Code of Procedure, under which we worked from 1848 to 1877, nor the Code of Civil Procedure under which we have worked, or tried to work, since, but the five Codes, which were prepared by commissioners appointed by the Legislature, pursuant to the Constitution of 1846. What I have to say to you, therefore, will relate to those Codes and to codification.

"Why these Codes have been neglected in New York, it would not be difficult to say. The resistance which the first Code provoked, the conservatism, or, as I prefer to call it, the inertia of the profession, and the late revision of the statutes, have been the causes. It is not surprising that such a change as the first Code produced should have encountered vehement opposition. Most of the lawyers looked upon it with disfavor, some for one reason, some for another: the equity lawyers because it had so much of the common law, and the common lawyers because it had so much of equity; the admirers of special pleading because it made useless their favorite learning; and all, or almost all, who had learned and loved the old ways, were adverse to treading in the new. The resistance, however, gradually lessened and at last died away; but in the meantime the old had forgotten, while the young, had never learned, that the fragment of 1848 had been completed by the same codifiers, and that four other codes had been added for the purpose of completing the codification of all the law of the land. . . .

"In 1870, twenty-two years after the enactment of the Code, the Legislature ordained a revision of the statutes. The revisers, ignoring the completed Code which the codifiers had prepared, and passing by the shapeless and tangled mass of statutes which cumbered the shelves of law libraries and made the heart of the searcher sick every day of his life, began, with the Code, and after six years produced 1,496 sections, which they represented as part of a system of civil practice and convenient to be enacted before the remainder. Those sections the Legislature enacted, to take effect after another session. That other session came, the two Houses disagreed, and thus, while one Legislature was sitting, a law went into effect against the will of one of its Houses, solely because a Legislature that had gone out of office had so willed it. The second installment then came, with more than 1,800 sections. This has not yet been passed. It is not my purpose to make the present an occasion to criticise this work, either the first installment or the last, further than to show its effect upon general codification. That it has seriously interfered with the plan of codifying our law can hardly be denied by an intelligent observer. It is not comprehensive, which a code must be, and it is minute, which a code must not be. It professes to be what it is not, a code. This, as I have said, is a digest of all the law upon a given subject. This work, while it takes a name which implies comprehensiveness, is avowedly incomplete. Thus the fourth section, instead of defining the jurisdiction of the Supreme Court, declares that it shall continue to exercise the jurisdiction now vested in it by law, except as otherwise here prescribed; in other words, enacting that the Court has the jurisdiction which it has, and what that is must be gathered from, I know not how many ordinances, statutes, and reports. The work contradicts the theory in another respect; it is particular and minute, while a code is general and comprehensive; it undertakes to provide for every case by an enumeration of particulars, while a code provides for the same things by general description. Meantime the contest over it has made the name of code odious to many who, by a natural mistake, have made the particular instance to stand for the general principle. While the thirteen chapters now on the

statute book are a serious hindrance to codification, the nine chapters would be greater, and so long as either or both stand in the way, though the other branches of the law might be reduced to a code, the civil practice would remain without codification, and before it could be undertaken with success these thirteen or two-and-twenty chapters would have to be taken to pieces, enlarged on the one hand and diminished on the other, so as to include every general rule and exclude every unnecessary particular. . . ."

2. See the following in "Speeches, Arguments, and Miscellaneous Papers of David Dudley Field," (1884), D. Appleton & Company, Vol. ii: Introduction to the Completed Civil Code, p. 323; Legal System of New York (Address to the Law Department of the British Social Science Association, November 12, 1886) p. 338. See also Henry M. Field, "The Life of David Dudley Field," (1898) Charles Scribner's Sons, Ch. vii, viii.

CHARLES PAYNE FENNER, THE JURISPRUDENCE OF THE SUPREME COURT OF LOUISIANA

(Oration delivered at the Centenary of Louisiana Supreme Court)

133 La. lxi, lxiii (1913).

I do not think in the first place, that it can be justly claimed that as the result of codification, we have attained a greater certainty in the law which has relatively diminished the volume of litigation, even as regards those subjects which are specifically covered by the Code. Our experience and that of France in this respect would seem to justify the claim of the opponents of codification that the limitations of human capacity for written expression are such as to make the attainment of certainty in a written code of substantive law well-nigh impossible.

In France, for instance, I think the following statement by an eminent advocate of the theory of codification, Mr. Sheldon Amos, must be admitted to be well founded. He says:

"It is well known, for instance, that the set of French Codes, which in time became the most comprehensive and self-dependent of all, have been completely overridden by the interpretations of successive and voluminous commentators, as well as by the constantly accruing decisions of the Court of Cassation. In France, as was intimated before, in treating of another subject, there can be no reliance in any given case as to whether a judge will defer to the authority of his predecessors, or will rather recognize the current weight attached to an eminent commentator, or will extemporize an entirely novel view of the law. The greatest possible uncertainty and vacillation that have ever been charged against English law are little more than insignificant aberrations when compared with what a French advocate has to prepare himself for when called upon to advise a client."

With us, partly, perhaps, because we have had no commentators, but principally because we have fully adopted the common law rule of *stare decisis*, the uncertainties of codal interpretation have not been so marked. Speaking relatively, however, I do not think it can be justly claimed that our jurisprudence exhibits any material gain in legal certainty as the result of codification.

It is certainly not true either that our jurisprudence consists wholly, or indeed in the main, of mere codal interpretations, or "in the interpretation of words." The most cursory examination of our reports, particularly those of comparatively recent years, will discover that in a very large proportion of the decided cases the rule of law applied has been deduced from the same sources and by exactly the same process as would be resorted to in a similar case in any common-law state, and there are lawyers in this city engaged in important branches of practice who rarely have occasion to consult the Code.

That this is due in some measure to the fact that both our judges and lawyers too frequently "sin the sin" of resorting to common-law authorities when the true rule for decision might be found in the Code I think must be admitted. Forming as we do, in effect, an integral part of a much larger community with the other component parts of which we are united by the strongest ties of race, blood, and common interest, and in all of which the common-law system prevails, there is naturally manifested in our jurisprudence a strong and ever-present tendency to conform to common-law standards. And that this has resulted not infrequently in unjustified departures from the letter of the Code is doubtless true. It is to this tendency which Mr. James C. Carter, sometime leader of the American bar, referred, when in one of his philippics against the theory of codification, he said in reference to Louisiana:

"The defects so strikingly characteristic of French jurisprudence would have been repeated here (in Louisiana) but for the practical good sense which has been exhibited by the bench and bar of that state. Largely imbued with the principles and methods of the English common law, they have looked to that body of jurisprudence, so far as the Code permitted them, as containing the real sources of the law, and have fully adopted its maxim of *stare decisis*. Nothing is more observable than the extent to which the English and American reports and text-books are cited as authoritative in that state. It would seem that the courts, except where there is some provision of the Code directly in point, and except in those cases where the civil law, which lies at the basis of the legal system of Louisiana, notoriously differs from the common law, seek the rule in any given case, in the same quarters in which it is sought by us, and then inquire, if the occasion arises, whether there is anything in the Code inconsistent with the rule thus found."

The appeal here to common-law authorities is justified, moreover, in many cases, because upon many subjects, as the result of the extent to which the earlier common-law judges, in the formative period of English jurisprudence, adopted the principles of the civil law, there are no very material differences between the two systems.

The very liberal admixture of common-law principles and methods of decision in our jurisprudence is, I think, due, in the main, however, to quite another cause, viz., that in a very large proportion of the cases which are presented to our courts our Code furnishes no definite rule for decision.

And this must ever be true with any code of substantive law. Civilization has certainly not yet attained a condition of stability in which it is possible, in the nature of things, that statutory rules can be enacted at any one time to cover all the varying groupings of fact which may arise in the future, and it is therefore entirely impossible to wholly supplant the unwritten law.

FRANCIS M. BURDICK, A REVIVAL OF CODIFICATION

10 Colum.L Rev 118 (1910)

Almost a century has passed, since Jeremy Bentham addressed to President Madison his famous proposal to prepare a complete code of law for the United States.

"Give me, Sir," wrote Bentham, "the necessary encouragement—I mean a letter importing approbation of this my humble proposal; and, as far as depends upon yourself, acceptance. I will forthwith set about drawing up for the use of the United States, or such of them, if any, as may see reason to give their acceptance to it, a complete body of proposed law, in the form of Statute law; say, in one word, a Pannomion,—a body of statute law, including a succedaneum to that mass of foreign law, the yoke of which, in the wordless, as well as boundless, and shapeless shape of common, alias unwritten law, remains still about your necks."

The letter went unanswered for a number of years; and the answer, when made, though very courteous, was a virtual declination of the great codifier's offer, on the ground, that "a compliance with your proposals would not be within the scope of my proper functions." Meanwhile, Bentham had extended similar proposals to the Governors of several States; and, shortly after the receipt of President Madison's answer, he proffered his services "to the citizens of the several American United States."

Two of the Governors—Snyder of Pennsylvania and Plumer of New Hampshire—were captivated by the "philanthropic communication." They urged its consideration upon their respective legislatures, but without favorable result. Governor Plumer promptly intimated to Bentham his own lack of power in the matter, as well as his misgivings about the attitude of the legislature. "How far it is practicable to establish such a system in New Hampshire, I cannot determine," he writes. "We have not only a host of prejudices to encounter, but the interests of a body of lawyers, many of whom here, as in all other countries, dread reform, fearing it would diminish their individual profits."

That the Governor's misgivings were well founded is shown by an extract, published by Bentham from a private letter, written to him by one whom he styles, "distinguished Functionary in the United States, Member of the House of Representatives in his State, and Delegate therefrom to Congress." This letter assures Bentham that his proposal was fairly brought before the legislature by Governor Plumer;

that to give it a better chance of success, a son of the Governor, who was a member, caused the greater part of an article on this subject, in a late *Edinburgh Review*, to be published and distributed among the legislators, but that all the lawyers of that body, except the Governor's son, declared it inexpedient to accept the codification proposal. These lawyers, Bentham's distinguished friend assured him, were actuated by various motives. Some believed that the common law was the perfection of reason. Others, who were advanced in years, did not like the idea of adopting a new system which would compel them to learn the law over again. Still others "were perhaps swayed by the persuasion, that the new system would prove injurious to the profession, by rendering the law more clear and explicit, and thus diminishing the profits which are at present derived from its uncertainty and obscurity." . . .

Notwithstanding this traditional attitude of the legal profession its members seem to be growing more and more tolerant of the idea of enacting, what Bentham styled, "particular codes": that is, codes containing "such matters only, with which some one class or denomination of persons only have concern." Advocates of scientific codification, like Sheldon Amos, are as stoutly opposed to such enactments as they are to the old policy, (as they conceive it) of allowing law to be made by judicial legislation. Mr. Amos refers to the "particular" codifiers as those who are fond of speaking of "gradual" or "progressive" codification. "They desire to reconstruct large portions of the law, each severally by itself—in face, converting all the law on each separate topic into a statute, the statutes being quite independent of one another, or only casually related. The subjects to be thus codified in turn would be chosen either in view of their apparent importance, or of the pressing need they stand in of having some process of reorganization performed upon them." Mr. Amos fears that the codifier of this sort may "interpose permanent barriers in his path which shall forever prevent him from progressing to the highest point of perfection," viz., the production of the ideal code, which he declares, "is eminently a product of logical art."

In the face of this and abundant other criticism, the "progressive codifiers" have been making considerable progress, both in England and on this side of the Atlantic. The first of their productions to secure Parliamentary sanction was the Bills of Exchange Act, 1882, although several years earlier, Sir James Fitz-James Stephen had done pioneer service in the cause, by his *Digest of the Law of Evidence* and had been followed by Sir Frederick Pollock with his *Digest of the Law of Partnership*. Judge Chalmers tells us that the idea of codifying the law of negotiable instruments was first suggested by the *Digest of the Law of Evidence*; and he ascribes the success of his Bill to the "wise lines laid down by Lord Herschell who insisted that the Bill should be introduced in a form which did nothing more than codify existing law, and that all amendments should be left to Parliament. A Bill," he adds, "which merely improves the form, without altering the substance, of the law creates no opposition, and gives very little

room for controversy. . . . I am sure that further codifying measures can be got through Parliament, if those in charge of them will not attempt too much, but will be content to follow the lines laid down by Lord Herschell. Let a codifying Bill in the first instance simply reproduce existing law, however defective. If the defects are patent and glaring it will be easy to get them amended. If an amendment be opposed, it can be dropped without sacrificing the Bill. The form of the law at any rate is improved, and its substance can always be amended by subsequent legislation. If a Bill when introduced proposes to effect changes in the law, every clause is looked at askance, and it is sure to encounter opposition."

This policy was adopted by Sir Frederick Pollock, whose Partnership Bill, considerably amended, became The Partnership Act, 1890; and by Judge Chalmers again, in the Bill which became the Sale of Goods Act, 1893.

Another fundamental tenet of these successful codifiers is that, "while any branch of the law is in process of formation, it is unwise to attempt to codify it." To quote Judge Chalmers again:

"A code should be formed on a firm basis of experience. You then know what you are doing. A practical and working code cannot spring from the head of the draftsman, as Pallas Athene is fabled to have sprung, fully equipped, from the head of her father Zeus. In legislation, as in other sciences, the *a priori* road is a dangerous one to tread. When the principles of the law are well settled, and when the decided cases that accumulate are in the main mere illustrations of accepted general rules, then the law is ripe for codification. A code can usefully settle disputed points, and fill up small lacunae in the law, but it should always have its feet on the ground. If you go above and beyond experience, you are codifying in the air, and will probably do more harm than good to commerce and mercantile law. No service is done to the cause of codification by putting the case for it too high. The province of a code, I venture to think, is to set out, in concise language and logical form, those principles of the law which have already stood the test of time."

It is quite clear that the revival of codification in England is due to the fact that its promoters have been content to act upon the discreet and unambitious principles enunciated above by Judge Chalmers. They have not posed as iconoclasts of the common law. They have not proclaimed themselves law reformers. They have not undertaken the task of substituting for existing law, the law as it ought to be. It has not been their aim to show themselves wiser than the courts. On the other hand, it will be observed, they do not attempt to codify any branch of the law, until its principles have become well settled. And then, their codes are not to contain experiments, but are to embody experience.

REPORT OF THE COMMITTEE ON THE ESTABLISHMENT
OF A PERMANENT ORGANIZATION FOR IMPROVEMENT
OF THE LAW PROPOSING THE ESTABLISHMENT OF
AN AMERICAN LAW INSTITUTE

A.L.I.Proc., Vol. 1, 12-28 (1923).

(D) Need for a Restatement of the Law

The American legal encyclopedias summarize the decisions of the courts, and to a limited extent the statutes, in such manner as usually to enable the lawyer to learn without the necessity of consulting further authority the simple and certain matters of the law.

On single branches of the law, as corporations, property, torts, there is also a large number of books, the object of which is to do for one topic what the encyclopedia undertakes somewhat summarily to do for all. These treatises and textbooks vary in excellence. The majority are poor, but there are some which are well written, and from which a full and accurate knowledge of the law may be obtained.

The law encyclopedia, being a collection of treatises written by different persons, also varies greatly from topic to topic, both as to the completeness and accuracy with which the authorities are cited and, as to the skill with which the law is analyzed and stated. It is not, and from the very nature of its objects and uses should not be either critical or constructive. While properly calling the reader's attention to direct conflicts between cases, especially where the courts making the decisions have expressly recognized the conflicts, the object of the work is not to point out conflicts and uncertainties that do not lie on the surface and to suggest solutions, or to make a critical analysis of the law, or to enter upon a learned discussion of what is or ought to be the law. What is true concerning the legal encyclopedia is also very largely true in regard to most American legal treatises. . . .

One reason for the absence of critical and constructive features from the law treatise that cites all the decisions is the great volume of case law. Legal authors of the requisite ability are rare who at once have the time and patience to collect, examine and arrange thousands of decisions and, when this labor is accomplished, have left sufficient energy to do high-class analytical and constructive legal work. Indeed the mere task of collecting and examining the material on a legal topic of any scope is rapidly becoming too great for any one person, no matter how great his patience and his capacity for work; while even in topics of comparatively narrow scope, the necessary expenditure for type-writing and secretarial assistance is so great as usually to eliminate the probability of financial return. And yet our examination of the causes of the present uncertainty of the law shows conclusively the need of a restatement of the law that will have an authority much greater than that now accorded to any existing encyclopedia or treatise. We are convinced therefore that the specific work which any organization created by the legal profession to improve the law should

undertake on its formation is the production of such a "Restatement of the Law."

We speak of the work which the organization should undertake as a restatement; its object should not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life. The character of the restatement which we have in mind can be best described by saying that it should be at once analytical, critical and constructive. . . .

Again, where the law is uncertain or where differences in the law of different jurisdictions exist not due to differences in economic and social conditions, the restatement, while setting forth the existing uncertainty, should make clear what is believed to be the proper rule of law. The degree of existing uncertainty in the law should not necessarily be reduced by a mere explanation of rival legal theories. Indeed, a restatement which confined itself to such an explanation would reduce the degree of existing uncertainty only in those instances where but one line of decisions was supported by reasons worthy of consideration. Where the uncertainty is due, as it often is, to the existence of situations presenting legal problems on the proper solution of which trained lawyers may differ, the courts can best be helped by support given to one definite answer to the problem.

Furthermore, there can be little doubt that the law is not always well adapted to promote what the preponderating thought of the community regards as the needs of life. The limitation on the character of any reformation of the law by an organization formed to carry out the public obligation of the legal profession to improve the law is reasonably definite. Changes in the law which are, or which would, if proposed, become a matter of general public concern and discussion should not be considered, much less set forth, in any restatement of the law such as we have in mind. Changes which do not fall under the ban of this limitation, and which will carry out more efficiently ends generally accepted as desirable are within the province of the restatement to suggest.

The limitation just stated would exclude suggestions of changes in governmental organization, except possible changes in the details of court organization. It would also bar the suggestion of any change in the law pertaining to taxation and other fiscal matters and matters connected with governmental administrative policy, as well as advocacy of novel social legislation, such as old age or sickness pensions, or a method of improving the relations between capital and labor, or of protecting the public from industrial controversies by the establishment of arbitration tribunals. . . .

The restatement here described, if adequately done, will do more to improve the law than any other thing the legal profession can undertake. It will operate to produce agreement on the fundamental principles of the common law, give precision to use of legal terms, and make the law more uniform throughout the country. Such a restatement

will also effect changes in the law, which it is proper for an organization of lawyers to promote and which will make the law better adapted to the needs of life.

(E) Form of the Restatement

Though there necessarily will be minor variations in the manner of presentation of different parts of the restatement due to the special exigencies of particular topics, general uniformity of type throughout the restatement is important.

The profession would find great difficulty in the use of the publications of the organization if each topic was treated in a different manner. Again radical differences in form would rightly be taken to indicate a lack of agreement among those preparing the restatement as to its objects.

As the restatement will be the work of a number of persons all fundamental questions of form must be determined before the work on any topic is begun. These questions of form are of the first importance. The form adopted should reflect the objects of the restatement, and if it does so will materially aid the attainment of those objects.

The chief characteristic of the form of presentation should be the separation by typographical or other device of the statement of the principles of law from the analysis of the legal problems involved, the statement of the present condition of the law and the reasons in support of the principles as stated.

The statement of principles should be made with the care and precision of a well-drawn statute, though it will not be necessary and may often not be advisable to adopt language appropriate for statutory enactment. The adoption of a statutory form might be understood to imply a lack of flexibility in the application of the principle, a result which is not intended.

This separation of the statement of the principles of law from the discussion of legal problems, authorities and reasons, lends itself to the constructive objects of the work far better than that mixture of statement of present law, historical description and discussion of legal theory which is characteristic of the law treatise. It is essential that the attitude of mind of those doing the work shall not be that of those who are writing a treatise solely based on the existing decisions of the courts and some knowledge of the statutes. The mental attitude should be more like that of those who desire to express the law in statutory form. Even though those who draft such a statement may not be doing more than express the existing law as found in the decisions and scattered statutes, they think primarily of the topic, and therefore deal, as we have pointed out the restatement should deal, with situations that have not as yet been passed on by the court or made the subject of statutory enactment. Again, a group of persons primarily absorbed in setting forth a complete body of principles are perhaps more apt to perceive possible improvements. Each change, however, before being suggested, must pass through the

test of precise statement. This necessity for precise statement will tend to make the writers give careful examination to the effect of the proposed change in view of the law as set forth in other related parts of the restatement. We do not intend to imply that the treatise form of restatement precludes the possibility of care; rather that the separation of the statement of principles from the body of the accompanying analytical and expository treatise is more apt to impel its exercise.

The statement of principles should be much more complete than that found in European continental codes. The common law student of foreign codes is impressed with the fact that the statements of law are for the most part expressed in such general terms that the court, in applying the principles without other control than the code has a much wider discretion than the judges of our own courts, who are usually guided in the most minute details by former decisions in cases presenting almost every phase of the case before them. The difference between the position of the continental European court and that of the American court in determining a case is that the former is bound by every statement made in the code, but these statements are expressed in such general language that the court has wide discretion in their application; the American court, on the other hand, though always in the position of being able to change and modify the common law, practically, because of the detail in which the law is set forth in prior decisions and its respect for such precedent, has usually a far narrower field for the exercise of discretion. We believe any restatement of our law to be of practical use should follow this characteristic of our law, and that therefore the principles of law should be set forth with a fullness made possible by the care with which rules pertaining to the application of more general principles have been considered in the decisions of our courts.

As intimated, the statement of principles should be accompanied by a thorough discussion of legal theory. Principles cannot be properly applied without full knowledge of the legal theories on which they are based. While this discussion of legal theory should be separate from the statement of principles, to refer to it as notes or annotations will convey the erroneous impression that the discussion intended is a mere explanation or expansion of the principles, rather than what we believe it should be in a thorough and scientific discussion of the legal theories underlying the principles made in the light of a full knowledge of the authorities. . . .

We here also desire to call attention to the importance of expressing the restatement in clear and simple English avoiding so far as possible, the use of technical and unusual terms. The restatement should be understandable by an intelligent, educated person who is not a trained lawyer. This, of course, does not imply that any restatement would enable a man to act as his own lawyer or that the need of trained lawyers would be diminished to any considerable extent.

(F) Legislative Enactment of the Restatement as a Code of Law
Not Desirable.

From what has been said in regard to the form of the restatement it is clear that we do not look forward to the principles of law therein set forth being adopted as a code.

Two features distinguish the common law from statute and code. The first of these features is its flexibility where the law has been made statutory and the statute covers the facts of a case presented to the court, the court has no discretion; the judges must apply the statute even though they feel that the rule of law stated in the statute as applied to the facts does a real injustice. Where, however, the same statement of law is the clear result of prior decisions, but has not been made part of the statutory law, if the members of the court feel that the application of the law as found in prior cases will produce injustice, they frequently announce a modification or exception to the universality of the previously accepted statement of law; the modification or exception being based on those facts which made a real difference between the case before them and the ordinary case in which the rule of law as previously stated is applied. The second feature of the common law and one which we have just explained is the greater fullness with which it is possible by an examination of the decisions of the courts to express the law.

If the "principles" in the restatement of the law were made with a view to their adoption by legislatures as a formal statutory codification of the law, one or other of these two distinctive features of the common law, its flexibility or its fullness of detail, would have to be sacrificed. We have already stated our belief that the principles of law should be set forth with a fullness made possible by decisions of the courts. We fear that if the law stated in this detail were given the rigidity of a statute, injustice would result in many cases presenting unforeseen facts.

If the principles of law set forth in the restatement are not to be adopted as a formal code it is nevertheless not impossible that they may be adopted by state legislatures with the proviso that they shall have the force of principles enunciated as the basis of the decisions of the highest court of the state, the courts having power to declare modifications and exceptions. It has been suggested that such action on the part of a state legislature would at once give an authority to the restatement which it otherwise would not possess, and at the same time would not fetter the courts as would a formal legislative code; and furthermore, that the courts would have greater freedom in adopting the rules laid down in the restatement, and at the same time would be free to deal with those cases which inevitably will arise wherein the rigid application of the principles set forth in the restatement would result in injustice. The possibility that the proposed restatement of the law may receive *quasi* statutory sanction, either in whole or in part, as a "guide and aid" to the courts is one that we should keep before our minds while the work is in progress as a possible outcome of

our labors. The suggestion is at least an interesting one, though at this stage of the project we are not required to commit ourselves to an approval of it. The important thing now is so to plan the work that the restatement from its inception shall be recognized as a work of great public importance for the execution of which the American legal profession as represented by its leaders on the bench, in practice, and in the schools, is responsible. The way in which these things may be accomplished is the subject of later sections of this Report.

If the organization which we suggest can be formed and supported there is reasonable assurance that the restatement, even though it may not be formally adopted by legislatures as a guide to the courts, will be given by courts not already committed to a contrary rule approximately such authority as is now accorded a prior decision of the highest court of the jurisdiction, and therefore that its effect in correcting existing uncertainties and otherwise improving the law will be very great.

(G) Extent to Which Legislative Action will be Necessary to Carry Out the Purposes of the Restatement.

The principles of law set forth in the restatement will not include deformities, but will eliminate many uncertainties of the existing law, and make improvements which will further the administration of justice.

Where the law is uncertain the courts can adopt the solution suggested in the restatement without waiting for statutory authority. Where the statement of the law set forth is against the weight of authority in most of the states, but the matter has not been the subject of a prior decision by the courts in some one or more of the states, the courts in these jurisdictions, likewise without waiting for any legislative authority, may follow the law as set forth in the restatement. A somewhat different situation will arise in any jurisdiction where the principle set forth in the restatement is clearly contrary to previous decisions of the courts of that jurisdiction. Whether in such a situation the courts will, without legislative action, follow the law as suggested in the restatement rather than the law as embodied in their own prior decisions will depend upon the particular circumstances of each case. Where the cases opposed to the rule laid down in the restatement are numerous, and especially where some of the decisions are of long standing and the rule suggested in the restatement is not found in any prior decision, the courts will be likely to take the position that, though the rule as stated in the case may be subject to adverse criticism it has become so far a part of the accepted law that it can now be changed only by legislative action. This legislative action may be the adoption as a statute of that part of the statement of principles embodying the proposed change in the law. As already explained, however, it is possible for the legislature, instead of giving the change the rigidity of a statute, to adopt the law as set forth in the restatement as a guide to the courts. Such action would warrant the court adopting the law as set forth in the restatement even though the

rule there stated was admittedly *contra* to the prior decisions of the court.

Where the change proposed in the restatement is a change in the present statute law, the mere adoption of the principles set forth in the restatement as a guide to the courts would not warrant the courts disregarding the statute. Furthermore there are topics of our law where the very rigidity resulting from the embodiment of the law in a legislative enactment is a distinct gain. If, for instance, there is little or no change in the essential conditions which make the law pertaining to a particular topic, and if in many situations constantly arising it is more important that the law should be certain than that one rule rather than another should be adopted, then it is probable that the statement of principles dealing with the topic should be made a part of the statute law. Thus the action of the commissioners on uniform state laws in presenting to the state legislatures statutes to codify the law of sales, the laws pertaining to commercial paper and the law pertaining to some of our business associations is justified not only because uniform statutes on these subjects correct the unfortunate effect of varying commercial law as between the different states, but also because the law on these topics, presenting as they do many of the characteristics just referred to, may with advantage be the subject of legislative enactment.

Outside, however, of those changes which of necessity require legislative action and of those legal topics which, because of their peculiar characteristics, are perhaps best embodied in a statute, lie the great fields of the common law and that common law of the statutes which consists of the rules for the application of ancient and generally adopted statutes. For the greater portion of these fields the statement of principles, though made with the care and precision of a well-drawn statute, should be made without thought of its adoption by state legislatures or Congress as a code each provision of which was in all cases binding on the courts. As we have said, we are opposed to any attempt at the general codification of the law in the usual sense of the word.

NOTE

See historic article by Harlan F. Stone, "Some Aspects of the Problem of Law Simplification", 23 *Colum.L.Rev.* 319 (1923).

THE AMERICAN LAW INSTITUTE PROCEEDINGS

Discussion of Conflict of Laws Restatement Tentative Draft,
Vol. 7, pp. 86-89 (1929).

"Section 624. Action for Trespass upon Foreign Land.

"Except as stated in Sections 625 and 626, no action can be maintained in one state to recover compensation for a trespass upon or injury to land in another state."

Mr. Rose: I wish to enter a protest against Section 624. Arkansas has on the west the barbarous community of Oklahoma and also the

READ & MACDONALD U.C.B.LEG.

barbarous community of Texas. Now, those people from that country can come into Arkansas according to this rule and burn up all of our houses and go back home and ever after be absolutely free from punishment. A man can come over from Oklahoma and burn up my house, in fact, burn up all I have in the world, and I have no way of pursuing him and making him pay. I do not believe that that is the law. There may be some decisions to that effect, but law and common sense and justice ought to be the same, and I do not believe that we ought to give our sanction to a rule like that, even if there be decisions to that effect. Eliminate it and let the courts come to a reasonable conclusion. If a man comes from Oklahoma and burns up my house I ought to be allowed to go to Oklahoma and sue him for the loss. Furthermore, the rule is inconsistent with the rule in Section 626, which reads:

"If an act is done in one state causing injury to land in another state, an action can be maintained in the former state as well as in the latter."

If, on knowing that the wind is blowing toward Arkansas, and I have a house on the border, he sets fire to a piece of property in Oklahoma and the sparks are carried over into Arkansas, I can go into Oklahoma and recover judgment against him for the amount. Now, I do not see that it makes any difference whether he sets fire in Oklahoma and it goes into Arkansas and burns my property, or whether he comes into Arkansas and burns my property. Those two rules are inconsistent in principle, and while there may be cases which support either or both of them, the cases supporting the latter are certainly correct, and the cases supporting the former are certainly a parody upon justice and common sense. If a man can come over from Oklahoma into Arkansas and burn up my house and go back and I am absolutely without redress, that is something that we ought not to give our sanction to.

Mr. Beale: I am very happy to find myself in agreement with everything Judge Rose says here. This is one of the most obnoxious rules of law that I have found in the books, and I always occupy ten minutes of very valuable time in my classes each year in saying exactly what Judge Rose has said, but unfortunately this is the law and is laid down not by one authority or two, but by hundreds in every state in this country except Minnesota. It is inconsistent with Section 626. That is why I make Section 626 an exception, but you have given us a commission to state the law as it is, not as we should like to have it. This body a year or two ago, much to my pleasure, voted to change our statement of law on one point against the authorities in favor of what was just. If this body will vote the same now, and the bar of this country will stand by us, I believe we can do away with this horrid thing; but we are now stating what we find to be the law.

R. L. Tullis (Louisiana): Am I to understand that what is now under discussion is substantially the rule as stated in *Livingston v. Jefferson*, as I wish to express my hearty agreement with what Judge Rose has said and with what the Reporter has said, and to take some

little pride in the emancipation of my own state from so pernicious an adoption, and it does seem to me that if this body can ever with propriety assume a quasi legislative function, it is now and I move, therefore, that we express ourselves in favor of the abolition of this rule and a statement of a rule that where one who has trespassed upon land in another jurisdiction is found in a certain jurisdiction he may be there sued, of course, if personal service can be obtained.

Mr. Wickersham: I take it what the gentleman means is that the Institute in the Comment upon this Section states what it thinks the rule should be and what rule should be adopted, and that is already stated. Of course, it is the duty of the Institute to state the prevailing rule of law on a particular subject. There have been a number of instances where the authorities are about evenly divided where the Institute has made a choice. Of course, in the selection of a rule to be adopted by the Institute, the choice must necessarily be right.

Mr. Rose: What we should move is not what the Chairman suggests. That is stated in the Comment that the rule is unjust, but what we want is a statement of the law the other way, and that is the motion before the house. I move that the law as laid down in those three states which is humane and reasonable be declared to be the common law.

Judge Mack: I sympathize entirely with Judge Rose's view as to what the law should be of course, but I oppose just as decidedly this last motion. If this body is to change itself from one to restate the law into one to codify the law, we are entering upon an enormous task. It seems to me that the work of this body in regard to the development of the law can be fully performed by a statement such as is contained in the Comment or the note to this Section. That expresses a strong disapproval of the law as it is. It ought to influence legislators to follow the example of New York, and it may influence courts in those states that are not precluded by express decisions. The highest courts have been known to listen to reason and to change prior decisions. That influence will come about in a way that it seems to me is entirely proper on the part of this body, but to state as the law something which we know is entirely contrary to the great weight of authority would seem to me entirely improper.

Charles Warren (Washington, D. C.): I would like to make a substitute motion to Judge Rose's motion, and that is that the Institute place itself on record as strongly recommending that courts and legislatures change the rule.

Mr. Wickersham: Mr. Warren's substitute motion is that the Institute strongly recommend to courts and legislatures to adopt the other rule from that stated in the Restatement.

(Seconded and carried.)

HERBERT F. GOODRICH, RESTATEMENT

36 Neb.S.B.A.J. 159, 160-168 (1945).

For quite a number of years the American Law Institute has worked upon the Restatement of the Law, and last year, as the chairman of your committee said, we got it done. It has been offered, as you know, year by year a volume at a time. Just let me run through the subjects: Two volumes on Agency, two volumes on Contracts, one on Judgments, five volumes on Property, one on Restitution, one on Security, four on Torts, and two on Trusts, plus the General Index and a volume which I will describe a little later called "Restatement in the Courts." It is quite a batch of books. So what? Why are they of any more consequence than any more books on the shelves?

An important and rather surprising result of the preparation of the Restatement has been to prove two things not previously realized, and contrary to generally accepted beliefs. They are: First, there does exist in this country a body of general law in the common law subjects treated, the principles and rules of which are recognized and accepted and applied by almost all courts, with variations in form rather than substance or effect. This applies to all excepting a small percentage of the rules enunciated in the Restatement and is conclusively proved by a careful and detailed analysis which has been made of the first 100 or more State Annotations published. This analysis has developed the unexpected fact that the much discussed and widely publicized confusion in the law, so far as it relates to common law subjects, is not in fact a confusion as to principle or particular rule, but rather a differentiation due to application of particular states of fact.

In the vast majority of instances you will find, I think, that the courts are in essential agreement as to the existence and validity of the rule of law under consideration, although they often differ in their application of such rule to almost identical statements of fact—exactly as they differ in the interpretation and application of identical or closely similar statutes.

And, second, even in our largest states, with an enormous body of case law, such as New York, Pennsylvania, Massachusetts, Illinois, Texas and California, where lawyers are inclined to regard their local law as covering the total field of such subjects, there are numerous gaps in these basic subjects which are included in the Restatement. These gaps are found in many sections and upon them the lawyer will find no local decisions at all. When a case arises within one of these gaps the court is wholly free to adopt the rules set forth in the Restatement. With the rapid development of and recognition of the Restatement there is a strong and rapidly growing tendency on the part of the appellate courts to do this and a number of important courts have expressly stated such an intention. . . .

This Restatement should not be regarded as a Code. It is not a codification nor even a step toward codification. Its object is to preserve and perpetuate the flexibility which characterizes the common law

method of developing law through judicial determination of cases and at the same time maintain and improve its definiteness and certainty.

Too many of our textbooks have simply been put together with a paste-pot. We have, of course, Wigmore on Evidence, Scott on Trusts, and a few others. They are considered eminent scholars, which is worth a good deal. The object of the American Law Institute in preparing the Restatement has been to present an orderly statement of the basic subjects of our general Common Law. Included in this term is both the law developed solely by judicial decision and the law that has grown from the application by the courts of important statutes which have been generally enacted and in force for long periods of time.

The principles and rules already developed, or in process of development, are presented with certainty and clarity, yet leaving room for flexibility in meeting new and unforeseeable situations responsively to our rapidly changing and growing civilization.

When the Institute was formed the idea came into the heads of the founders, "Can't we get some sort of series of statements to be our common law until such principles will be not simply the view of one author but rather the consensus of opinion from among the legal profession"—that is, modern present-day views of the different principles of law. We tried it for something more than 20 years. I read off a list of the books a few minutes ago. Why should we say that this set of books brings anything more to the practitioner and the judge than any other set of books? Perhaps you would let me give you very briefly the reason why this particular set of books has found such favor with the courts, both State and Federal. This is clearly evidenced by the record showing how and to what degree the several state appellate and federal courts have regarded and cited the rules stated in the Restatement.

In the first place, this job of compiling these books has been accomplished by as competent people as could be secured for this purpose. . . .

The second point is the care in which the work has been done. It was adequately financed. From its beginning the work of the Institute on the Restatement of the Law has been rendered possible by the generous and frequently renewed donations of the Carnegie Corporation. Sufficient funds are now available to insure the completion of the set of 21 volumes.

The members of the Council do not get paid, but the academic people were paid a reasonable amount for their work. We got from them a great deal more than they got paid for; but on the material written by the chairman or the reporter, he would go to his committee and have it worked over two or three times before he even went to the Council, and sometimes twice to the Council, before it finally went to the floor of the Institute; and it was also sent out to the members of the cooperative committee of the various states and talked over, until

it was finally adopted as a statement of the law in any particular chapter or subject by the American Law Institute.

Now, that kind of work would be utterly impossible if you are going to put out a book and make it pay for itself commercially. Of course, we are not trying to do that. We had a subsidy and, therefore, did the job as well as it could be done.

I suppose one great weakness which lawyers and judges are addicted to is the lack of care in the use of words, don't you think? We use a word meaning one thing in one place and use the same word meaning a different thing in another place. In the first place, we get confused in our words and ideas. It is the habit of judges to express their own legal conclusions in their own way, and the first thing you will find the same legal conclusions being expressed in half a dozen different ways in the same opinion of the same court—the same opinion expressed half a dozen different ways by half a dozen different judges. And I am mentioning no names!

One of our dangers is and was very definitely a carelessness or non-common use in connection with language, bringing us in danger of losing continuity and consistency in our common law. That was a very real danger and still is a danger. I think the American Law Institute work will be the strongest cure for that kind of thing that I know of. We have tried hard to use words in a definite sense from one place to another where the terms are used. We have tried to do it without introducing a lot of new and strange terminology, as Mr. Wigmore did in his book on Evidence. His terms, however, no longer bother me, but I am sure that is not the case with any lawyer first starting out, who finds the terms strange and so upsetting and confusing that he sometimes fails to travel through a very good thought that the author had put in. We try to stay away from strange terms. We have tried to use terms with which the bar is familiar and to use them more precisely than the bar has been in the habit of using them. Now, I do not mean by that that it is all easy. . . .

When you are getting a piece of technical work you must not expect it to read like a novel. You must not expect to understand what it is trying to get at and what it says without being a little bit patient to learn its technique, its use of terms, and then the application will come along quite smoothly.

The third thing and the third reason that I would call your attention to this work as something which has significance for you is not only the way in which it is done and the people who did it, but what has happened to it in the course of its production. Up to October 1, 1945, the various volumes of the Restatement have been cited by the courts of the United States, as I have indicated before, whose opinions are reported in the National Reporter System, 12,356 times. . . .

Now, there is a great deal that comes up in the practice of the law that this Restatement does not purport to cover. It won't solve problems of federal taxation. It won't help you any on the question of the issuance of security, either under a state "Blue Sky" law or the Secu-

urities Exchange Act. It won't help you very much with problems under the Labor Act in any particular state, or the National Labor Relations Act, although there is a chapter in Torts that would prove some help in that respect. We don't purport to cover all the law, and we certainly stayed clear away from federal taxation. Our effort was to give a statement of the fundamentals of the common law which were back of all the statutory things I have just mentioned and give the lawyer a starting point for all cases that have a common law bearing and a finishing stop for some. But there are, too, of course, many, many cases where a statement of the fundamentals will not settle the application of the fundamental rule to a particular fact. We think we have done a good part of the job when we start the lawyer off with a citation statement of what the bench and bar of the country think the common law rule of the land is. . . .

We have had quite a successful program of voluntary help through local annotation, which has in some states been highly successful. In Pennsylvania we have either finished or have in course of preparation annotations on all of the subjects which the Restatement has appeared upon. Despite the fact already mentioned that in the majority of instances decisions of the courts show them to be in accord upon principles and rules of law, there are a substantial number of exceptions to this general rule, though they center largely upon a very limited number of highly debatable sections. Even more important, the courts differ quite frequently upon the application of accepted rules. And to render the Restatement a uniformly useful and dependable working tool for the profession, we find it has been desirable that members of the bench and bar shall have convenient means of learning the attitude of their local law toward any section of the Restatement.

So I think those annotations have a significance other than their actual use in the state. I think they show something about the possibility of generalizing in regard to the general law. People who practice locally frequently urge that such and such may be all right in general, "but the law in our state is different." But I remember as we worked through several of the subjects, where we had a Pennsylvanian on the committee, he would always be telling us that "Well, that isn't Pennsylvania law," and others from other states would say that wasn't their law, although it might do as a statement of general common law.

As these annotations began to appear we kept track of three things. We went through each annotation by itself in each case and compiled our table. We wanted to see in how many sections of a given subject of the Restatement the local study would show that the local decisions were in accordance with the rule that we had stated in the Restatement, and we wanted to see in what proportion the cases had been proven to the contrary to what we had stated. Third: We wanted to see where there was no local authority at all.

It doesn't follow that the court is going to change its mind, although we have had some experience where the courts have made a complete turnabout when confronted with Restatement on the subject. But the

most significant thing, it seems to me, was not that so much as to try to find out from an analysis of all its annotations how closely we could tell a lawyer or a judge that the Restatement here would represent the common law rule in any particular state. While this was the combined effect, yet it does not represent all annotations but only enough to make a generalization of this.

In Agency we found that the percentage of state decisions in general in accord with the Restatement was 62.6 per cent; that the percentage of decisions contrary to the Restatement was 1.4 per cent; no local authority, 35.1 per cent. On Contracts we had many, many more annotations to go on. The percentage in accord, 69.8 per cent; percentage contrary, 2.6; no local authority, 25.9. I am not going to read you the statistics from the other subjects, although I have them here and would be glad to show them to anybody that wants to see them. I make this generalization, that the Restatement is out of accord with local authority in any particular state in, oh I would say, about one and a half to two per cent of the time. In other words, it will represent 98 out of 100 chances of being not out of line with local authority. It will be "dead on the nose" with local authority on one-half to two-thirds, and the rest of the gap or unaccounted for percentages are situations in which there is no local authority of the particular state on the subject. That was a great surprise to me and maybe to you. Even in jurisprudence as old as Pennsylvania there are immense gaps even in a subject like Contracts, where there is no local authority.

Of course, you can see the obvious thing that we urge. If there is no local authority, the court is free if it pleases to accept the statement of law as general in the Restatement, and the statement of law as shown in the Restatement is, we think, hope and trust, as sound and accurate and well-considered a statement of law as American legal brains can make it. . . .

That is the product so far. Oh, we have done some other things. We wrote a Code on Evidence, which you could have an awful good time with. It would probably get some people excited. But, of course, lawyers are apt to be where any change is being discussed. We have done some other things in the statutory field. I wrote a Youth Correction Authority Act, which in California I am told is working very, very satisfactorily.

Now, . . . we are starting on the Code of Commercial Law. I hope you won't completely discharge your state committees, because pretty soon we will have something for them—something that we hope will be important. We hope it is going to be a modern, well-done, carefully integrated Code of Commercial Law, which will, of course, if you like it and adopt it in the various states, take the place of the present Negotiable Instruments Law. . . .

INDEX

References are to pages

ABATEMENT AND SUMMARY ENFORCEMENT

Effectiveness as law enforcement devices, 541

ADMINISTRATIVE AGENCIES

Application of legislative standard by, 614

Characteristics of, 582-590, 608

Interpretation by, effect given by courts, 1051

ADMINISTRATIVE INTERPRETATION

Conflicting with judicial interpretation, weight given, 1109, 1117

Contested quasi-judicial proceedings, weight given, 1109

Duration, effect of, 1107, 1108

Erroneous, effect of, 1108, 1118

Ex parte rulings, weight given, 1109

Familiarity of legislators, 1115, 1117

Inconsistency, effect, 1109

Judicial review, 1118

Public enforcement officer, weight given, 1109

Re-enactment rule and, 1109, 1117

Statutory power, limitation, weight given by courts, 1117

Weight given, 1054, 1107-1108, 1120

ADMINISTRATIVE PROCEDURE ACT, 1946

Purpose and effect, 598

ADMINISTRATIVE PROCESS AS MEANS OF APPLYING AND ENFORCING LAWS

Advantages over executive and judicial processes, 574 et seq.

Federal Administrative Procedure Act, 1946, 598

Immunity for conformity as safeguard, 514, 600

Judicial process compared, 574-599, 607-609

Judicial review, 604

Legislative administration distinguished, 571

Legislative standards, 604, 614, 887-908

Necessity, 572, 608, 617

Reasons for using, 195, 574 et seq.

Requisites of legislative delegation, 590, 604, 613, 887-908

Types of regulations, 603

Weaknesses as compared with judicial process, 585-599

ADMINISTRATIVE REGULATIONS AND RULE MAKING

See *Administrative Process as Means of Applying and Enforcing Laws*

ADMINISTRATIVE STANDARDS

Constitutional sufficiency in, Federal courts, 887, 891-900

State courts, 889, 901-908

ADVERSE PRESUMPTIONS

Utility and constitutionality as law enforcement device, 549-554

AMBIGUITY

Absurdity of result creating, 1051

Extrinsic aids resorted to without, 1132-1155

"Intention", 1139

Interpretation, 1046-1051

Latent, 840

Meaning of, 1067

Undesirable result of literal meaning creating, 1051

AMENDMENTS

"Acts in addition" to existing legislation distinguished, 367

Characteristics, 367-371, 382

Constitutional requirements, 371, 378, 683-690

Declaratory effect, 356

Defined, 379

AMENDMENTS (Cont.)—

- Language of amended act repeated unchanged in amending act, 371-376
- Merger into original statute, 371
- Methods of making express, 371
- Presumably change law, 356
- Repealed statutes and, 371-376
- "Replacement theory", 371
- "So as to read as follows", 364, 371
- Supplementary acts distinguished, 378
- Titles, 378, 683-690
- Unconstitutional statutes, 376

AMERICAN COURTS

- Postulates of interpretation in, 995-1011

AMERICAN LAW INSTITUTE

- Codification program, 1337
- Restatement of law, 1300, 1324-1337
- Uniform laws, 454
- Youth Correction Act, 148 et seq.

ANALOGICAL REASONING FROM LEGISLATION, 985, 988, 1268-1279

"AND"

- Construed as "or", 954

AND/OR

- Objections to using, 937, 954-955

APPLICATION OF STATUTES

- See generally *Interpretation*
- Interpretation, significance of distinguishing, 972, 976-978

APPROACHES TO INTERPRETATION

- Equity of the statute, 1015-1027
- Golden rule, 1041-1063
- Literal, 1011
- Mischief rule, 1028-1041

AUTHENTIC INTERPRETATION, 979, 997

BAR ASSOCIATIONS

- Legislation programs, 145, 146

BILLS

- Adjournment of legislature, effect, 304, 305
- Amendments in legislature, 213, 230
- Approval by executive, 214, 221
- Calendar, substitution on, 212
- Classified by source, 142
- Course followed through legislature, 212 et seq.
- Defeating, 217
- Derivation of use, 646-650

- Drafting to facilitate passage, 787

Engrossment, 218, 307

Enrollment, 320

Form, 646 et seq.

How to draft, see *Mechanics of Drafting*

Internal arrangement, 936-937

Introduction, 216

Legislation by, 220

Mechanics of drafting, 216, 909-971

Origin of Congressional, 250

Origins, 125, 141-145, 216 et seq.

Proof of passage, 224, 320

Printing, 217, 218, 220, 299

Proportion enacted, 228

Readings, constitutional requirements, 286, 291, 297

Readings, necessity for, 297, 309

Readings, procedural aspects, 213, 216, 400

Re-committal, 217

Reference to standing committees, 212, 216

Reporting by committees, 213

Resolutions and, 646-667

Roll call on final passage, 217

Signature of presiding officers, 320

Signing after passage, 304, 305

Sources and their effect on, 141-145, 646

Specimen forms, 968-969

Stages in progress through legislature, 212-235

Subject matter of, 228

Time of becoming law, 224, 777-785

Veto, 214, 221, 305

Volume introduced, 143, 227

When passed, 285, 305, 313, 325, 329

BODY OF ACT

See *Purview*

BONDS AS LAW ENFORCEMENT DEVICES

Classification, 564

Essential features, 566-570

Protection of sureties, 569

Purpose and utility, 565

CANONS OF INTERPRETATION

Ejusdem generis, 823, 827

Expressio unius est exclusio alterius, est, 831

"Golden rule", 1044, 1046

Methods of use, 817-833

Noscitur a sociis 818, 819

Utility, 817-833, 1038

CASUS OMISSUS

Avoidance by interpretation, 842, 848
Encroachment on legislative function
 by supplying, 840, 845
Legislative intent and, 840-851
Meaning, 994
Origin of doctrine, 990, 994
Reason for the rule, 841, 843, 847
Rule applied, 840, 845
Supplying, by resort to intrinsic and
 extrinsic aids, 841, 848

**CHARACTERISTICS OF JUDICIAL
LAW-MAKING, 17-95**

CIVIL LIABILITY

Defined, 554
Forms of, 556
Illustrative provisions, 511-513, 559
Regulatory value, 555, 557

CLAUSE AS TO TAKING EFFECT

Contained in constitutions, 782
"From and after passage" of act, 779
When statute is effective, 777, 781

CODIFICATION

American Law Institute's program of,
 1337
Arguments for, 1300
Compilations compared, 399
Contextual interpretations, 816
Defined, 399
General or particular, 1321
Interpretation, 399
Law-making effect of adoption, 396
Louisiana experience, 1319
New York experience, 1312
Objections to, 1304
Precedent, utility of doctrine when ap-
 plying, 1311
Purpose, 1303
Title of, 738
Traditional attitude of legal profes-
 sion toward, 1321
20th century revival, 1321
United States Code, law-making ef-
 fect, 413

COMMITTEES

Adjournment of legislature, effect on
 powers, 303
Conference, 218,
 Conference, criticism, 281
 Conference, reports, 246
Congressional, 238 et seq.
Consideration of bills, 245
Created by resolution, 303

Discharge, 219
Expert staffs, 247
Function, 215
Hearings, 216, 234, 244
Investigation, methods and powers of,
 260-280, 648
Joint investigating, reports, 237, 265
Legislative Reorganization Act, 1946,
 255-258
Legislative research, 283
Policy in Congress, 250 et seq.
Recall of bill from, 217
Records in Congress, 245
Reorganization of Congressional, 239
 et seq.
Reporting bills, 245 et seq.
Rules, 213, 219
Standing, 212, 216, 238, 243, 649
Types, 237
Whole house, 212

COMMITTEE SYSTEM, 237 et seq.

COMMON LAW

Chief defects, 1300
Codification or restatement, 1300-1337
Complexity, 1300
Fitting legislation into, 1207-1337
Judicial adaptation to basic legislative
 changes, 86, 1285-1299
Precedent in, *See Precedent*
Restatement by American Law Insti-
 tute, 1300-1337
Statutory interpretation and, *See In-
 terpretation*
Uncertainty, 1300

**COMMON LAW STATUTES, 988, 1253-
1256**

**COMPARATIVE ASPECTS OF JUDI-
CIAL AND LEGISLATIVE PROC-
ESSES, 1 et seq.**

COMPARATIVE RESULTS

Interpretation in light of 729, 1041-
 1064

COMPILATIONS

Codifications compared, 399
Nature, 401

**COMPOSITION AND STRUCTURE OF
THE LEGISLATIVE SENTENCE**

Action, 939, 955-956
Case, 940, 956-957
Condition, 941, 957, 964
Copula, 940, 942-951
Subject, 939, 955

References are to pages

- CONCURRENT RESOLUTIONS**
 Defined, 662
- CONFERENCE COMMITTEES**, 281
- CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION**
 Canadian, 456
- CONGRESS**
 Committees, 238 et seq.
 Legislative counsel, 249
 Reorganization, 238 et seq.
 Resolution, lawmaking by, 654-659
- CONSCIOUS CONSTRUCTIVE LAW-MAKING**
 Emergence of, 4, 6
 Transition from declaratory legislation in England, 7
- CONSTITUTIONAL LIMITATIONS ON INDEFINITE EXPRESSION**
 Administratively executed statutes, 887-908
 Self executing statutes, 852-887
- CONSTITUTIONAL LIMITATIONS ON LEGISLATIVE PROCEDURE**
 Compliance a judicial question, 286
 Compliance presumed, 225
 Directory or mandatory, 286, 299, 313, 320
 Enrollment of bill not conclusive evidence of compliance, 291
 Presumption of compliance, 291, 316
 Time of passing bills, 299
- CONSTITUTIONAL LIMITATIONS ON SPECIAL LEGISLATION**, 415 et seq.
- CONSTITUTIONAL PROVISIONS**
 When mandatory of directory, 286, 299, 313, 320, 718-719
- CONSTITUTIONAL REQUIREMENTS OF LEGISLATIVE FORM**
 Bills and resolutions, 651-667
 Enacting clause, 716-720
 Purview, 736-738, 750-757
 Titles, 669-690
- CONSTITUTIONAL THEORY**
 Statutory interpretation, 990-993
- CONSTRUCTION OF STATUTES**
 See generally *Interpretation*
 Interpretation, technical distinction from, 975
- Overruling as judicial legislation, 57, 75, 1080
- CONTEXTUAL INTERPRETATION**, 691, 729, 808-837
- CONTEMPT**
 Civil or criminal, 533
 Function of proceedings, 535
 Utility of proceedings, 532
- COURT REORGANIZATION BILL OF 1937**
 Study of the interaction of public opinion and legislative process, 200-211
- COURTS**
 Historical attitude toward legislation, 1207-1210, 1215
- CREATIVE LEGISLATION**, 167-177, 362-364
- CRIMINAL STATUTES**
 See *Penal Statutes*
- CURATIVE LEGISLATION**, 362
- DEBATES OF THE LEGISLATURE**
 Extrinsic aids for interpretation, 1051, 1057, 1140, 1144, 1149, 1155
- DECIMAL NUMBERING SYSTEM**, 962
- DECLARATORY LEGISLATION**
 Amendatory effect, 348-355
 Amending statute given effect as, 356
 Constitutionality, 348, 357
 Creative legislation distinguished, 8
 Curative acts, 362
 Early use, 981
 Function in development of law, 3
 Prospective operation, 348-356
 Retrospective effect, 348
 Reversing or revising judicial decision, 357
 United States Code, 413
- DEFINITIONS**
 Artificial, 720, 721, 727, 729
 Effect on construction of statutes, 720-736, 1006-1009
 Inclusive, 720, 721
 Interpretation of, 721-729
 Strict construction, 721
 Value, 722-723, 725
- DEVELOPMENT OF EARLY AMERICAN POOR LAWS**
 Influence of legislative precedent, 131

DEVELOPMENT OF LAW

Place of legislation in, 1

DIRECT LEGISLATION

Amendment, 223

Initiative, 342

Referendum, 336

DRAFTING

Agencies, 786, 1337

Choice and arrangement of language,
786-971

Definitions, utility, 720-736

Enacting clauses, 655, 659, 662, 716

Form in which bill most likely to pass,
787

Forms, see *Forms*

Incorporation of terms by reference,
738

Indefinite terms, use of, 799, 852-908

Mechanics see *Mechanics of Drafting*

Methods, influence on approaches to
interpretation, 992-994

Research for, 909-913

Titles, 699-703

ENACTING CLAUSE

Complete lack of, 716

Constitutional requirement, 220, 662,
716, 719

Mandatory or directory, 662, 716

Need for, 717, 719

Origin of constitutional requirement,
719

ENACTMENT OF STATUTES

Procedure, 212-235

Validity presumed, 225

ENFORCEMENT OF LAWS

Administrative process, 570 et seq.

Effectiveness a matter of degree, 500

Limitations upon, 183-198, 483-505

ENROLLED BILL RULE, 291, 309

EQUITY

Historical place in growth of law, 1

EQUITY OF THE STATUTE

Abandoned generally, as such, 1024

Chancellor's equity, distinguished, 984

Judicial legislation and, 1019, 1020,
1027

Meaning, 984-985, 1015, 1026

Modern use, 1016, 1017, 1024

Origin, 984

Public policy and, 1019

Purpose of doctrine, 1026

**EVOLUTION OF USE OF LEGISLA-
TIVE HISTORY AS INTERPRE-
TATION AID IN FEDERAL
COURTS, 1149-1174**

EXCEPTION

Defined, 763

Effect, 763

Function, 958

In enacting clause, 763

Pleading, 761, 764

Proviso compared, 761

Proviso in form interpreted as in-
tended to be, 765

Void when in conflict with purview,
765

EXECUTIVE

Relation to legislature, 128, 325

EXECUTIVE CONSTRUCTION

See *Administrative Interpretation*

EXPRESSION OF LEGISLATION

See *Legislative Language*

**EXTRINSIC AIDS FOR INTERPRE-
TATION**

Administrative interpretation, 1051,
1103-1122

Administrative rules and regulations,
1051, 1103-1122

Attorney general's opinions, 1103

Canadian courts and, 1140

Committee reports, 259-267, 1051, 1109,
1142, 1143, 1152, 1155

Common law, 837, 1018, 1213, 1262

Conditions at the time of enactment
402, 1112, 1122-1140

Contemporary opinion, 840, 1027, 1144

Debates of legislature, 1051, 1057,
1140, 1144, 1149, 1155, 1242

Dictionaries, 800, 807

Drafts of bill, successive, 1051, 1135,
1155, 1169

English courts and, 1140

In pari materia statutes, 808, 833, 995,
1073

Journals of legislature, 680, 1127

Judicial council reports, 1132

Judicial notice of, 1037, 1126, 1132,
1242

Legislative history, 729, 1051, 1057
1140-1174

Messages from executive, 1127

Methods of presentation, 1126, 1174

Opinions of legislators, 840, 1027, 1144

Pending legislation, 1055

EXTRINSIC AIDS FOR INTERPRETATION (Cont.)—

- Plain meaning rule and, 1151
- Presentation to courts, 1126, 1174
- Previous administrative interpretation, 1051, 1103-1122
- Previous judicial interpretation,
 - By the same court, 41-85
 - Of re-enacted statutes, 1088-1103
 - Of statutes adopted from other jurisdictions, 1078-1088
- Public policy, 1013
- Purpose of legislation, 1034-1040, 1122-1176
- Resorted to when no literal ambiguity, 1132, 1144, 1152, 1155
- Revisions, changes made in, 402
- State statutes, 1148-1149
- Subject matter, history of, 402, 1122-1140
- When resorted to, 1132-1174

FACTORS AFFECTING UPPER COURT DECISIONS, 33**FICTIONS**

- Historical place in growth of law 1

FITTING LEGISLATION INTO A UNIFIED SYSTEM, 1207-1337**FORM OF LAW-MAKING, 646-785****FORMS**

- Bills, 968-969
- Definitions, 506, 728, 969
- Detaching of clauses, 933, 936, 968-967
- Enacting clause,
 - Federal, 506
 - State, 659, 666, 704, 968
- Examples, 930, 967
- Exception, 964
- Explanatory notes for bills, 156-160
- Memorials, 971
- Postponing taking effect, 779
- Preambles, 659, 711, 970
- Purpose and policy section, 155, 266
- References, 959, 969
- Resolutions, 970
- Resolving clause,
 - Federal, 655
 - State, 659, 663, 970
- Schedule, 517
- Section and sub-division headings, 155, 283, 506-518, 965-967
- Severability clauses, 518, 770, 777, 936
- Short title, 506, 968
- Tabular construction, 932-933, 963-966

- Termination of act, 285
- Titles, 283, 506, 936, 968

FRAUDS, STATUTE OF, 101**FUNCTION OF INTERPRETATION, 1052****GENERAL AND SPECIAL PROVISIONS**

- Result when conflicting, 1137

GENERAL INTERPRETATION STATUTES

- Effect given to, 998, 1003

GENERAL TERMS, 885**GENERAL WORDS**

- Interpretation of, 1042

GOLDEN RULE APPROACH

- American courts, use in modern, 1044-1064
- Avoidance of absurdity, hardship, injustice and unreasonableness by, 1042, 1051-1064
- Judicial legislation and, 1013-1046, 1061
- Literal meaning, as justifying departure from, 1041-1044, 1051-1061
- Meaning of "golden rule", 1011, 1043
- Refusal by courts to take, 1013-1046, 1061
- Rejection by English courts, 1043
- Restrictive effect, 1042
- Unambiguous statutes and the, 1043, 1046

GOVERNOR

- Legislative function, 221, 325

GROWTH OF LAW

- Agencies of, 1
- Combination of judicial and legislative law-making, 95-125
- Conscious constructive lawmaking, 4, 6
- Declaratory legislation, 3, 6
- Equity as means, 1
- Fictions as means, 1
- In England by legislation, 9
- In twentieth century England and America, 10, 11, 14
- Judicial and legislative processes compared, 1, 14
- Judicial precedent, legislation by, 25, 26
- Judicial process, function and method of explained, 14
- Legislation by selection and amendment, 4

GROWTH OF LAW (Cont.)—

- Legislative precedent and, 128, 131-141, 155-160, 174-175
- Superiority of judge-made law, 8, 16
- Superiority of legislation as means, 12, 105-125
- Transition of growing point, 1
- Unconscious legislation as means, 3

HEADNOTES

- As interpretation aids, 406, 695

HISTORICAL PLACE OF LEGISLATION IN DEVELOPMENT OF LAW, 1-6

HISTORY OF DEVELOPMENT OF LAW

- Fictions, equity, and legislation, 1
- Place of legislation, 1

HOW TO DRAFT BILLS

- See *Mechanics of Drafting*

IMPERATIVE OR PERMISSIVE

- "Shall" as

IMPLIED AMENDMENTS, 364-382

IMPLIED REPEALS, 383-394, 995, 1001, 1003

INDEFINITE EXPRESSION

- Constitutional limitations on, 852-887
- In civil statutes, 858, 883
- In criminal statutes, 853, 865, 871, 878
- In penal statutes, 853, 865 et seq.

INDEFINITE TERMS

- Constitutional limitations on use of in, Administratively executed statutes, 887-908
- Self-executing statutes, 852-886
- Degrees of certainty, 799

INITIATIVE

- Legislation by, 342-347

IN PARI MATERIA, STATUTES

- Aids to interpretation, 1002
- Codes and revisions, 1002
- Repealed statutes as, 1002

INTENTION OF LEGISLATURE

- Interpretation as discovery of, 847, 995, 997, 1000
- Key to the meaning of the statute, 1134
- Presumptions of, 1211-1252

INTERIM INVESTIGATING COMMISSION OR COMMITTEE

- Establishment, 650
- Reports, 265

INTERPRETATION

- Absurd result, to avoid, 1003
- Administrative as aid to judicial, 1051, 1103-1122
- Advocacy, practical method for use in, 972-978
- Ambiguity and, 791-797, 1051, 1067
- Analogical, 985
- Application of statute, significance of distinguishing from, 972, 976-978
- Approaches to, 972, 979-1064
- Authentic, 997
- Canons or maxims of, utility, 972-973, 1038, 1206
- Casus omissis, to avoid, 840-851
- Changes in legislative process, influence on methods of, 992
- Codifications, 399
- Common law as a material of, 837, 1257
- Common law background, consideration of, 837, 1018, 1213, 1262
- Common law meaning of words, 803-805
- Common law statutes, 1253
- Common rights, to preserve, 402
- Constitutional theory, interaction with, 990-993
- Construction, technically distinguished from, 975
- Contextual 691, 729, 808-837
- Counselling, practical method for use in, 972-978
- Court and jury, functions, 875, 977, 1008
- Current points of view on basic theory, 1177-1206
- Definitions, effect given statutory, 720-736
- Derogation of common law, statutes in, 102, 979, 985, 1213-1219, 1229
- Derogation of common right, statutes in, 219, 402, 1229
- Distinguishing exception from proviso, 765
- Drafting methods, influence on techniques of, 990, 992-99
- Early freedom, 981
- Early meaning, 989
- Equity of the statute, 1015-1027
- Function, 1052
- Golden rule approach, 1041-1064
- Headnotes, marginal notes and section headings, 406, 695

INTERPRETATION (Cont.)—

Historical origins of techniques, 979-994
 In *pari materia* statutes, 808, 833, 995, 1002, 1073
 Intention of legislature, as discovery of, 1000
 Intent of the legislature, meaning of, 988-990
 Intrinsic aids, 800-837, 848, 883, 995, 1072-1077, 1275
 Judicial function exclusively, 980, 1001, 1052
 Judicial legislation, 996
 Judicial methods, 972-1312
 Judicial power of, 990, 991-992
 Jury and court, functions of, 803, 875, 977, 1008
 Justice, to achieve, 1021
 Just result, to achieve, 998, 1003
 Legislation distinguished from, 983, 986
 Legislative, 998
 Legislative debates as aid, 1051, 1057, 1140, 1144, 1149, 1155
 Legislative definitions, utility of, 720-736
 Legislative history as aid, *See Legislative History as Interpretation Aid*
 Legislative silence as implied approval of judicial, 1088-1103
 Liberal and strict, 1003
 Literal approach, 691, 1011-1015, 1044, 1046
 Methods, 972-1206
 Mischief rule approach, 1028-1041
 Necessity for, 1000
 Nature of rules, 996
 Object of, 806, 1066
 Of interpretation clauses, 721, 725, 727, 729
 Of "shall", 942-953
 Of terms incorporated into statute by reference, 743, 1078
 Overruling previous, 41-85, 66-81, 1039
 Plain meaning rule, 691, 1011, 1033, 1036, 1044, 1046
 Postulates of, 972, 979-1064
 Preamble, use of, 704-716
 Presumptions of legislative intent, 1211-1252
 Problem generally, 1177-1206
 Process, described, 972-978
 Prospective or retrospective effect of overruling previous, 66-81

Public policy and, 1013
 Punctuation as aid to, 951
 Purpose of statute and, 1028-1041, 1122-1176
 Realistic method of, 972-978
 Reason and spirit, in light of, 1026, 1057
 Re-enactment rule, 1011, 1088-1103
 Remedial statutes, 1038, 1231-1238
 Results, in light of comparative, 998, 1003, 1013-1044
 Revised statutes, 402, 406
 Severability clause, 769-777
 State statute copied from federal law, 1084
 Strict and liberal, 985, 995, 1129, 1220-1241
 Subject matter, history of legislation on, as aid for, 1122-1140
 Subject matter of statute, in light of, 800-807
 Textbooks, 972-973
 Theory of, emergence of a, 981
 Titles, use as aids, 607, 669
 Unconstitutionality, to avoid, 853
 Uniform laws, 459-468
 Utility of canons, 972-973
 Value of maxims, 972-973
 Value of text books and judicial decisions, 972-973
 Whole act to be read, 1132
 Words of statute, sources of meaning
 see Words

INTERPRETATION CLAUSES

See Definitions

"INTERPRETATION IS A JUDICIAL FUNCTION"

Historical origin of postulate, 983, 986

INTERSTATE COMPACTS

Congressional assent, 470-472
 Constitutional basis, 470
 Contractual effect, 472
 Enabling statute, effect and validity, 475-478
 Interstate crime control and, 473-481
 Treaty distinguished, 470

INTRINSIC AIDS IN INTERPRETATION

Context, 808-837, 848, 883
 Headnotes and section headings, 406, 695
 Legislative definitions, 720-736
 READ & MACDONALD U.C.B.Lms.

INTRINSIC AIDS IN INTERPRETATION (Cont.)—

Marginal notes, 691-699
Modern method of use, 1065
Preamble, 704-716
Punctuation, 951
Titles, 668, 669, 691-699
Words of the statute, 800-808

INVALIDATIONS AND DISABILITIES AS ENFORCEMENT DEVICES, 507, 537-541

JOINT RESOLUTIONS

By state legislatures, 659-667
Congressional, 654-659
Defined, 662
Effect, 654, 659, 662

JOURNAL ENTRY RULE, 291, 307, 313, 317

JOURNALS OF LEGISLATURE

Entry of ayes and nays, 220
Interpretive aids, 1127

JUDGMENTS OF LEGISLATURE

Basis of, 125, 128, 131-141
Influences bearing on, 125, 141-211

JUDICIAL ADAPTATION OF COMMON LAW TO BASIC LEGISLATIVE CHANGES

Illegitimate child's status, 1291-1299
Married woman's status, 86, 1285-1290

JUDICIAL CONSTRUCTION OF STATUTE

As part of statute, 57, 1078

JUDICIAL COUNCIL

Function, 1135

JUDICIAL FUNCTION

Interpretation as, 983, 986, 1001, 1006-1011, 1052
Legislative function distinguished, 309, 983, 986, 990, 1006-1011

JUDICIAL LAW-MAKING

Analogy, 30, 82
By over-ruling precedent, 41-85
By refusal to follow persuasive precedent, 37
Dangers, 30, 31, 53, 62
Discovery of law by judges versus, 24
Essential to growth of law, 25
Limited scope permissible, 26
Nature and limitations of, 17
Necessary attribute of judicial decision, 25, 26

Precedent, meaning and effect of doctrine, 17
Res judicata as limitation on, 71
Similarities of legislative law-making to, 125, 128, 131-141
Stare decisis, meaning and effect of, 17
Without precedent, 86-95

JUDICIAL LEGISLATION

Casus omissus and, 840-851, 994
Equitable construction as, 1019, 1020, 1027
Golden rule approach to interpretation as, 1043-1046
Interpretation as, 996

JUDICIAL METHOD

Interpretation of statutes, 972-1312

JUDICIAL PRECEDENT

Superiority of legislation as means of developing law, 12, 105-125

JURISDICTION OVER NONRESIDENTS

Legislative development of law by analogy, 134-141

JUSTICE

Law and, 1023
Reason, equity, conceived to be synonymous, 989

LAW-MAKING

Judicial, limitations on, 17-95
Layman's idea of, 15, 484
Unprecedented judicial, 86-95
Ways of, 74-76

LAW REFORMING LEGISLATION, 145-165

LEGAL LANGUAGE

Incomplete expression, 840-851
Judicially determined, 798 et seq.

LEGAL PROFESSION

Responsibility for legislation, 145

LEGISLATION

Analogical reasoning from, 1268-1279
English origin in assize, 5
Fitting into a unified legal system, 8, 1207-1337
Form, 646 et seq.
Function, 4, 5, 14, 30
Historical attitude of courts toward, 8, 1207-1210, 1215
Historical place in development of law, 1

LEGISLATION (Cont.)—

- In aid of courts, 14, 106-125
- Influencing public opinion concerning proposed, 146-165, 182-211
- Interpretation distinguished from, 983
- Judicial adaptation of common law to basic changes made by, 1285-1299
- Judicial conception in Tudor England, 6
- Language, choice and arrangement of, 786-971
- Lawyers' responsibility, 145
- Limitations on effective, 483-505
- Marshalling public support for new, 145-165, 178-211
- Origin of Congressional, 250
- Origins and development of policy, 125-211, 216
- Referential, 738-760
- Reforming law by, 95-125
- Requirements of effective, 493, 494 et seq.
- Restatement of common law, supplementing by, 1329
- Sources, 125, 141-145, 216 et seq.
- Superiority as method of legal evolution, 12
- Types of, 336-481
- Volume of, 143, 227

LEGISLATIVE COUNSEL

- Function in Congress, 249

LEGISLATIVE FACT FINDING

- Compulsory attendance of witnesses, 267
- Due process and, 260
- Immunity of witnesses from self incrimination, 273
- Methods, 260 et seq.
- Power to compel attendance of witness and production of documents, 278
- Power to grant immunity from self incrimination, 273
- Privilege of witness against self incrimination, 273
- Utility, 260

LEGISLATIVE FUNCTION

- Judicial function distinguished from, 30, 983, 986, 1006-1011

LEGISLATIVE HISTORY

- How discover, 106
- Meaning of language, use as direct evidence of, 1057

LEGISLATIVE HISTORY AS INTERPRETATION *AID

- Ambiguity of literal language, use when, 1143, 1149, 1151
- Ambiguity of literal language, use without, 1144
- Committee reports, 259-267, 1051, 1109, 1142, 1143, 1152, 1155
- Criticism of use of, 1165-1167
- Debates, 1051, 1057, 1140, 1144, 1149, 1155, 1242
- Federal courts, evolution of use of in, 1149-1174
- Meaning of language, directly utilized to explain the, 1152, 1169
- Method of evaluation of, 1155-11
- Plain meaning rule and, 1143, 1149, 1151, 1152, 1155
- Purpose or specific intent, use to show, 1057, 1149-1174
- Self contradictory, value of, 1147, 1160
- State statutes, problems of use in, 1148-1149

LEGISLATIVE INQUIRIES, 260-280**LEGISLATIVE JOURNALS**

- Legislative history, resort to, 680, 1127

LEGISLATIVE LANGUAGE

- Ambiguity of words and arrangement of, 787-793, 924-971
- Canons of interpretation and, choice of, 793 et seq., 808-833, 914 et seq.
- Clarity essential, 786, 914
- Constitutional limitations on, 852-908
- Defects of, 787
- Imperfections of words for communicating thought, 793
- Indefinite terms, 799, 852-908
- Influence of judiciary on, 789, 798-908, 921-923
- Lawyers' responsibility for, 786-791
- Legislative sentence, meaning of, 791-913
- Nature of the problem, 785-800, 914 et seq.
- Obscurity of, 785, 797, 914-923
- Semantics and, 792-798
- Simplicity desirable, 914 et seq.
- Style of, 914-971

LEGISLATIVE POLICY

- Case studies in formulation and influencing, 146, 165, 183, 200
- Development, 125-211
- Origins of, see *Legislation*

LEGISLATIVE POLICY (Cont.)—

- Precedent compared to, 128
- Pressure of organized interests and public opinion on, 146-211
- Principle compared to, 128

LEGISLATIVE PRECEDENT

- Analogous application, 134-141
- In early American law, 131
- In 20th century American law, 134-141, 155-160, 174-175
- Principle, policy, distinguished, 128
- Restrictive influence on development of law, 128, 131
- Tendency toward following, 128, 131-141

LEGISLATIVE PRINCIPLE

- Policy, precedent, distinguished, 128

LEGISLATIVE PROCEDURE

- Constitutional limitations on, 220, 225, 286 et seq.
- Course of bill from introduction to enactment, 212 et seq.
- Improvements in New York, 233
- Majority rule, 220
- Outline of, 212-235
- Passage over governor's veto, 305
- Problems concerning, 233
- Proof of procedural irregularity, 291, 307-325
- Purposes, 220
- Readings of bills, reasons for, 297
- Speaker, function and powers of, 235
- Stages, 212-235
- Suspension of rules, proof, 291

LEGISLATIVE PROCESS

- Basic nature, 125
- Characteristics of modern, 493
- Comparison of precedent, principle and policy in, 128
- Formulation of policies, 141-211
- Influences of changes in, on methods of interpretation, 990, 992
- Issues, case studies in shaping and presenting 146, 165
- Judgments of legislature,
 - Basis of, 125, 128
 - Influences bearing on, 125, 141-211
- Judicial process, similarities, 125, 128, 131-141
- Lobbying, 178 et seq.
- "Log rolling", 736
- Precedent, adherence to, 128, 131-141
- President, relation to the Congress, 331
- Principle, conformity to, 128

- Public opinion and, 200-211
- Technique for study, 165

LEGISLATIVE PURPOSE

- Interpretation in light of, 1031-1041, 1051, 1057, 1122-1174

LEGISLATIVE REORGANIZATION ACT, 1946

- Appraisal, 254, 259-260
- Excerpt from, 256
- Reference Service, 197
- Regulation of lobbying, 178
- Report of Congressional Committee resulting in, 238-253

LEGISLATIVE RESEARCH COUNCIL, 283

LEGISLATIVE STANDARDS FOR ADMINISTRATIVE ACTION

- See *Administrative Process as a Means of Making Laws Effective*

LEGISLATURE

- Adjournment, continuation of powers after, 299, 307
- Administrative oversight by, 571
- As an entity, 299-307, 651
- Bicameral and unicameral compared, 281, 299
- Contempt of, 276
- Executive, place of in, 221, 313, 325-335
- Investigatory power, 267 et seq.
- Journals, conclusiveness, 317, 320
- Judgments,
 - Basis, 125, 128, 131-141
 - Influences bearing on, 125, 141-211
 - May not bind future legislatures, 653
 - New York, overall view, 225
 - Powers, 225 et seq.
 - Power to discharge its employees, 651
 - Precedent, tendency to follow, 128, 131-141, 155-160, 174-175
 - Pressure of organized interests and public opinion on, 146-211
 - Procedure in, 212 et seq.
 - Public opinion and the, 200-211
 - Responsibility to enact valid laws, 776
 - Shaping and presenting issues in, 141-211
 - Unicameral and bicameral compared, 281, 302

LEQUITY DE LESTATUTE

- Equity of the statute distinguished from, 987
- Meaning of doctrine. 986

LIBERAL CONSTRUCTION

See *Penal Statutes*

LICENSING AND INSPECTION

Attorneys, 357

Business regulation, 507-508, 604, 612

Constitutional requirements, 620, 622, 626

Contents of typical statute, 612

Definition of license, 611

Effective methods, 612

In federal law, 611

Investigatory powers, 507, 510, 515, 621

Legislative standards for, 357, 613

Revocation of license, 626

LIMITATIONS OF JUDICIAL LAW-MAKING, 17-95**LIMITATIONS ON EFFECTIVE LAW MAKING**

Ascertainment of facts, 485, 490

Customs, 491, 500

Imperfections of human beings, 490, 495

Impracticability of enforcement, 494, 496

Inapplicability of legal machinery to certain phases of conduct, 487, 492

Individual action needed to set law in motion, 488

Ineptitude in art of drafting legislation, 489

Intangibility of moral duties, 486, 491, 496

Irresponsibility of legislature for enforcement, 495

Lack of legislative control over interpretation and application, 490

Nature of subject matter, 486-487, 491, 494, 501

Opposition of majority of community, 494, 498

Subtle modes of violation, 486, 500

LITERAL APPROACH TO INTERPRETATION

Constitutional support for, 994

Defects, 1036, 1042, 1051, 1057

Detailed drafting and the, 904

Extensive effect, 691, 1011, 1033

Plain meaning rule and, 691, 1011, 1044, 1046

Restrictive effect, 1044

LOBBYING

Case study in, 183

Defined, 180

Dependence of legislators on for assistance, 197, 199

Evils, 182

Legislative inquiries, 278

Legislative Reorganization Act, 1946, 178 et seq.

Problem of controlling, 180

Regulation of by states, 183-186

Regulation of by the congress, 178, 180-193

Requirements of effective statute to control, 193-197

MANDATORY OR DIRECTORY

Constitutional provisions, 718-719

"Shall", interpretation as, 948

MARGINAL NOTES

Interpretation aids, 406, 695

MEANING

Meaning of, 792-797, 1067

MEANS OF MAKING LAWS EFFECTIVE

Abatement and summary enforcement in equity, 541

Administrative process, 570-610

Adverse presumptions, 549-554

Bonds, 564-570

Civil liabilities, 511-513, 554-560

Committal—"psychopathic personality" statutes, 642

Contempt proceedings, 517, 532-536

Detention of suspects,

"Public enemy" acts, 637-642

Vagrancy laws, 638

Fixing valid standards for administrative action, 887-908

Injunctions, 515, 729

Invalidations and disabilities, 507, 537-541

Licensing and inspection, 507-508, 604, 611-630

Limitations on, 483-505

Oaths, 515, 561-564

Penalties, 517, 524-531, 1219-1231

Provisions for rehabilitation and reform of offender—youth correction act, 645

Publicity, 183-198, 509, 518, 630-637

Sanctions defined, 519-523

MECHANICS OF DRAFTING

Alternatives and choices, how to state, 926, 954-955, 965-967

MECHANICS OF DRAFTING (Cont)—
 Audience, writing laws readily understood by, 914-935, 960, 963-967
 Bold face sub-titles for convenience and understanding, 155, 283, 506-518, 926, 962-967
 Conciseness, devices for promoting, 916, 932, 938, 960, 964-966
 Conjunctives and disjunctives, 937, 954-955, 965
 Constitutionality, ensuring, 260, 336-362, 371, 401, 415-449, 470, 477, 669-690, 736, 750-757, 782, 852-908, 909, 913
 Cross references, when and how used, 738 et seq., 958-959
 Definitions, utility and place, 720, 736, 936
 Detaching of clauses, 926, 936, 959, 962-969
 Devices for enhancing clarity and convenience, 914-971
 Duties, imposition of, 945-951, 963-967
 Enacting clause, 715
 Enforcement devices, 483-645, 912-913
 Enumerations, use and form, 936, 959-960, 964
 Examples, use of, 929-931, 967
 Exceptions, when and how used, 958
 Formation of a legislative sentence, 939-951, 955-958
 Future tense, avoidance of, 936, 941-946, 957, 958
 General interpretation statute, 935
 Generic terms, 960
 Granting a right or privilege, 950, 955, 964
 Incorporation of terms by reference, 738-760, 958-959
 Internal arrangement of bills, 924-927, 936-937
 Jargon, elimination, 789-791, 927, 936, 937-938, 954, 960, 962-967
 Judicial precedents, 800 et seq., 921-923
 Legislative precedents, 131-141, 193
 Marginal notes and sub-titles, 691-699, 961, 963-967
 Mathematical tables and formulas, 932-934
 Memorandum as basis for drafting, 911-913
 Numbering sections and designating sub-divisions, 936, 962-969

Perfect past tense, use of, 941, 957, 966
 Policy and purpose section, 155, 260-267
 Policy and substance, establishing, 909-913
 Practical considerations concerning internal arrangement of bills, 787
 Preamble, when and how used, 704-716,
 Present tense, use of, 936, 941-946, 949, 957, 964-967
 Prohibition, expression of, 950
 Provisos, avoiding, 921, 936, 940, 958
 Punctuation, 951
 Questionnaire for determining substance and policy of proposed new law, 912
 Redundancy, avoiding, 936-938
 Sections, sub-dividing bill, 936, 937, 968
 Sections, subdivision of, 936, 937, 962-969
 Sentence, construction and arrangement of the legislative, 939-951, 955-958
 Severability clause, 769-777, 936
 Specimen forms. *See Forms*
 Tabular construction, 926, 936, 959, 962-969
 Telling the reader how to conduct himself, 931, 939-951, 955-957, 963, 967
 Telling the reader what the law is about, 925-927, 964, 967
 Titles, how drafted, 699-704, 936
 Voice to be used active or passive, 940, 956
 Writing for the reader to whom the law is primarily addressed, 914-935, 960, 963-967

MEMORIALS BY LEGISLATURE

Defined, 662
 Forms, 971

METHODS OF INTERPRETATION AND CONSTRUCTION, 972-1206

MISCHIEF OF THE STATUTE

See Mischief Rule Approach and Purpose of Legislation

MISCHIEF RULE APPROACH

Equity of statute, and, 1029
 Extended effect, resulting in giving language, 1031, 1036, 1038

References are to pages

- MISCHIEF RULE APPROACH** Cumulative, 527
 Defined, 525
 Fixed or flexible, 525
 Increase for subsequent offenses, 526
- PETITION TO PARLIAMENT AND RESPONSE**, 646
- PLACE OF EXECUTIVE IN LEGISLATIVE PROCESS**, 221, 313, 325-335
- PLAIN MEANING RULE**
 Application of, 601, 1011, 1033, 1036, 1044, 1046
 Extrinsic aids and, 1143-1155
 Method of use, 978
 Oversimplification, 1057
- POLICY OF LEGISLATURE**
 See *Legislative Process*
- POPULAR VOTE**
 Submission of laws to, 222
- POSTULATES OF INTERPRETATION**
 American courts, enunciation by 995-1011
 Development in England, 979-994
 Historical origins, 979-994
 "Interpretation is a judicial function", 983, 986, 1000-1011
 "Statutes must be interpreted according to the intention of the makers", 988-990, 995-1005, 1025
- PRACTICAL CONSTRUCTION**
 Weight given by courts, 1103-1108
 See also *Administrative Interpretation*
- PREAMBLE**
 Defined, 707
 Interpretation, as aid in, 704-716
 Utility, 707, 710
- PRECEDENT**
 Analogical application of decision overruling, 30, 82
 Distinguishing, 22
 In American courts, 23 et seq.
 In Supreme Court of Canada, 21
 Interpretation of statutes, value in, 972-973
 Judicial decision without, 86-95
 Judicial legislation induced by doctrine of, 33-34
 Legislation as, 1268-1279
 Legislative, 128, 131-141, 155-160, 174-175
 Legislative character of, 25, 26, 31
- MISCHIEF RULE APPROACH**
 (Cont.)—
 Heydon's Case, 1028
 "Lequity de lestatute" and, 986
 Meaning of, 1028
 Refusal by court to apply, 691, 1033
 Restricting application of statute by, 1030, 1034, 1129
 Techniques of, 1034-1040, 1122-1176
- NEW YORK**
 Discharge of surety or guarantor, proposed statutory reform of law, 119-125
 Law Revision Commission recommendations to legislature, 112, 119, 557
 Seals on written instruments, legislation in aid of judicial development of law, 106-119
- OATHS AS ENFORCEMENT DEVICE**, 515, 561-564
 Classified by purpose, 562
 Efficiency, 561
- ORIGINS AND DEVELOPMENT OF LEGISLATIVE POLICY**, 125-211
- "OVER-LEGISLATION" PROBLEM**, 143, 231
- OVER-RULING INTERPRETATION OF STATUTE**
 Prospective or retrospective effect, 66-81
- OVER-RULING PRECEDENT IN AMERICAN COURTS**, 41-85
- PARTS OF A STATUTE**
 Clause as to taking effect, 777-785
 Definition or interpretation clause, 720-736, 1006-1009
 Enacting clause, or style, 716-720
 Exceptions, 761-768
 Preamble, 704-716
 Proviso, 761-768
 Purview, or body, 736-760
 Saving clause, 761-768
 Severability clause, 769-777
 Title, 687-704
- PENAL STATUTES**
 Beneficial distinguished, 986-987
 Interpretation, 1004
 Strict or liberal interpretation, 853, 985, 995, 1129, 1220-1241
- PENALTIES**
 Amount, criterion for fixing, 525
 Civil or criminal, 528, 535

PRECEDENT (Cont.)—

Legislative standards, judicial application as, 886

Limitations of doctrine on overruling in English courts, 18, 21

Method and effect of doctrine, 17

Modern English law, place of doctrine, 18, 21

Origin of doctrine, 17

Overruled because,

Based on erroneous construction of statute, 41, 1088

Generality destroyed by exceptions, 61

Inconsistent with fundamental legal principle, 41

Obsolete, 53, 55, 61

Politically and socially defective, 41, 53, 55

Unconstitutional, 41

Overruling as,

Judicial legislation, 53, 71

Prospectively, 66, 71

Refused where long standing construction of statute, 57

Retrospectively, 69, 77, 81

Reliance on,

As cause of judicial legislation, 34

By laymen in conduct of practical affairs, 34, 35, 57, 62

Superiority of legislation over, 12, 105-125

Utility when applying codes, 1311

PRESIDENT OF THE UNITED STATES

Relation to Congress, 331

PRESSURE GROUPS

Lobbying by, 178 et seq.

PRESUMPTIONS OF LEGISLATIVE INTENT

Bills passed with deliberation, 339

Constitutionality, 225, 429

Interpretive, 972

Legislative intent, 972 et seq., 1211-1252

Validity of statute intended by legislature, 843

Concerning:

Changes from the common law, 102, 979-986, 1213

Deprivation of life and liberty, 985, 995, 1220-1231

Derogation of common right, 219, 402

Remedies, 1231-1238

Taxing statutes, 1238, 1241

Territorial application, 1238

The sovereign, 1241-1252

Generally, 1211

PREVENTIVE LEGISLATION

See also Means of Making Laws Effective

Trend toward, 576

Types of, 506, 537, 541, 561, 604, 611, 621, 630, 637-645, 729

PRINCIPLE

Comparison of judicial and legislative, 128

PROBLEM OF AMBIGUITY, 791-797,
1067-1071, 1132, 1143, 1149, 1151, 1152, 1155

PROBLEM OF CODIFICATION

Arguments for and against, 1303-1321, 1328

Chief defects in common law, 1300, 1306-1307

General or particular codes, 1321

PROCESS OF INTERPRETATION

As a practical technique in counselling and advocacy, 972-978

Described, 972-978

PROFESSIONAL ORGANIZATIONS

Influence on legislative policy by, 145-177

PROPHYLACTIC LAWS, 637-645

PROVISO

Avoidance of using, 921, 936, 940, 958

Defined, 763

Effect of, 764

Exception compared, 761

In form interpreted as intended to be exception, 765

Pleading, 764

Prevails when in conflict with purview, 765

PUBLICITY AS LAW ENFORCEMENT DEVICE, 183-198, 509, 518, 630-637

PUBLIC OPINION AND THE LEGISLATIVE PROCESS, 200-211

PUBLIC POLICY

Discovery of, 1013

Equity of the statute and, 1019

Interpretation and, 1013

PUNCTUATION OF STATUTES, 951, 1038

References are to pages

PURPOSE OF LEGISLATION

- Derived from:
 - Comparison with other statutes on some subject, 1057
 - Conditions at time of enactment, 1122-1140
 - Facts judicially noticed, 1037, 1132
 - History of legislation on subject matter, 402, 1122-1140
 - Legislative history of statute, 1051, 1140-1174
 - Report of official body recommending enactment, 259-267, 1132, 1143
 - The statute itself, 1034, 1037
- Mischief rule approach and, see *Mischief Rule Approach*
- Undesirable result of literal meaning justifying resort to, 1051

PURVIEW OF STATUTE

- Incorporation of terms by reference, 738
- Unity of subject matter, 736

QUESTIONNAIRE

- For research in determining substance and policy of proposed legislation, 912
- For study of existing legislation, 166

REASON AND SPIRIT OF THE STATUTE, 988**RE-ENACTMENT RULE, 804, 1011, 1053, 1088-1103, 1109, 1117****REFERENDUM**

- Amendment of laws enacted by, 223
- Legislation by, 222, 336
- Local laws enacted by, 222
- Operation of law conditioned on, 222
- Power to legislate by, 222
- Ratification of amendments to federal constitution by, 336

REFERENTIAL LEGISLATION

- Amendment of act from which terms adopted, effect, 744
- Codification adopted by, 396
- Descriptive reference, 747
- Evils of, 750
- Extent and effect of a reference, 741
- Factors to be considered before using, 758
- Federal constitutional restraints on, 754
- General reference, 741, 745
- Implied reference, 739
- Interpretation, 743, 1078 et seq.

- Primary effect, 743
- Repeal of act from which terms adopted, effect, 714
- Secondary results, 743
- Specific reference, 741, 745
- State constitutional prohibitions, 750
- Terms adopted from unconstitutional statutes, 376
- Time, extent of reference in, 742
- Types, 738

REGULATORY LEGISLATION*See Means of Making Laws Effective*

- Nature and purpose, 496
- Specimen statute, 506

REMEDIAL STATUTES

- Interpretation, 1038

REPEALS

- Blanket repealer, effect, 383, 384, 395
- Blanket repealer in revising act, effect, 396
- Common law, effect of repeal of act which repealed, 1267
- Conflicting general and special statutes on same subject, 384
- Conflicting statutes passed at same legislative session, 385, 680
- Express, 383, 394
- Implied, 371
- Implied, a question of interpretation, 385, 387
- Implied by revising act, 395
- Implied, earlier statute covering part of subject, later covering all, 680
- Implied, identity of subject-matter, 388
- Implied not favored, 385, 995, 1001
- Omission of old language in re-enactment, 409
- Repugnant statutes, 385, 680, 995
- Revival of repealed act, 389
- Types, 394

RESOLUTIONS

- By one house of legislature, 651, 662
- Compared with statutes, 651-667
- Concurrent, 214
- Congressional, 654-659
- Constitutionality of legislation made by, 650-667
- Creation of committees by, 303
- Enacting clause, 655, 662
- Forms, 969
- Law-making in form of, 303, 651-667

RESOLUTIONS (Cont.)—

State legislatures', 659-667
Types, 662

RESTATEMENT OF LAW BY AMERICAN LAW INSTITUTE

Form, 1326
Influence on judicial decision, 1336
Legislative action supplementing, 1329
Method of preparation, 1330-1336
Need for, 1300, 1324
Reasons for not codifying law, 1328

REVISING STATUTES

Titles of, 689

REVISIONS

Adopting act, effect, 409
Contextual interpretation, 816
Continuous, advantages, 394, 408
Interpretation, 402
Law-making effect of adoption, 402
Omission of old language, repealing effect, 409
Phraseology of revised act changed, effect, 406, 409-412
Purposes, 404, 408
Repealing effect, 395
Repugnant provisions, 995
Wisconsin system, 408, 412

REVISOR OF STATUTES

Function and value, 394, 408

SANCTIONS

Availability of different types, 520
Defined, 519

SAVING CLAUSE

General statutory incorporated in repealing acts, 767-768
Special. See *Exceptions*

SCOPE OF LEGISLATIVE OPERATIONS, 227 et seq.

SEALS ON WRITTEN INSTRUMENTS
Development of law by New York courts and legislature, 106-119

SECTION HEADINGS

As interpretation aids, 406, 695

SECURITIES ACT OF 1933, 506 et seq.

SELECTION AND AMENDMENT

Legislation by, 4

SEPARATION OF POWERS DOCTRINE

Influence on ideas about lawmaking function in United States, 14
Influence on laymen's concept of law, 15

SEVERABILITY CLAUSE

Abuse of, 774
As aid to interpretation, 769-773
Dangers from use, 773-774
General statutory, illustrations, 777
Presumption of divisibility from, 771
Presumption of indivisibility in absence of, 770

"SHALL"

Construed as "may", 946-948, 949
Directory effect, 948
Imperative effect, 946
Mandatory effect, 948
Permissive effect, 946

SILENCE OF LEGISLATURE AS IMPLIED APPROVAL OF ADMINISTRATIVE AND JUDICIAL INTERPRETATION, 1088-1103, 1109, 1117

SIMPLE RESOLUTIONS

Defined, 662
Effect, 651, 662

SOME DEVICES FOR PREVENTING LAW VIOLATION, 506, 537, 541, 561, 604, 611, 621, 630, 637-645

SOURCE OF LEGISLATION

Legal profession as, 141-165

SOVEREIGN

Application of statutes to, 1241-1251

SPECIAL LEGISLATION

Classified general laws distinguished, 426-448
Constitutional limitations on, 415 et seq.
Constitutional provisions generally, 415-426
Objections to, 415, 448

STANDARDS FOR CONSTITUTIONAL EXERCISE OF LEGISLATIVE POWER BY ADMINISTRATIVE AGENCIES

In federal legislation, 887-900
In state legislation, 901-908

STANDARDS OF CONDUCT

Expression of legislatively prescribed, 852-887

STARE DECISIS

As limitation on judicial law-making, 107
Evaluation of, 34
Meaning and effect of doctrine, 17

STATUTE COVERING ENTIRE SUBJECT

Replacing prior law, 1258-1267

STATUTE LAW

"Basis of legal practice", 215

STATUTES

Ambiguity, 1067-1071

Codes, 395 et seq.

Compiling, 395 et seq.

Consolidating, 395 et seq.

Covering entire subject, 1258-1267

Early form, 649

Early law reforming, 95-106

Enacting clause, 659, 716

Failure to comply with requirements of legislative procedure, effect and proof, 286, 291, 307-325

In aid of courts, 106-125

Incorporation of terms by reference, 738-760

In derogation of common law, 102, 620, 979, 985, 1213-1219, 1229

In derogation of common right, 219, 402, 1229

In pari materia, 356, 1002

Interpretation methods, 972-1206

Judicial attitude toward, 8, 95-106, 922-923

Merged into common law, 1253-1256

Penal, 985, 995, 1220-1231

Precedent, place of in shaping, 128, 131-141, 155-160, 174-175

Prenatal history, discovery of, 165 et seq.

Publication requirement, 329

Punctuation, 951

Readability, 918

Remedial, 1231

Repealing, 383-395

Responsibility of legislature to enact valid, 776

Revising, 395 et seq.

Textual irregularity, proof, 307-325

Time of taking effect, 777-785

Types, 336-481

Violation as negligence per se, 1279-1285

Void in part, 672

STRICT AND LIBERAL CONSTRUCTION, 102, 620, 979, 985, 986, 988, 1003, 1215-1252

STRICT CONSTRUCTION

Ejusdem generis as rule of, 827

STYLE OF ACT

See *Enacting Clause*

SUMPTUARY LAWS, 491

SUPPLEMENTARY STATUTES

Amending acts distinguished, 378

Defined, 378

Titles, 378

TAXING STATUTES

Strict or liberal interpretation, 1238-1241

TECHNIQUE OF INTERPRETATION, 972-1312

THEORY OF INTERPRETATION

Emergence of a, 981

Enunciated, 972, 1066, 1070, 1177-1206

Current points of view on basic, 1177-1206

Objective and subjective compared, 1139, 1180-1189

TIME AT WHICH STATUTES TAKE EFFECT, 777-785

TITLE AND SUBJECT MATTER, CONSTITUTIONAL PROVISIONS REGARDING

Amending statutes, 683-690

Codifications, 736

Expression of object of statute, 669, 672, 679, 680-681

Expression of subject of statute, 677-681, 688, 736

Failure to express object where constitution requires expression of subject, 678

Germaneness, test, 677, 736

Interpretation, 672, 678, 680-681, 736

Liberal construed, 677, 736

Mandatory, 736

Original statutes, 669-683

Purposes, 673-675, 689, 736

Purview, effect on, 669, 672, 736

Repealing acts, 675

Revision statutes, 689

Severability of part of purview unexpressed in title, 672

Statute broader than title, 672, 681

Unity of object, 672, 680

Unity of subject, 677, 680, 736

Validity of title, how determined, 671-690, 736

TITLES OF STATUTES

Amending acts, 683-690, 699, 701

As index of law, 737

TITLES OF STATUTES (Cont.)—

As interpretation aid, 668, 669, 671 et seq., 691-699
 As part of statute, 667, 669-690
 Brevity of, 681, 699, 700
 Codifications, 736
 Congress, in acts of, 668
 Constitutional requirements affecting, 671-690, 736
 Drafting, 667, 699-703
 Early use and status, 667
 Generality of, 677, 681, 699, 700, 736
 Misleading, 668, 672
 Original acts, 669-683
 "Relating to" subject of the act, 681
 Repealing acts, 675, 699
 Revising acts, 689
 Single subject, 677, 680, 700, 736
 Styles, illustrative, 702
 Supplementary acts, 378

TRANSITION OF GROWING POINT OF LAW

In England, 9
 In the United States, 11
 Judge-made law to legislation, 1-16
 Reasons for, 10

TYPES OF STATUTES

Amendments, 356, 364-378
 Codifications, 395 et seq.
 Consolidations, 395 et seq.
 Creative, 362-364
 Declaratory, 347-362
 Direct legislation, 336-347
 Interstate compacts, 453, 469-481
 Proportion of different, 232
 Repeals, 383-395
 Revisions, 395 et seq.
 Special legislation, 415-449
 Supplements, 378-383
 Uniform laws, 450-468

UNCERTAINTY, STATUTES VOID FOR, 853-908

UNCONSCIOUS LEGISLATION, 3

UNCONSTITUTIONAL STATUTE
 Effect, 76

UNIFORM LAWS

Adoption, 457
 Advantages, 451
 Application by courts, 459-468

Interpretation, 459-468

National conference of commissioners, 450

Purpose, 451, 463

Written Obligations Act, 119

UNITED STATES CONSTITUTION

Article I, sec. 7, 654

USE OF COMMON LAW AS A MATERIAL OF INTERPRETATION, 837, 1287

USE OF "MAY" IN STATUTES, 946 et seq.

USE OF "SHALL" IN STATUTES, 940, 942-951

USES, STATUTE OF, 96

VIOLATION OF STATUTES AS NEGLIGENCE PER SE, 1279-1285

WESTMINSTER II, STATUTE OF, 95

WORDS

Ambiguity, 791-793, 1051, 1067

Certainty, grades of, 799

Common law background, 837, 1018, 1213, 1262

Common law meaning, 803-805

Context, meaning derived from, 808-837

Dictionary* meaning, 800, 807

Figurative use, 805

Generality, degrees of 799

In pari materia statutes, meaning derived from, 808, 833, 995, 1073

Legislative history, as shedding direct light on meaning, 1152, 1169

Legislatively defined, 720-736

Meaning, 792-797, 1067

Ordinary meaning, 800

Popular usage, 800, 805

Primary source of statutory meaning, 1036, 1052

Proof of technical and trade meanings, 801

Subject matter, interpreted with reference to, 800-807

Technical and trade meaning, 801

YOUTH CONSERVATION ACT OF MINNESOTA

Development of, 146-165

